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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.

The present volume of the Indian Journal of Law and Justice raises concerns over some of the emerging global social and legal issues like Cyber Security in Aviation with special reference to European Air Traffic Control, Digital Currency, Land Reforms in Andhra Pradesh, Crypto-preserved Pre-embryos and Legal Regime in Blood Transfusion. Along with these, there are other papers which take us through a diversity of subjects like Joint Forest Management and Community Participation in India, Significance of TDPS in Indian Legal Regime, Accountability of Civil Servants, Illegal Migration and Issues of Citizenship, Realising rights of Senior Citizens, Land holding Rights of Women in India, Right to Privacy, Child labour in Asansol, Child Rights in Armed

Conflicts and Impact of Globalisation on Women Workers in Agricultural Sector.

One can enjoy short reads on Labour Rights under the Labour Code of India and LGBTQ Movement in India which have been included in the Notes and Comments section. Book reviews on “The Power of Precedent” authored by Michael J. Gerhardt and “Law relating to Sexual Harassment at Work” by Alok Bhasin, have been contributed by two young authors for the issue

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

Emerging Trends in Aviation Cyber-Security: Study of European Air Traffic Control (Euro-Control)

Dr. Jitender Loura¹
Prof. (Dr.) Kanwal DP Singh²

Abstract

Civil Aviation is a critical infrastructure. The cyber-attacks on Civil Aviation infrastructure leads to significant impact not only on the safety and security of the airports, airlines and air traffic control units but also on the passengers and staff working at these airports, airlines and air traffic control units. Cyber Security threats in the aviation sector have tremendously increased owing to extensive use of information technology and paucity of appropriate cyber-defence mechanisms and framework. The increase in cyber-attacks in civil aviation are predominantly due to increased use of information technology, higher susceptibility of data, advanced methods and tools of attack, instant and high exposure coupled with increased motivation of attackers. In the following parts, an overview has been given on these very aspects, with a particular focus on recent trends that are present in the aviation industry with special reference to air traffic control. The measures undertaken by Euro Control have also been evaluated. European Union Aviation Safety Agency (EASA) regulates the cyberspace certifications and licensing to keep a check on the technicians and mechanics in aeronautical department. EASA undertakes standardized inspections for monitoring applicability of EU legislations in a uniform manner. EUROCONTROL has been nominated as the Network Manager for Europe and acts as the central unit for managing air traffic flow.

To gain an understanding on the possible threats, the various instances where malware or other attacks have rendered losses or caused problems for the aviation industry have also been discussed.

Keywords: Cyber Security, Civil Aviation, Air Traffic Control, Euro Control

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I. Introduction

Aviation industry in the modern times has become a very critical and lucrative target for the state sponsored cyber warfare initiatives and for the hackers. The disruption of operations of any airport BAS (Building Automation System) is a matter of few hours, resulting in loss of millions of dollars in airlines and even for the related vendors. In addition to this, the air transport covers highly complicated operations, which arrange and guide a range of critical systems, which includes air fleet management, Airline Operations Centre (AOC) networks, APRON and tarmac operations, surveillance, luggage and goods management and Air Traffic Management (ATM) networks among other things. The complexities of these systems, makes securing them a critical task.

Worldwide, cyber-security has been facing despair over the past decade as compared to past years because of the virtual financial infrastructure that has been created at a fast pace. Furthermore, with the emergence of cyber-physical networks that form the Digital revolution, like "smart" domestic goods, the importance of cyber protection continues to grow every day³. In the face of this digital transition, though, the public and private sectors remain unable to keep up with cyber-security challenges. In the news features, it is obvious the sadness of the dominant attitude to cyber-security. Various businesses around the globe surpassed each country in the last years and non-national program-makers are understood.

The research focuses on an overview of various cyber threats and resilience in aviation and particularly in air traffic control. The study specifically underpins the role of Euro Control and other safety agencies in Europe taking care of safety in Air traffic control (ATC) and their raising attention on cyber protection.

II. International Regulatory Measures

ICAO or the International Civil Aviation Organization is the UN professional body that codifies the strategies and values of aerospace around the world. To ensure that global air travel is secure and has orderly progress, ICAO encourages the planning and construction facets of this. It was set up on 04

³ Sujeet Kumar Sharma, *Internet Banking Adoption in India*, 6 Journal of Indian Business Research (2014).

April 1947 and came into effect. It was accepted, and ratified on 07th day of December 1944 at Chicago, Illinois, the "Convention on international civil aviation⁴." The conference has taken on based on these factors a middle path whereby a new international organization named "ICAO" should be formed. In addition to the general supervision tasks, ICAO was assigned the main duties of professional norm description. The bilateral regulation (agreements), excluding the regulation of prices, tariffs and fares, has been subject to economic regulations. These elements were exempt from multilateral self-regulation according to conferences in the sector, but also subject to government approval. In addition to the tax growth of air travel, the ICAO's key strategic priorities included defence and assistance, environmental conservation, safety (main objective), air navigation capability and quality.

In different facets, this arrangement was manifested. The first was the "Convention of International Civil Aviation" which would have been the Conference's key instrument and formed the structure of the ICAO. The above was protected by the Multinational Air Transit Service deal, which requires transit privileges to be mutually shared. The third was secured by the Five Freedoms Agreement that guarantees that traffic privileges are collectively assumed but that remains a dead text. Finally, the fourth and last one was entered into via the Interim Civil Aviation Agreement, which required the creation of the PICAO, which remained pending entry into force in the key Convention⁵.

ICAO has established 19 Annexes to the Convention centred on the Civil Aviation Organization Convention alone, particularly Article 54 thereof (1). This leads to the development and introduction of both the PANS (Air Navigation Services Procedures) and the SARP. In compliance with Article 54(m) and Chapter XX of the Convention, ICAO updates technical annexes if and when appropriate. In Annex 13, aircraft crash analysis is centred and

⁴ Ruwantissa Abeyratne, *Aviation Cyber Security: A Constructive Look at the Work of ICAO*, 41 Air and Space Law (2016).

⁵ Ruwantissa Abeyratne, *Regulation of Commercial Space Transport*. (2014).

included; in Annex 17, the defence is addressed and in Annex 19, security control systems are dealt with⁶.

Currently ICAO, business and national agencies are driving various efforts to defend vital cyber-attack networks. The need for improved comprehension and recognition of the data protection threats in this sector and the need to synchronize aviation cyber readiness internationally and the interest to establish mutual understanding and implementation of risk management practices are both recognized among the local community experts and stakeholders⁷. This group seeks to encourage the creation of a stable and resilient aviation environment that encourages members to share their business expertise and best practices in all essential device segments of the aviation industry.

The more critical thing is the growth of an aviation cyber readiness community in the industry and further is cyber protection personnel. The world community has acknowledged these challenges. In the 2019 ICAO Cyber-security Aviation Plan, capability development and the culture of cyber-security were recognised and discussed, as core components of a successful cyber resilience programme⁸. The ICAO Strategy says that the civil aviation sector is taking tangible action to expand the amount of trained and experienced staff engaged in aviation and cyber protection.

The backbone of European Union aviation safety system is covered under the common safety rules. The new generation aviation safety rules at the first place were adopted in 2002 by the European Union and these rules were based on the Regulation (EC) No 1592/2002⁹. Along with this, European Union Aviation Safety Agency (EASA), the cornerstone of European aviation's safety system, was also established. The maintenance, airworthiness, environmental certification of aeronautical products and licensing and training of technicians and mechanics in aeronautical department was set up through the initial set of

⁶ Ewa Dudek, *The Concept of a Method Ensuring Aeronautical Data Quality*, 37 Journal of KONBiN (2016).

⁷ Jean Claude Geofrey Mahoro, *ICAO's Role in Environmental Protection and Its Shortcomings Under Rapid Growth of Aviation Industry*, 4 Diponegoro Law Review (2019).

⁸ John Macilree, *Aero politics in a Post-Covid-19 World*, 88 Journal of Air Transport Management. (2020).

⁹ Regulation (EC), 2002, No. 1592, European Parliament and the Council, 2002 (Europe).

these rules. As a result of Regulation (EC) No 216/2008¹⁰, brought forth in 2008, EASA's common aviation safety rules, and its associated duties were extended by EU to the aircrew training and licensing, and to aircraft operations. The very next year saw the adoption of second extension of such common rules, which clearly covered the provision of air traffic management and air navigation services, and safety aspects of aerodrome operations, through Regulation (EC) No 1108/2009¹¹. The European Commission adopts the aviation safety rules based on the technical opinions, which are issued by EASA. The commission is responsible for the proper execution of such rules and EASA provides its assistance in this context, as it undertakes inspections on regular basis for all the member states. Where the detected safety deficiencies are not corrected, enforcement actions can be undertaken. This can also lead to the certificates' mutual recognition being suspended or even imposition of penalties on the certificate holders.

III. Aviation Industry and Cyber-Security

There are numerous attack points for a hacker or cybercriminal and at separate phases i.e. manufacture of the aircraft and its equipment; the Air Navigation Service Provider and the Airport Service Provider. Cybercriminal has a capacity; it does not matter if Governments, entities and businesses do the same thing, to attack the electronic system of organisations. Any electronic device utilized in air traffic control systems, airlines and airports that designs or improves software and hardware may be an aim. Also, cyber terrorism could threaten those sectors which are engaged in the construction of aircraft or its part regardless of the construction for military or civil use. Currently, the aviation sector, which encompasses a gambit of sectors including airports, air traffic control, air fleet management, air transport operations (AOCs), air traffic control, baggage and materials tracking, aircraft manufacturers, Maintenance Repair and Overhaul Organizations (MROs), is a very important and lucrative

¹⁰ Regulation (EC), 2008, No. 216, European Parliament and the Council, 2008. (Europe).

¹¹ Regulation (EC), 2009, No. 1108, European Parliament and the Council, 2009 (Europe).

target for state-sponsored cyber warfare and hackers¹². These networks are dynamic and there is a real challenge to protect them.

IV. Rapid Changes in Civil Aviation

Over the past decades, Civil Aviation has changed rapidly, with technological advances and legislative changes that have brought in greater resilience and growth in the aviation industry and business models. Cyber challenges, which threatens both networks and IT infrastructure, threaten the high efficiency of activities, alongside the benefits of the technology, as the worldwide structures are interconnected. To remain ahead of today's world, the organization or company must ensure the identification, prevention, and the implementation of incident management plans and the remedy of any responsibility resulting from any danger vector at an early point¹³.

The technological challenges and related cyber-threats, the usage of IoT in operations (such as luggage handling, passenger check-in, landside operational tracking, common-use passenger systems, and traveller network services), and intelligent technologies implemented by smart airports to achieve operational performance. While several airports have comprehensive frameworks in place for mitigating popular cyber challenges, it is important to mitigate cyber protection hazards in terms of a systemic approach to the cyber world, which encompasses both internal and external threats¹⁴.

The CIA (Internal/Sensitive Knowledge and Authentication) trip (Confidentiality-Integrity-Availability) information management trio focused on its relevance for business operations encompasses a large variety of various asset categories (mainly covering contact networks, VoIP systems, server and access control systems). Some properties have critical criteria for secrecy (such as corporate secrets), some may have critical requirements for honesty

¹² Stefan Katzenbeisser, *Envisioning Smart Building Botnets* (2014).

¹³ Ravi Kumar Jain, *A DEA Study of Airlines in India*, 20 *Asia Pacific Management Review* (2015).

¹⁴ Himanshu Gupta, *Evaluating Service Quality of Airline Industry Using Hybrid Best Worst Method and VIKOR*, 68 *Journal of Air Transport Management* (2018).

dependent on financial activity values, and some have critical requirements for availability (like e-commerce web servers and communication systems)¹⁵.

European Union Agency for Network and Information Security (ENISA) says smart airports use networked, data-driven sensitive capabilities that provide travellers with a more efficient flying experience, and on the other side, seek to maintain a higher degree of protection for passengers, operators and the wide public.

V. Cyber Threats, Impact Evaluation and Resilience Measures

Significant cyber-security risks to modern aviation industry may be segregated into (i) attacks on the network and communication; (ii) malware; (iii) smart devices on airports; (iv) Authorization Misuse; and (v) phishing attacks on the social security infrastructure¹⁶. The object of these vectors of danger is:-

- i. Obstruction in the operations of the computer
- ii. Stealing confidential data like personal, organizational and financial records.
- iii. Obtain unapproved entry
- iv. Spying
- v. Indulged in Distributed denial-of-service attacks (DDOS)
- vi. Locking and keeping down the data for ransom on the device

Some of the prominent threats that the aviation industry faces include the following:

A. DDoS and Botnet Attacks

There is a growing popularity of Distributed-denial-of-service attacks with the purpose of undertaking different malware injection activities. Through such measures, the hackers use botnets of the networks, which have been compromised, for flooding the ATC and other crucial systems related to traffic, resulting in the platforms crashing entirely. At such instances, the attackers, with

¹⁵ Georgia Lykou et al., *Implementing Cyber-Security Measures in Airports to Improve Cyber-Resilience*, Global Internet of Things Summit (GIoTS) (2018).

¹⁶ E Shahbazian, *Meeting Security Challenges Through Data Analytics and Decision Support* (2016).

the threat of disrupting flight control and management systems, often ask for ransom amount.

B. Jamming Attacks

When a ghost flight is injected in air traffic control system by an attacker, with the purpose of altering mapping and projection of airplanes, or that of deleting the position from the radar screen, it is deemed as jamming attacks. As these attacks compromise the very accuracy of the data, which is provided to the aircraft management, these attacks, have a big negative impact.

C. Phishing Attacks

These are the most successful ones, working against the aviation industry. The nature of these threats qualified under advanced persistent threats, meaning unauthorized individuals/ groups attaining access to network of the organization.

D. Remote Hijacking

The hackers are able to attack or control, the on-board systems and flights remotely because of the security flaws in ICT, contributing to such attacks. The Flight Management System was shown to be attacked by a hacker, which showed how the varied elements like surveillance systems, engine and fuel systems, aircraft displays, engine and fuel systems, and the others, could be easily manipulated.

E. Wi-Fi based Attacks

Weaknesses have been identified in the on-board systems of modern aircrafts, which enable attackers in using the inflight entertainment system or the Wi-Fi signal to hack the avionics equipment of planes, and for disrupting/ modifying satellite communications. One view is that after such attacks, with remote control, the planes could be landed in a successful manner. It just requires a framework of codes, by such actors, to get inside the system of planes and to override the security measures¹⁷.

Unless system owners have decided to extract private details, spy on the compromised system, or seize over the system, ransom ware or malicious software infiltrates and retains control over a specified system or mobile

¹⁷ *Id.*

device¹⁸. The malware is a software, application, client or computer network harm program built deliberately. There are several harmful programs such as viruses, worms, Trojan horses, malware, spyware, adware, rogue applications and scare ware¹⁹. Similar attacks may be carried out by an intruder downloading the malware on the website or intranet on the airport, where airport users' computers may be compromised, enabling malicious attackers to use these infected devices to enter airport's sensitive information system and network²⁰.

For future attacks to trigger network interruption, flight termination, customer disruptions, lack of trust, serious financial damage, and Smart airports networks are interconnected to improve their internal connectivity. The usage of data manipulation from critical functionalities and safety criteria, including air navigation and air traffic control systems, communications, air crash avoidance systems is also helpful in improving connectivity²¹.

A counter-measure can be introduced that involves anti-malware and IDS/IPS programs. To keep smart airport systems up-to-date with reduced access to popular defects, both software fixes and hardware upgrades are critical²². Moreover, the surveillance and auditing of networks and log files is also important for smart airports, as any unwanted alteration by malicious insiders must be identified and remediated immediately. It states, "What you can't avoid, you should be capable of detecting and, if you detect anything, it means you couldn't prevent it" so that protective and detective controls for the resilient device can function together.

¹⁸ Georgia Lykou et al., *Smart Airport Cyber-Security: Threat Mitigation and Cyber Resilience Controls*, 19 Sensors (2018).

¹⁹ Ramjee Prasad, *Cyber Threats and Attack Overview*, Springer Series in Wireless Technology. (2019).

²⁰ Bryan Watkins, *The Impact of Cyber Attacks on the Private Sector*, Amo.Cz (Feb. 27 2021, 06:22am) <http://www.amo.cz/wp-content/uploads/2015/11/amocz-BP-2014-3.pdf>.

²¹ Xiaoqian Sun, *Network Similarity Analysis of Air Navigation Route Systems*, 70 Transportation Research Part E: Logistics and Transportation Review (2014).

²² Alan J Stolzer, *Implementing Safety Management Systems In Aviation* (2011).

VI. Cyber Security in Air Traffic Control

A. Air Traffic Control /Air Navigation System

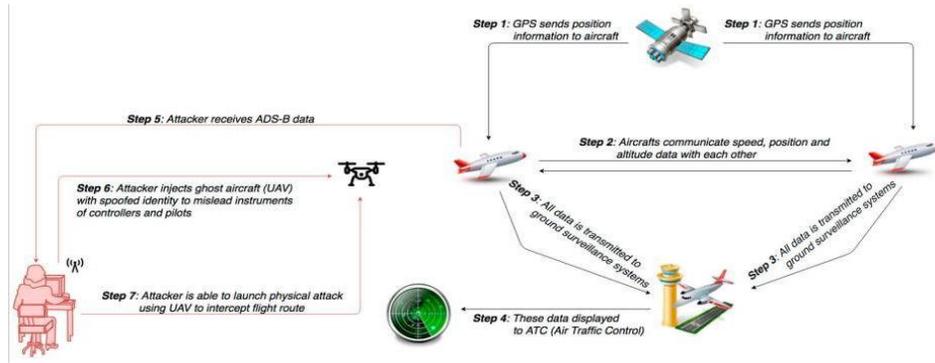
The air transportation sector has seen digital technologies gaining lot of traction, as they have a major impact over the passenger and flight safety. The air traffic management is increasingly becoming a data driven force, which makes it crucial for it to be properly safeguarded. The Network Manager function of Euro control has the responsibility for taking care of the ATM in forty three nations, and in order to fulfill its objectives of protecting the information systems from any and all kinds of cyber threats, has adopted outside help. One of this outside assistance is provided by Thales to modernize the air transport sector, and to help in developing five markets of space, defense, security, ground transportation and aerospace²³.

Cyberspace puts forth a cheap heaven for undertaking varied disruptive activities, which leads to the inference that hackers consider aviation sector as their key target. Apart from this, the low risks associated with this makes it easier for cyber terrorism to replace hijackers and bombers, thereby becoming the leading option for attacking aviation industry. One of the most complex and integrated mode of Information and Communication Technology, i.e. ICT is hosting. This, when coupled with the increased inter connectivity, results in growth of threats on aviation industry from multiple fronts hiding behind anonymity. The actors of such cyber threats focus over malicious intent, physical damage, political motivations, hactivist national, financial gains and theft of personal data. In short, by adopting an informed risk cyber security roadmap that is attained by analyzing the threats, thereby strengthening the resilience of aviation industry against cyber threats, takes the centre-stage²⁴. A depiction of communication attacks on ATM system is presented below:

²³ Thales, *Euro-control Chooses Thales For Cyber security And Digitalization Of Air Traffic Services* (Feb.26, 2021, 08:07pm)

<https://www.thalesgroup.com/en/worldwide/security/press-release/eurocontrol-chooses-thales-cyber-security-and-digitalization-air>

²⁴ Dan Virgillito, *Cyber Threat Analysis for the Aviation Industry* (Feb.,26 2021, 10:40pm), <https://resources.infosecinstitute.com/cyber-threat-analysis-aviation-industry/#gref>



(Source: Georgia Lykou, Argiro Anagnostopoulou, and Dimitris Gritzalis, 2019²⁵)

Air traffic control applies, in its simple sense, to geographic and integrated networks that execute multiple functions such as land control, runway lighting control, separation and routing, as well as radar control. Within ATC, the essential infrastructure is cyber defence. This is how the environment is intricately and misleadingly interested in the cyber hazard scenery. Sometimes, the critics blame numerous organisations which have now contributed to assaults on vital infrastructure²⁶. The facility that computers can be interlinked with all forms of networks raises the probability of certain attacks in the field of hyper-connected Internet of Things (IoT). The shifting IoT world presents a challenge over the ATC networks as airports are seeking to modernize their essential functions. A potential cyber assault on ATC networks may contribute to the abuse of physical processes such as airport road lights and radar controls²⁷.

B. Emerging Threats in Air Traffic Control

Air traffic control networks are prone to Internet threats and there has been a shortage of sufficient intrusion detection capability for the Federal Aviation Administration to identify future cyber penetration. Assessors will take

²⁵ Georgia Lykou et al., *Smart Airport Cyber security: Threat Mitigation and Cyber Resilience Controls*, 19 Sensors (2019).

²⁶ Andrew Cook, *Applying Complexity Science to Air Traffic Management*, 42 Journal of Air Transport Management (2015).

²⁷ Martin Strohmeier, *Realities and Challenges of Nextgen Air Traffic Management: The Case of ADS-B*, 52 IEEE Communications Magazine (2014).

advantage of technical weaknesses in commercial IP devices for the manipulation of ATC networks, which is especially alarming at a period when the nation is experiencing more and more danger from sophisticated nation-state-supported cyber-attacks²⁸. Innovations have been gaining a lot of momentum in the air travel business, as they have a significant effect on passenger and air welfare. The control of air traffic is becoming more and more a data engine, which makes it necessary to be adequately protected. As a result of the computer systems available both on-board and off board, the rampant usage of data networks, coupled with navigation systems, data breaches and cyber-attacks are deemed as the top most growing threats for this sector.

VII. Cyber-Security in European Air Traffic Control (Euro Control)

To achieve its goals of securing information networks from some kind of cyber danger, the network manager role of Euro Control must look after the ATM in forty-three countries, and has been given outward assistance²⁹. Thales is one of several external supports for the modernization of aviation and the growth of five space, safety, security, land and aerospace markets.

Air transport is a crucial sector for the European economic sector with nearly sixteen thousand air traffic controllers in 65 control centers. This momentous magnitude led to EU taking proper steps towards safeguarding the ATC. This was done through the EUROCONTROL Mission. Through the European Organization for the Safety of Air Navigation/Traffic, efforts were made to integrate and harmonize the Air Navigation /Traffic Services in Europe, with the purpose of forming unified Air Traffic Management System for both the civil and the military users. This was done with the purpose of attaining safe, orderly and expeditious flow of air traffic throughout Europe. EUROCONTROL has been nominated as the Network Manager for Europe and acts as the central unit for managing air traffic flow. It also supports the placement of all technology-based improvements in the ATM network of Europe. Apart from this, it also implements the contingency plans and the security management system, along

²⁸ Donald McCallie, *Security Analysis of the ADS-B Implementation in the Next Generation Air Transportation System*, 4 International Journal of Critical Infrastructure Protection (2011).

²⁹ James P Farwell & Rafal Rohozinski, *Stuxnet and the Future of Cyber War*, 53 Survival (2011).

with presiding over the operations of EACCC, i.e. European Aviation Crisis Coordination Cell³⁰

One of the key enabler identified in EASA's Cyber-Security in Aviation project and roadmap is the European Centre for Cyber Security in Aviation (ECCSA) which has to function as a catalyst to achieve the core identified objectives of:

- i. Situational Awareness,
- ii. Readiness & Resilience,
- iii. Reactiveness, and
- iv. Cyber-Security Promotion.

ECCSA, set up with ENISA's CERT-EU platform, as Aviation Computer Emergency Response Team (CERT), establishes an aviation-focused cross-sectorial risk landscape as well as coordinates the prevention of threat scenarios and response to future attacks. The purpose is to use as a clearing house for (confidential) incident information that builds on existing safety reporting in aviation.³¹ Because of the increase demand in air traffic, the Single European Sky was brought forth in 1999. Through these, two packages were brought forth, for regulating Functional Airspace Blocks, new technologies, interoperability regulations and SESAR. SESAR is the program, which modernized the air traffic management system for Europe.³²

VIII. Conclusion

The focus of this research was to discuss many views about how the global aviation industry is addressing cyber-security challenges. The research concluded that while there are several views on how to develop a common view of the aviation cyber-security challenge, there is potential for and a move forward. Adversaries have a large attack surface and potential, with growing numeration and accessibility. A further weakening of physical controls which shielded the aviation industry so long is the increasing complexities of systems, procedures, and supply chains, combined with an increase in wireless

³⁰ Antonio Noguera, *Air Traffic Management moving into European Critical Infrastructure*, (Mar. 01, 2021), http://www.motia.eu/webfm_send/85.pdf.

³¹ EASA, *EASA cooperate with CERT-EU on cyber-security*, (Feb. 14, 2021 09:31am), <https://www.easa.europa.eu/newsroom-and-events/news/easa-cooperate-cert-eu-cybersecurity>.

³² *Id* at 19.

connectivity. In addition to highly competent threat entities, the aviation industry faces an essential challenge, spanning from terrorists to nations. Where necessary the industry wants to pursue rapid gains, but still understand that it is still an evolving challenge to protect the aviation industry from cyber adversaries. Europe has many regulations and legislative instruments safeguarding the aviation sector of this region. EASA regulate the cyberspace certifications and licensing to keep a check on the technicians and mechanics in aeronautical department. EASA undertakes standardized inspections for monitoring applicability of EU legislations in a uniform manner. On the other hand, EUROCONTROL has been nominated as the Network Manager for Europe and this act as the central unit for managing air traffic flow. The bodies like EACCC, ECSCG and ECCSA, along with the adopted ENISA's CERT-EU, SESAR and the like are just a few of bodies and frameworks working in this direction.

Consequently, particularly though the market is global and time-consuming, it has to be equipped to solve significant, structural problems. ICAO can be seen as a world pioneer and regulator in aviation with a concrete reform policy. It cannot drive reforms in the isolation mechanism and needs help and collaboration, if it is to be successful and sustainable, from states, industry organizations and the people involved in the aviation field. While progress has been made, there are still major challenges both in obtaining visibility into and in the global management of aviation cyber-security risk. Leadership and time would be required to properly prepare the aviation industry to resolve these cyber-security challenges. Steps should be taken to speed up this improvement phase, increase accountability and confidence, and enhance objectivity and cooperation. The aviation cyber protection infrastructure is without a single solution and will need positive cooperation among different stakeholders. Strengthening relationships around defence, security, cyber-security, and IT businesses are often complicated; however contribute to a dramatically enhanced perception of comprehensive risk, representing better the essence of the dynamic attack surface being guarded. It must be noted, along with this initiative, that air travel is a global business, with differing domestic and regional sophistication and capacity. It would be necessary to strengthen aviation cyber protection and getting all players together is vital if we want to reduce global, structural risks.

Land Reforms Regulation to Unlock Potential of Land Resources for Development in Arunachal Pradesh

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Abstract

Arunachal Pradesh is a tribal territory in North Eastern India. This state has been cut off from the mainstream India in matters of connectivity and development. Tribes in Arunachal Pradesh have had customary rights to land under age old customs. This was duly recognized in the Constitution of India under Article 13. People in the state relied on subsistence agriculture, and varied forms of trade, craft and workmanship of forest products. Their economy was not monetized. However, after independence, development schemes have been implemented and governmental intervention in the state increased. Development planned after the 10th Five-Year Plan emphasized speedy growth in the state. It envisaged to promote entrepreneurship in the tribal communities. However, people found a bottleneck in their endeavors to set up new industrial and business enterprises. This was related to land. Although people held large areas of land by way of occupation, they were unable to obtain bank loans for setting up new units. This was because banks and financial institution did not recognize the Land Possession Certificates (LPC) issued by the government. The government faced difficulty in acquiring land for public purposes. Therefore, the government decided to amend the Land Act 2000 of Arunachal Pradesh, for granting land ownership or title to land. This paper presents regime of law on land before and after the 2018 amendment of the Land Act. It is hoped that the 2018 amendment will encourage people in the state to setup economic units for speedy economic development.

Keywords: *Land tenure, Title Deed, Customs, Land Possession Certificate, Shukla Commission, Land Reforms, Unclassed State Forest (USF)*

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I. Introduction

The Shukla Commission, in its report “Transforming the Northeast East³”, mapped backlog in physical and social infrastructure in North East India at the turn of the previous millennium. It recommended more investment to bridge the gap in infrastructural facilities. While recommending a policy for development in Arunachal Pradesh, the commission recommended, among other things, harnessing land resources for speedy development. It also recommended that land-based economic activities may be promoted for economic empowerment of people in rural areas.

The commission identified agricultural as well as horticultural lands for large-scale cultivation of orchids, bamboo and medicinal and aromatic plants, and formulated schemes for their subsequent marketing. It also recommended setting up of processing units for surplus produce from horticultural crops like oranges, apple, kiwi etc. The Government would initially provide some subsidy to support small and medium farmers.

It was envisaged in the report that subsidy-based development would not last long. In the end, capital requirement for these initiatives have to be by way of institutional credit. In the absence of legally tenable land ownership documents, the local people were handicapped in arranging credit from banks, to realize their dreams of undertaking land-based economic development. It is therefore important to review the existing legal and policy framework on land resources in Arunachal Pradesh, identify the bottlenecks, and devise strategies to overcome the problems.

II. Land Tenure and Poverty

Today, only 30% of the world’s population have legally registered rights to their land and home, with the poor and politically marginalised especially likely to suffer from insecure land tenure. Unless such people, who lack land tenurial

³ Government of India, Transforming the Northeast: Tackling Backlogs in Basic Minimum Services and Infrastructural Needs, High Level Commission Report to the Prime Minister, Planning Commission, New Delhi, March 7 1997.

security, are included in any plan of development ‘Goal 1 and 2 of the United Nations Sustainable Development Goals 2015 will be impossible to achieve’.⁴

Land tenure determines who can use land, for how long, and under what conditions. Tenure arrangements are based both on official laws and policies, and on age-old customs. If those arrangements are secure, users of lands have an incentive not just to implement best practices for their sustainable use, but also to invest in land.

An international consensus has emerged regarding the importance of secure land tenure for development outcomes. In 2012, the Committee on World Food Security, based at the Food and Agriculture Organization (FAO) of the United Nations, endorsed the Voluntary Guidelines on the Responsible Governance of Tenure as the global norm on this front.⁵

By stifling economic growth, inadequate land-tenure systems perpetuate poverty and marginalization. But the opposite is also true: strong, properly enforced land rights can boost growth, reduce poverty, strengthen human capital, promote economic fairness (including gender equity), and support social progress more broadly.⁶

Moreover, secure land rights are an urgent imperative at a time when climate change is already fueling more and more frequent extremes of weather and such disasters displace people and destroy their homes. Properly maintained land records provide the baseline for compensation and reconstruction of shelters, and help affected communities rebuild better.⁷

In the Land and Poverty Conference 2017 held at the World Bank, it was realized that secure land rights are important for reducing poverty and boosting shared prosperity at the levels of country, community and family.⁸

It is a common experience that land ownership is instrumental in attracting investment and use of land for economic growth. This is true for promoting

⁴ Mahmoud Mohieldin & Anna Wellenstein, *Why Strengthening Land Rights Strengthens Development*, Blog-World Bank, August 16, (2018).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ World Bank, *Why Secure Land Rights Matter*, March 24, 3, (2017).

land-based agricultural and horticultural development. It can also arrest forced migration of rural folk to cities for job opportunities.

III. Scope of the Study

This paper has focused the study on Arunachal Pradesh as far as land reforms are concerned. There was nothing in the hilly territories of northeast India corresponding to the land revenue system of the plains. Nor did the British government consider it necessary to devise a legal basis for land revenue procedure, or to recognize the tribes' as having any status concerning land.⁹

Jawaharlal Nehru, in his foreword to the second edition of Dr. Verrier Elwin's book¹⁰, said that the avenues of development in this territory should be pursued within the broad framework of five fundamental principles. These principles came to be known as Panchsheel.¹¹ The second principle 'Tribal rights in Land

⁹ Lands in Northeast India had been not consolidated and settled on the lines of Punjab and Bengal. This was because tribes inhabiting that region mostly had their customary rights to land, and vast areas were heavily forested.

¹⁰ Verrier Elwin, *A Philosophy for NEFA*, (Second Revised Edition.) Shillong: North-East Frontier Agency, (1959).

¹¹ In 1954, Jawaharlal Nehru appointed Dr Verrier Elwin as adviser on tribal affairs to the administration of the North East Frontier Agency.

Complying with the advice of Elwin, Nehru formulated the Panchsheel, the five principles for NEFA in the 'A Philosophy for NEFA':

1. People should develop along the lines of their own genius and we should avoid imposing anything on them. We should try to encourage in every way their own traditional arts and culture.
2. Tribal rights in land and forests should be respected.
3. We should try to train and build up a team of their own people to do the work of administration and development. Some technical personnel from outside, will no doubt, be needed, especially in the beginning. But we should avoid introducing too many outsiders into tribal territory.
4. We should not over-administer these areas or overwhelm them with a multiplicity of schemes. We should rather work through, and not in rivalry to, their own social and cultural institutions.
5. We should judge results, not by statistics or the amount of money spent, but by the quality of human character that is evolved.

Elwin wrote 'A Philosophy for NEFA' to formulate policy and a philosophy for the administrative and work staff of NEFA and to introduce new or uninformed NEFA personnel to facts about the area and its people. The deep understanding of the tribes of NEFA was necessary to administer them.

and Forests should be respected' has been the basis of all future enactments on land in tribal areas. The Constitution of India also included customary rights of tribes' as having force of law under Article 13.¹²

In view of the special nature of this territory, not all the rules applicable in British India were made applicable in the erstwhile NEFA, now renamed Arunachal Pradesh. However, there was a shift in policy in 1914, when selected acts, rules and regulations were made applicable to this territory. A special provision was also inserted in Section 14 of the Assam General Clauses Act, 1915, providing that no act of the Assam Legislative Council, in the absence of any special provision to the contrary or special extension or under the Scheduled District Act 1874, shall apply to these Frontier Tracts.¹³

The Assam Land Revenue Regulation, 1886 (Regulation 1 of 1886) was extended to this territory, with the exception of sections 3 to 159 (both inclusive). In other words, the bulk of legislation (Sections 3 to 159) was not extended. This implied absence of land revenue regulation in this territory.¹⁴

This paper will, therefore, attempt to present an overview of the main regulations impacting use of all kinds of land, focusing on the state of Arunachal Pradesh, and suggest measures to unlock the potential of land for development, as also to meet the rising aspirations of people.

IV. Origin of Rights to Land

Almost the entire state was under dense forest cover, and people inhabited this territory at scattered locations. For their livelihood needs, they invested money and labour for clearing forests, and peacefully came to hold land over generations. The common maxim of law is that it will not disturb such possession, which people have acquired since time immemorial. The people are said to have acquired the property by *prescription* due to long and peaceful usage¹⁵.

¹² The Constitution of India, Bare Act with Short Notes (Universal Law Publishing, 10, 2018).

¹³ Assam General Clauses Act 1915, 31, available on website of Government of Assam.

¹⁴ The Assam Land and Revenue Regulation 1886, The Arunachal Pradesh Code, Volume-I, 11, Government of Arunachal Pradesh, Law and Judicial Department, 1982.

¹⁵ *Id* at 27.

English law has borrowed the notions and concept of property from Roman law. The old Roman law first recognized this principle of *prescription*, and all other systems of law have in one way or another followed it. Old Roman lawyers on the subject have stated that initially the land was ‘nobody’s goods’ (*res nullius*), and the person who first took and successfully retained possession, became owner by natural law, or got a title by occupancy. This concept of the origin of right to property got embodied in laws across the nations. Such a right has three connotations: i) the feeling that long possession ought not to be disturbed, ii) the feeling that everything ought to have an owner, iii) and that ownership resides freely in each individual.¹⁶ It is thus important to appreciate the juristic connotation of the term “ownership”. Roman lawyers neatly expressed this term by saying that full owner (*dominium*) had the use (*usus*), the whole of the products (*fructus*), the right entirely to consume (*abusus*), and the right of transferring or alienating at pleasure (*vindicatio*).¹⁷

The notion of property appears simple, but this is not so. This happens with government as well as private lands. A person holds a piece of land, which supports bushes and trees, and the inhabitants of a neighboring village have the right to graze cattle on it. This right prevents the owner from ever cultivating his land. Likewise, the government may be the owner of a patch of forest, but there may exist rights of grazing and jhumming in favour of the neighbouring village. In such a case, the government officer in charge of the forest can never close the whole forest at once and plant it over, nor can he lease out the whole of the grazing field nor cut the grass. In both of these cases, the owner has something less than the absolute or perfect and full enjoyment of his property.

In other words, while the property itself remains with the owner and while his ownership is not reduced or altered, still some of the rights which go to make up a perfect ownership have been, as it were, detached in other persons. The sum total of all these detached and separate rights have been called by the Roman lawyers as *servitude*. The English law has no general term for servitude. The English law gives a special name *easement* to one class of these

¹⁶ B.H Baden Powell, Manual of Jurisprudence for Forest Officers, 1882, First Indian Edition, 8, (Natraj Publishers, Dehradun, 2002)

¹⁷ Id at 27

rights. Easement, howsoever long, cannot give rights to a claim of ownership in the estate. Indian Easement Act 1882 is a statute on this subject.¹⁸

Other mode of origin of right to land is from the principle of *terra nullius* i.e. un-owned lands. This like *res nullius* (i.e. nobody's goods) belongs to the sovereign/government. The British invoked the juristic principle of *terra nullius* when Captain Cook established a British colony in New South Wales following Declaration of Possession in 1770. In later times, ownership of land was dealt under special statutes like land regulation, etc.¹⁹

V. Land Regulations and the State of Arunachal Pradesh: A Historical Analysis

The state of Arunachal Pradesh has seen many changes as far as land laws are concerned. The authors have elucidated the contemporary scenario by going back into the annals of history to bring forth a clearer picture.

In the late 1990s, a need was felt to introduce the land tenure system, in order to obviate the problems being faced by tribes of Arunachal Pradesh in getting institutional finance for realizing their entrepreneurial ambitions. The evolution of the land tenure system in this territory has taken place by different policy and legal instruments. It is worthwhile to appraise the main policy and legal frameworks which put the formal land tenure regime in place.

A. Land Possession Certificate

The government issued guidelines for issue of land possession certificate (LPC) to occupants of land in 1988. This instrument was administrative in nature. The interested applicants may submit an application to the local administrative authority for LPC. This application should be accompanied with a certificate from the Forest Department to the effect that the land in question

¹⁸ *Id.*

¹⁹ *Terra nullius* means "nobody's land". This doctrine has existed in the law of nations throughout the development of Western democracy. The fact that it is a Latin phrase gives us the clue that it is derived from Roman law – the **concept** that ownership by seizure of a thing no one owns is legitimate. This was at the Centre of several important legal cases in Australia in the late 20th and early 21st centuries. Mabo case of 1992 is a landmark judgment in Australia.

does not fall under reserved forest; a certificate from the Village Council/Anchal Samiti²⁰ that the land is actually owned by him and it is not a joint property; that the land is free from all encumbrances; the sketch map of the land duly countersigned by the vice-president of Anchal Samiti/Village Headman.²¹

After inspection of the site, the local administrative authority would issue a notice of 'No Objection' from the public of the locality, and on satisfying himself that the land in question actually belongs to the applicant, he will recommend the case to the Deputy Commissioner, who in turn will recommend the proposal to the State government for approval. On receipt of approval from the State government, the Deputy Commissioner will issue Land Possession Certificate.²²

B. Arunachal Pradesh (Land Settlement and Records) Act, 2000

The State government enacted this instrument on land, envisaging implementation of a land tenure system in Arunachal Pradesh. "This Act included details on revenue divisions' and revenue officers, rights over land, survey and settlement of land revenue, land records, realization of land revenue, rights of tenants, etc. This is a legislative instrument".²³

C. Arunachal Pradesh (Land Settlement and Records) Rules, 2002

The State government, in exercise of the power under Section 99 of the Arunachal Pradesh (Land Settlement Records) Act, 2000, and in supersession of the Arunachal Pradesh Allotment of Government Land Rules, 1988, and the Arunachal Pradesh (Land Settlement and Records) Rules, 2002, issued this Act. This legal instrument was an improvement over the previous set of rules, and it was also more exhaustive. It contained more details on procedural aspects. "These rules are in tune with land settlement rules prevalent in the rest

²⁰ Anchal Samiti is a vernacular term for Block Committee.

²¹ Government of Arunachal Pradesh, Land Records Department, Issue of Land Possession Certificate-Procedure thereof, No. LR-31/84 Dated 19 December 1988.

²² *Id.*

²³ Government of Arunachal Pradesh, the Arunachal Pradesh (Land Settlement and Records) Act, 2000, Land Management Department.

of the country”.²⁴

After independence, most parts of the North East were brought under Schedule VI of the Constitution of India. The rationale for according a special status in the Indian federation was that most of the indigenous tribes of the region were not under direct administration of the Mughals and the British, and they were thus self-governing societies. Thus, many states in the North Eastern region were treated as federation within federation. Arunachal Pradesh was earlier under Schedule VI of the Constitution. Later on, it achieved statehood and opted for Panchayati Raj, thus it ceased to be part of Schedule VI. “Therefore, all central laws are *ipso facto* applicable in Arunachal Pradesh. Assam (limited to autonomous areas), Meghalaya, Mizoram and Tripura still belong to the regime of Schedule VI”.²⁵

In Nagaland and Schedule VI areas, central laws are not applicable. However, these states may adopt central laws. The customary laws are accorded legal status under Article 13 of the Constitution. They have been recognized as such under Article 371A in Nagaland, under Article 371G in Mizoram, and in Schedule VI areas in Meghalaya, three autonomous councils in Assam and tribal areas of Tripura under the Constitution.

Arunachal Pradesh and Manipur do not have such clear recognition of customary laws in the matter of land under the Indian Constitution as was done in Nagaland and Schedule VI areas. This led to difficulties for the State Government in finding land for developmental projects.²⁶

²⁴ Government of Arunachal Pradesh (Land Settlement and Records) Rules, 2002, Department of Land Management, Itanagar.

²⁵ Namita Wahi and Ankit Bhatia, The Legal Regime and Political Economy of Land Rights of Scheduled Tribes in the Scheduled Areas of India, Centre for Policy Research, 15 March 1918 accessed on <https://cprindia.org/research/reports/legal-regime-and-political-economy-land-rights-scheduled-tribes-scheduled-areas> 29 December 2020).

²⁶ The customary laws have been accorded legal recognition in Nagaland (Article 371A), Mizoram (371G) and in Sixth Schedule in Meghalaya, three Autonomous Councils in Assam, tribal areas of Tripura. Arunachal Pradesh & Manipur have not been recognized in clear terms by the Constitution as done in case of Nagaland and Sixth Schedule States.

D. Inner Line Regulations

The provisions of the Bengal Eastern Frontier Regulations (BEFR) 1873 provided for restrictions of entry of a person from outside to the territory of the erstwhile hilly tract now known as Arunachal Pradesh. It established a regime of 'Inner Line'. "The regime of inner line was also extended to some areas of the North East".²⁷

The historical roots of Inner Line lie in the Anglo-Burmese Wars of the early 19th century, which exposed British ignorance of a strategic area, abutting Burma and China. After several difficult expeditions, the hill tracts were mapped out. The BEFR empowered the Lt. Governor to define an inner line, beyond which no British subject of certain classes or foreign residents could pass without a license. "These regulations are still in force in Arunachal Pradesh".²⁸

Section 7 of the BEFR is relevant for the purpose of this paper. It stipulates that, 'it shall not be lawful for any person, not being a native of the districts comprised in the preamble of this Regulation, to acquire any interest in land or the product of land beyond the said 'Inner Line' without the sanction of the State Government.'²⁹

By implication, tribal interests in land, mostly based on customary law, have an umbrella protection. The sale of tribal land in these states is limited only to other tribes of the state, unless the State Government expressly allows such transactions. In most cases, these have been done for the constructions of Dams, National Highways, Airports, Institutions and other public interest works, where land is acquired under the Land Acquisition Act or Forest (Conservation) Act 1980 after payment of assessed compensation. In recent years, the State Government has permitted limited land leasing arrangement to attract private investment.

The State Government was aware of the communal status of most lands in Arunachal Pradesh. The common resource of land was recognized under local

²⁷ The Bengal Eastern Frontier Regulation 1873 (5 of 1873), the Arunachal Pradesh Code Volume-I, Government of Arunachal Pradesh, Law and Judicial Department, 1982.

²⁸ Ashish Kundra, 'Understanding the History of the inner Line Permit in the North East', Hindustan Times, December 22, 2019.

²⁹ Supra note 28, at 10.

customs, which differed from tribe to tribe. However, jhum control regulations were in place, but the State Government did not invoke their provisions.

In case of diversion of land for non-forestry purpose, prior permission from the Government of India is mandatory under the Forest (Conservation) Act 1980. Even in case of diversion of forest land for development purpose, the user agency has to grant compensation to individual holders of land as well as to the Government in case of common property resource called as USF. “Many user agencies like Defence termed this regime as double compensation”.³⁰

In addition, the Supreme Court directed that all forest areas have to be documented irrespective of ownership and classification.³¹ To sum up, in addition to the independence’s era jhum control regulations, two other regimes on land were operating simultaneously, namely Land Possession Certificates and provisions of Arunachal Pradesh (Land Settlement & Records) Act 2000 and its rules notified in 2012 after amending rules issued in 2002.

Existing regimes on land regulations were not able to make land easily available for various developmental activities. Therefore, developmental projects were suffering from inability of the Government to provide land, due to cumbersome procedure involved in land acquisition and community lands burdened with rights of users. There were inherent infirmities in the existing regimes on land in the state. In this background, the state Government decided to brainstorm the issues in land regulation and find out bottlenecks for their improvement. Thus was born the idea to hold a national level consultation in Arunachal Pradesh in December 2018 under the title “Dream Change Arunachal 2027: Reshaping Development Discourse of Arunachal Pradesh”. This as an elaborate

³⁰ Tribes in Arunachal Pradesh have customary Common property resources or unclassed state forest (USF). The tribes’ have been using forest resources for their livelihood and bonafide domestic needs. If land in USF category is diverted for non-forestry purpose then user agency is required to give monetary compensation to the members of the tribe family besides amount payable to forest department as per Forest (Conservation) Act and Rules. User agency like Defence calls it double compensation. However, it has its own legal backing.

³¹ Lafarge Umiam Mining Pvt. Ltd v Union of India and others,(1995) WP No. 202

consultation on many issues of development including those related to land right.³²

The State Government was keen to develop a law, which helps, unlock the vastly-hidden potential in land to facilitate entrepreneurial development.³³

VI. Era of Reformation *vis a vis* Land Regulations

The state cabinet in its meeting on 18th May 2018 discussed issues relating to land rates, regulation of encroachment and grant of ownership right etc.³⁴ The State cabinet decided to constitute two committees on the above issues:

i. Regulatory issues Relating to Law, Amendments Required Leasing etc.

Principal Chief Conservator of Forest (PCCF) (Wildlife and Biodiversity), Commissioner (Law), Commissioner (Health & Family Welfare), Secretary (Land Management).³⁵

ii. Issues of Rates, Encroachment etc.

Principal Secretary (Coordination), Secretary (Land Management), Deputy Commissioners, Daporijo, Itanagar Capital Complex, Tezu, Pasighat, Namsai.³⁶

Both the committees were directed to submit their recommendations in the Cabinet meeting in July 2018.

Decisions taken by the State Cabinet in the meeting in July 2018

The committee on regulatory issues relating to law, and amendments required, submitted its report to the State Government in June 2017. The State

³² The theme of the consultation included Economy and Development, Agriculture and Allied Sectors, Education, Skills & Entrepreneurs, Health Service Delivery, Protection and Continuity of Tangible and Intangible Heritage, and Cultural Expressions.

³³ The first author argued in one of the sessions in Dream Change Arunachal 2027 to introspect current laws on land and go for structural changes.

³⁴ State cabinet discussions and papers are privileged documents and cannot in public domain. Joint secretary to cabinet communicates decisions of the cabinet to concerned departments.

³⁵ The officers included G N Sinha, IFS (senior most), Bilatee Pertin, IAS, Kaling Taying, IAS, and Sanjeev Jain IAS in serial order.

³⁶ The officers included Satya Gopal IAS (senior most), Sanjeev Jain IAS and Deputy Commissioners by designation in serial order.

Government accepted the recommendations of the committee, and the Nodal Department on land matters prepared a cabinet note for discussion in the State Cabinet in August 2017. The recommendations made by the committee were presented to the State Cabinet, which took the following decisions:

1. Notification may be issued by the Land Management Department whereby Bank/ Financial Institution may be advised to recognise LPC and on the basis of LPC, loan should be given by the Banks/ Financial Institutions to individual farmers.
2. Notification shall be issued by Land Management Department whereby LPC holder can give his land on lease as per the terms and conditions arrived mutually between LPC holder (Lessor) and lessee. The respective Deputy Commissioner and Forest Settlement Officer (FSO) should register such instrument and it shall be ensured that land ownership is not alienated and local tribal people continue to retain the ownership.

The State Government approved the committee's recommendations to grant land ownership rights to LPC holders. The State Cabinet, while agreeing with the recommendations of the previously mentioned committee, decided to go ahead and in turn appointed a committee under the chair of Minister, Land Management, with the mandate to prepare a draft of the amendment bill so that necessary land ownership may be provided to LPC holders.³⁷

A. Ministerial Committees on Draft Bill

The State Cabinet, vide order dated 14 November 2017, constituted a committee under the chair of Minister, Land Management, with three other Ministers

³⁷ The senior author was opted as a member of the committee under the chair of Minister, Land Management though he had retired in June 2017. He therefore moved to Itanagar to take up his new assignment in October 2017.

In brief, the committee had recommended the identification of various areas of USF, demarcation of land, preparation of digitized maps of all districts, and most importantly recommendation for conversion of LPC into land ownership certificate, subject to a ceiling of land allotment upto four hectares per family/person. The rationale of four hectare per family/person was that this was the norm provided under the Scheduled Tribes Right Act 2006 for allotment of land title in forest areas.

(Power, Rural Development and Agriculture). The committee also comprised senior officials of Environment & Forests, Finance, Law, Land, Additional Advocate General. The terms of reference of the committee were:

1. Detailed examination of status of USF land with reference to all the existing legal provisions included in any act, rules.
2. Detailed examination of the issue of grant of ownership rights as per the existing legal provisions.
3. Examination of the issues pertaining to land, and to suggest ways and means to tackle the problem of rampant encroachment on Government land.

The committee examined the position and status of unclassified State Forest (USF) on the basis of various laws and rules enacted from time to time. Briefly, the committee appreciated the legal status of USF land as government land burdened with rights of people for many decades, acquired through prescription. This right flowed from one of the articles of the Constitution, namely customary law as provided under Article 13. The settled position of law was that people were entitled to compensation if their customary land is acquired for public purpose. Thus, the concept of just compensation prevalent in USA is applied under Indian laws also. However, proprietary rights in USF land belong to the State.

On the issue of grant of ownership rights to local bonafide residents in respect of occupation of lands under USF category, the committee noticed the following facts:

- I. No cadastral survey has been done in Arunachal Pradesh; therefore, no Record of Rights (ROR) has been prepared. It was mandated under Arunachal Pradesh (Land settlement & Records) Act 2000 and rules framed thereunder in 2012, but no action was initiated.
- II. Land possession certificates (LPCs) have been issued in almost all districts for the land classified as USF.
- III. However, the fact remains that LPC is neither a ROR nor an ownership certificate. In most parts of the country, the RORs have been settled but in absence of cadastral survey, it could not be done in Arunachal Pradesh.

- IV. In absence of land ownership status of LPC, farmers are not able to avail benefits from central government schemes, and finance from banks and financial institutions.
- V. It is thus of importance that tenancy rights are given to farmers so that they may have tenurial security. This would involve amendment of the Land Act 2000 as applicable in the State, as also the rules framed thereunder. For achievement of this gigantic task, revenue department needs to be strengthened with work force, finances and technological support.

The committee, under the chair of Minister, Land Management, recommended the following suggestions to be incorporated in the proposed Arunachal Pradesh (Land settlement and Records) Amendment Bill 2018.

Section 88 (1) and 88 (4) of Arunachal Pradesh (Land settlement & Records) Act 2000 may be amended.³⁸

B. Conversion of LPC into Record of Rights (ROR)

In terms of Section 23 of the Act, the Government may by notification direct the revenue survey of any local area, with a view to the settlement of the land revenue, and to the preparation of a record of rights connected therewith. The

³⁸ **Section 88 (1): Existing**

Every person, who, at the time of the commencement of this Act, holds any land from the Government for agricultural purpose, and his successors in interest shall, subject to the provisions of sub-sec (2), become the owner thereof as such from such commencement.

Section 88 (1): Proposed

Every person, who, at the time of the commencement of this Act, holds any land from the Government or in possession of land for agricultural purposes, and his successors in interest shall, subject to the provisions of sub-sec (2), become the owner thereof as and from such commencement.

Section 88(4) original:

Every person who, at the commencement of this Act, holds from the Government for a purpose other than agriculture shall, subject to sub-section (2) be entitled to the settlement of that land on such terms and conditions as may be prescribed.

Government may convert the existing LPC as draft record of right, and after inviting claims and objections, the permanent record of rights can issue.

Once the records of rights are settled, the land revenue will also be payable.

- The Government will be required to take a decision on the land revenue to be charged from the tribes/farmers.
- To carry out survey and settlement of land, the Revenue Department proposed the creation of a requisite work force, on the lines of other states.

The above recommendations were made to the Cabinet. The methodology adopted by the first author was the field inspection in districts³⁹.

³⁹ In meetings held in the districts in 2017-2018, actual operation of land ownership and customary practices were understood. The meetings were held in the conference hall of the Deputy Commissioners. Those who attended generally included government officials of revenue, forest and land management. The senior author presented the official system of management of land, followed by active participation of Panchayat functionaries and elder members of the district. In case of conflicting views, Deputy Commissioner and senior author addressed and tried to resolve the issue. This meeting was followed by senior author's informal interaction with Gaon Burahs (GBs) in the afternoon, followed by visits to some families of few clans to further understand the finer notions of land holding and land ownership practices prevalent in that particular tribe. During these informal interactions, senior members of the clan would often describe the history and land ownership practices they had received from their ancestors. They would also share about grievance redressal mechanism in case a dispute on land arises.

Next day, senior author would visit some representative plots of shifting cultivation, fallow areas, densely forested areas and open lands, and ask about their owners. All members' accompanying I in field visit would promptly inform about owner and none would dispute. This was the kind of clarity, which existed in the villages of Arunachal Pradesh. Some members of the village communities were apprehensive about the initiative of governmental reforms in land management and ownership. The senior author explained to them that as of now they have traditional ownership on their land since time immemorial. All lands under their ownership are not legally recognized. They are at liberty to use land in whatever manner they want. However, they cannot obtain loan from banks if they wanted to setup a production or manufacturing unit.

Most of the villagers do not have LPC. They just have traditional rights on lands that are in the nature of servitudes or concessions, subject to approval or modification or

C. Arunachal Pradesh (Land Settlement & Records) (Amendment) Bill, 2018

An amendment bill to the Land Act was introduced in the State Assembly of Arunachal Pradesh at Itanagar on 9th March 2018, vide Bill No. 6 of 2018. This bill envisaged to amend the Arunachal Pradesh (Land Settlement & Records) Act 2000. It provided for the amendments reproduced below:

D. Amendment of Section 88

In original Section 88, after sub-section (1), the following sub-section shall be inserted:

“(1A) Every person who holds valid land possession document issued by the competent authority outside notified forest shall be entitled to be conferred ownership rights on such terms and conditions, as may be prescribed”.

E. Amendment of Section 90

In the Principal Act, in Section 90, for sub-section (1), the following shall be substituted:

“Subject to the provisions of this Act or any other law for the time being in force, a land owner may lease out his land to another person or entity for the permissible land use on such terms and conditions as may be agreed upon between him and such person or entity for such period not exceeding thirty three years.”

In Section 90, for sub-section (2), the following shall be substituted:

“Every lease of land made after the commencement of this amendment Act shall be for a period not exceeding thirty three years, and at the end of the said period,

annulment by the State Government. Even if they have LPC, banks and financial institutions do not recognize it. They do not treat LPC as a legally validated instrument fit for mortgage. The villagers were explained in the meetings that the State Government intends to grant them legally validated land ownership document, so that they may put their assets to best productive and economic use after entering into arrangement with banks and financial institutions.

the same can be renewed for a period not exceeding thirty three years on such modified terms and conditions as may be agreed between both the parties.”

The Arunachal Pradesh (Land Settlement & Records) (Amendment) Bill, 2018 was passed. The Amendment Act received the assent of the Governor on 7 May 2018.

VII. Conclusions

For many decades, members of the tribes were without any tenurial rights. Various studies and theories on ownership in land⁴⁰ amply demonstrate that grant of tenurial land rights to people not only empowers them, but also leads to their economic development.

In case of forest-rich states like Arunachal Pradesh, this step is in conformity with the concerns expressed at international forums about the need to protect forest and other lands from degradation, as they act as sink for carbon sequestrations.

Like the Aboriginal Land Right (Northern Territory) Act 1976 of Australia, the Arunachal Pradesh (Land Settlement and Records) Amendment Act 2018 is a fundamental piece of social welfare legislation, which recognized tribes' inalienable land ownership, and puts it into law.

In our parliamentary form of government, sometimes legislature enacts a framework law on an emergent issue, with the responsibility given to the government to prepare their rules and other operational guidelines. However, due to bureaucratic inertia, the intent of the legislation is lost for want of preparation of requisite formats and other operational guidelines like Standard Operating Procedure (SOP). The Government should move fast to translate the intent of the Amendment Act, for the welfare of the targeted village farmers. In the instant case, it pertains to granting tenurial security to indigenous tribal farmers in the state. The Government realized the predicament of the farmers in not having tenurial security, and in May 2018, amended the Land Act 2018. This momentum should not die out for want of implementation.

⁴⁰ Various theories of property include Labour theory, Utilitarian theory of private property and Economic theory.

Joint Forest Management and Community Participation: A Study in Indian Perspective

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Abstract

The Joint Forest Management Programme (JFM) has been a major thrust area of forest management over the last two decades. The programme is operating with main objective of forest management and empowerment of local communities through sustainable resource utilisation. The effective and meaningful involvement of local communities has been attempted under the Joint forest Management system in India by linking socio-economic incentives and forest development. The present paper will provide a brief overview of the policy makers regarding the effectiveness of the programme operationalised in different parts of the country. It further tries to review the process of JFM and factors promoting community participation for forest management under the regime of JFM in India.

Key words: Sustainable, Joint Forest Management, Local Communities, Forest Policies, Rights, Community Participation.

I. Introduction

The focus on the role of rural communities in the management of forest resources and forest policy formulation has, in its background, the concerns for environment and sustainable development at the world as well as at national level. The United Nations Conference on Human Environment at Stockholm in the year 1972 drew the attention of the international community towards the protection and improvement of environment and related issues. This was reiterated by the World Commission on Environment and Development in 1987 through its report titled 'Our Common Future' which was followed by intensive discussion at the United Nations Conference on Environment and Development in 1992. As a result, a consensus seems to have emerged that global

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environment problems have solutions only in the combination of decentralisation of governance and participation of the community in the management of natural resources. In the case of forests, the United Nation Rio Conference marked a turning point when countries affirmed their commitment to sustainable forest management by adopting a statement of the principles for a global consensus on the management, conservation and sustainable development of forests popularly known as forest principles.³

In India the increasing depletion of forest resources has brought into sharp focus the inherent inadequacy of traditional state owned and run systems of forest management in sustaining the forest resource against the growing human and livestock population pressures, industrialisation, urbanisation and overall economic development. The crisis in Indian forestry relating to high rates of deforestation, unregulated and unsustainable use of forest produce in the past, can be attributed to the twin processes of erosion of customary resource management regimes and the acquisitive tendencies of the state in the period following independence. Forest conservation priorities cannot be determined in isolation from local people and broader patterns of natural resource use, and this must be complimented by policies promoting sustainable and equitable development of the natural resource base as a whole.⁴ However, forest management policies have been faulted on account of ignoring the livelihoods of people directly or indirectly. It is also believed that such policies have alienated a vast majority of rural communities in the forest management. In acknowledging this factor, the Ministry of Environment and Forests, Government of India issued a circular in June 1990 to various state Department of Forest encouraging for the involvement of village communities and voluntary agencies in the regeneration of degraded forest lands under the Joint Forest Management (JFM) programme.⁵

³Dinesh Pratap, Community participation and forest policies in India. https://www.researchgate.net/publication/258185406_Community_Participation_and_Forest_Policies_in_India_An_Overview, p.236-237 (last visited March 22,2021)

⁴ Binodini Majhi, Joint Forest Management Programme in India and Community participation, p. 322, (2016) <http://euroasiapub.org/wp-content/uploads/2016/09/31ESSMarch-3213-1-3.pdf> (last visited March 22, 2021)

⁵ Sanjay Upadhyay & Videh Upadhyay, *Forest laws wildlife and the Environment*, p. 49, (2008)

II. Joint Forest Management and Community Involvement: A Conceptual Framework

Joint Forest Management (JFM) is a concept of developing partnerships between fringe forest user groups and the Forest Department (FD) on the basis of mutual trust and jointly defined roles and responsibilities with regard to forest protection and development.⁶ In JFM, the user (local communities) and the owner (Government) manage the resource and share the cost equally, however it is difficult to generalise the JFM concept and approach in the light of variations across the nation with respect to geography, resource base, socio-economic status, cultural diversity and pressures on forests.

While the primary objective of the JFM programme continues to be rehabilitation of degraded forestlands with people's organisations (Village Forest Committees - VFCs), in the course of evolution, approaches like village resource development, micro watershed development have got integrated into JFM as most State governments are attempting to improve the socio-economic status of forest dependent communities in order to reduce pressure on forests. Several approaches initiated to conserve forests without involving the local communities have not met with reasonable success. Thus, it is increasingly recognised that involvement of people in forest management, apart from contributing to regeneration of degraded forest, and helping in cost-effective conservation, also meets community's subsistence needs. To push such efforts, a decentralised and participatory forest management program called joint forest management (JFM) is being promoted in India since 1990. The JFM provisions, under the JFM guidelines of 1990, are expected to promote peoples' involvement, collective decision-making, social fencing, empowerment of the village community, sharing of authority, and focus on non-timber forest products (NTFP) and sustained harvest of usufructs.

The term 'community' has received recurrent and persistent attention in social science literature. Hence, a longer-term perspective is required to understand how community has acquired prominence or lost it at different points of time. In

⁶ S. Agarwal, Essay on Joint Forest Management (JFM) | Forestry, <https://www.environmentalpollution.in/essay/joint-forest-management/essay-on-joint-forest-management-jfm-forestry/4806> (last visited March 23, 2021)

the context of teleological theories of social change or theories of modernisation, community is seen to possess limited transformative capacities. On the other hand, when change is regarded ambivalently or negatively, community is perceived to have positive notions. The term 'community' depicts a small, locally situated, harmonious social formation in the contemporary writings. For instance, a study on community and forestry brings out that community exists among individuals who share common interests and common identification and grows out of shared characteristics.

The first meaning of community concerns with community as shared understandings where the community members are presumed to possess common interests and share beliefs about how to achieve their interests. The second meaning of community concerns with community as a social organisation, implying shared territory, regular and frequent interactions over a range of livelihood issues, local tenurial or institutional arrangements and stability in membership. The external agencies including the state, NGOs, aid agencies, and policy makers can do very little about the first aspect, but can influence the second aspect. Most recent programmes to involve communities in resource management included attempts to alter local institutional arrangements, establish new structures of decision-making or decentralise power, with a hope to encourage a greater feeling of community as shared understandings.

In the context of community-based conservation of forests, community involvement implies assigning specific roles and responsibilities to the community in conserving the allotted portion of forest by granting certain rights to it over the use of the resource along with a few other incentives like the provision of wage labour, building of locally useful infrastructure, etc., to take part in the process. In this sense, community involvement means the participation of the members of community in both protecting and managing the forest area allotted to them, enabling them to derive some benefits at present and in future. Thus, community involvement is synonymous with community or people's participation. If the objective of conservation is to achieve sustainable and effective management of the resource, then nothing less than functional participation will suffice. Thus, community involvement in conservation of

forests means functional participation of the people in protecting and managing the forest resources.⁷

Community participation is being increasingly viewed as the process of empowering the local people with the focus on transfer of power to communities by incorporating changes in the power structure. Interactive participation and participation through self-mobilisation are critical for participation to become a process of empowering the people so that they gain more control over their own resources and lives. In brief, the objectives of community involvement as an active process are empowerment, building beneficiary capacity and self-reliance, increasing project effectiveness, improving project efficiency and project cost sharing. In fact, the involvement in decision-making, implementation and monitoring helps in developing local human resources in the form of target group, and leads to sustainability. The community participation is intended to contribute towards both beneficiaries' empowerment and project efficiency.⁸

III. Evolution of Joint Forest Management in India

To understand the concept and process of Joint Forest Management (JFM) in India one needs to delve into the evolution of the forest policy and legislations in the country. Though the initial set of policies and laws on forestry dates back to the colonial period and the immediate post-independence period, one notices a paradigm shift in India's forest policy and legislations in the 1980s, with the passage of the Forest (Conservation) Act of 1980. The first forest policy of India was enacted during the British period in the year 1894 which emphasised upon the commercial use as well as ecological role of forests. It stressed on conserving forests for maintaining environmental stability and meeting basic needs of fringe forest user groups. However, the primary focus of the policy was commercial need of the furtherance of cultivation and revenue collection.⁹ The

⁷ Rani G Sudha, Community involvement in joint forest management: A study in Anantapur district of Andhra Pradesh, p.3-7 (2008), https://shodhganga.inflibnet.ac.in/bitstream/10603/85617/8/08_chapter%201.pdf, (last visited March 27,2021)

⁸ *See id*

⁹ Bishwa Bhaskar Choudhary et al., Evaluating the Joint Forest Management: A Review of Impact, Performance and Constraints, p.814-815,(2017), https://www.researchgate.net/publication/317113214_Evaluating_the_Joint_Forest_

Forest Act was enacted in the year 1927, which gives the state jurisdiction over both public and private forests and facilitates the extraction of timber for profit. The Act of 1927, continues to be the governing legislation till date despite all its flaws.¹⁰ Immediately after gaining independence, India adopted the policy of industrialisation with special emphasis on establishment of heavy industries. This proved to come in conflict with the local communities and in turn adversely impact the lives of forest dwelling communities. Around the same time the Government of India enacted a new forest policy in the year 1952 that, while largely subscribing to the philosophy of the 1894 policy, nevertheless highlighted the functional classification of forests.¹¹ The most explicit emphasis in the post-independence declared 1952 policy statement was with respect to the claims of communities living near forests. Referring to the claims of such communities, it stated that ‘local use should at no event be permitted at the cost of national interest’ and that ‘national interests should not be sacrificed because they are not greatly discernible.’ Forests that had the potential for timber and related raw materials required for the industry were exploited on the basis of ‘scientific working plans’ to yield raw materials. With a number of decades of scientific forestry behind it, the government’s view of production was, fairly obviously, timber production.

The debate over how to balance the various demands of the nation on forests intensified in the 1970s. The Forty-second Amendment Act of 1976 transferred forests from State List to the Concurrent List of the Indian Constitution.¹² In the year 1976, the National Commission on Agriculture too, endorsed the same approach to the use of forest. The point was put in very categorical terms by the commission, which said that there should be a changeover from conservation-oriented forestry to more dynamic programme of production forestry. Production of industrial wood would have to be the *raison d’etre* for the existence of forests. The commission also identified providing small timber and

Management_A_Review_of_Impact_Performance_and_Constraints (last visited March 24, 2021)

¹⁰ Shyam Divan & Armin Rosencranz, *Environmental Law and Policy in India*, p.289-293, (2nd ed. 2003)

¹¹ Divya Tyagi, *Protection of rights of forest dwellers in India: An unfinished agenda*, in, *Environmental law and climate change*.p.321, Sanjay Kumar Singh (1st ed.,2010)

¹² Shyam Divan & Armin Rosencranz, *Environmental Law and Policy in India*, p.289-293, (2nd ed. 2003)

fuel wood requirement and grass grazing for livestock for rural population as important needs. However, this was subject to a qualification, which can be best put in the commission's word: "free supply of forest produce to rural population and their rights and privileges have brought about destruction to forests, so it is necessary to preserve the process."¹³ The increasing rates of deforestation, loss of bio-diversity, recurrent droughts and degradation of forests showed by several civil society and research organisations created a platform to reconsider the forest policies and forest management practices of our country during the year 1980. Further, the marginalisation of rights of the forest dependent communities and the large-scale deforestation, which further curtailed their share of forestland, had resulted in varying kinds of protests and struggles in many parts of the country. Particularly, the seminal Chipko Movement and other subsequent movements have played a major role in mobilising local people to challenge the commercial orientation of state forest management. Impacts have been felt both directly on the ground and also through the movements' wider effects on policy. The internationally famed Chipko Andolan movement was originated in Uttar Pradesh's Chamoli district (now Uttarakhand) in 1973 has led to a major victory and also inspired the villagers of the Uttara Kannada district of Karnataka Province in southern India to launch similar movement to save their forests, and in September 1983, the people of Salkani also 'hugged the trees' in Kalase Forest. The local term for 'hugging' in Kannada is *appiko*, and so the *Appiko Andolan* movement emerged. The *Andolan* mobilised local people across the Western Ghats to agitate against the state forest management systems that have excluded local people and their priorities from the forests, leading to clear felling and exotic monocultures. The agitation led to state recognition that local people should be involved in biodiversity protection and therefore forest management. The people's movement had a major effect in generating pressure for a natural resources policy more sensitive to people's needs and the natural environment. Accordingly, the Forest Conservation Act of 1980 was enacted by the Government of India to check diversion of forestlands for non-forestry purposes. Social Forestry Programme initiated in mid of 1970 had aimed to raise fuel wood and biomass generating plantations in non-forest lands. Further the programme suffered for want of the participatory element. These concerns

¹³ Sanjay Upadhyay & Videh Upadhyay, *Forest laws wildlife and the Environment*, p. 27-28, (2008)

caused the Government of India and the States to shift their policy towards a massive afforestation programme in the wastelands of the country. The National Wasteland Development Board (NWDB) was set up in the year 1985 to promote the afforestation process in community and private lands, with the involvement of stakeholders. Despite these initiatives, the trend of depletion of forest cover in India continued unabated.

The success of two community-driven “greening” movements in India opened the eyes of the policy makers to the immense potential afforded by people’s participation in the management of forests. The first one was a community-based forest conservation movement initiated in Araberi in Midnapur District of West Bengal State during 1971-72, while the second one was a grassroots movement in the Sukhomajri village in Haryana in the 1980, to rejuvenate forests and agricultural systems in the village. In Araberi, the movement was triggered by a Silvi-culturists of the State Forest Department, who by offering incentives to local communities induced them to protect and regenerate degraded Sal forests. The local communities, which were organised into ‘forest protection committees’ (FPCs), successfully protected the degraded forests from illegal felling, overgrazing, fire, and encroachment. In Sukhomajri, in Haryana State, the movement started from amongst the people. Forests in and around Sukhomajri village regenerated as a result. The regenerated forests in turn provided valuable biomass, including bhabar grass to local communities. These instances awakened the policy makers at the Central Government to the need to go beyond the legalistic “Forest Conservation Act 1980.”¹⁴

The National Forest Policy of 1988 was a total paradigm shift vis-à-vis the earlier two policies with a strong focus on conservation, environmental stability and ecological balance through association of tribals and local communities in protection, regeneration and development of forests.¹⁵ The 1988 policy gave new direction in important areas. In a sense, it constituted a small beginning in trying to create an enabling rather than a policing role for government. In

¹⁴ Appukuttannair Damodaran et al., Joint forest management in India: Assessment of performance and evaluation of impacts, p.5-7, (2003), https://www.econstor.eu/bitstream/10419/84708/1/zef_dp77.pdf (last visited March 24, 2021)

¹⁵ Sanjay Upadhyay &Videh Upadhyay, *Forest laws wildlife and the Environment*, p. 28, (2008)

pursuance of the National Forest Policy of 1988, the Government of India issued a 'circular' in June 1990 for involvement of village communities and village associations (VAs) in the regeneration of degraded forest lands. This marked the birth of the Joint Forest Management (JFM) movement in India. Events generated by the 1990 circular forced the pace for the formation of the National Afforestation and Eco-Development Board (NAEB) in the year 1993, which was given the mandate of focusing its activities on degraded forest lands. The NWDB focused on its original mandate i.e., afforestation of community and non-forest wastelands. Subsequently while the NAEB functioned under the Ministry of Environment and Forests, the NWDB was shifted to the Ministry of Rural Areas and Employment.¹⁶

After almost ten years of experimenting with JFM in different states, the Government of India issued further guidelines to strengthen the programme through the Circular dated 21st February, 2000 which provided for the legal back up to the JFM committees, participation of women in JFM committees, extension of JFM to good forest areas, preparation of micro-plans in JFM areas, conflict resolution, recognition of self-initiated groups, contribution for regeneration of resources, monitoring and evaluation of JFM. To further strengthen the involvement of communities in forest management, the government of India issued the revised JFM guidelines in 2002. The key elements of these guidelines are memorandum of understanding, relationship with panchayats and capacity building for the management of NTFPs¹⁷

The number of Social Forestry programmes that were developed had helped the emphasis of the state policies shift from commercial forestry to that meeting the needs of the forest dependent communities on a priority basis. In that sense, JFM is a progression in the 'social' focus policy. On the other hand, the involvement of villagers on state-owned forest land is an important paradigmatic shift from any previous forest management model. Further, National

¹⁶ Appukuttannair Damodaran et al., Joint forest management in India: Assessment of performance and evaluation of impacts, p.5-7, (2003), https://www.econstor.eu/bitstream/10419/84708/1/zef_dp77.pdf (last visited March 24, 2021)

¹⁷Guidelines on Joint Forest Management (JFM) Programme <https://pbforests.gov.in/Pdfs/policies/JFM%20Guidelines.pdf> (last visited March 28, 2021)

Environment Policy of 2006 has also identified universalisation of JFM throughout the country as an innovative strategy to achieve the target of 33 per cent of area under forest and tree cover. The concept of Joint Forest Management originated in India and spread over all the developing countries as it is in favour of rural masses, poor tribal populations and environmental improvement.¹⁸

IV. Community Participation in Joint Forest Management in India

India's National Forest Policy of 1988 was a landmark policy for local people's rights over forest resources. The policy recognised people's participation in using and protecting forests and suggested the forest communities should develop and conserve forests together with the state forest departments. This reform in forest policy has begun to transform how forests are protected and used in India. Communities that were historically perceived to be encroachers and illegal users of forests by the state were invited to partner with the state in protecting forests. Following national implementation guidelines in 1990, various state governments began implementing their own Joint Forest Management strategies. By 2001, some twenty-two states had adopted JFM (Joint Forest Management). The area under forest cover has been fallen from the year 1987 to 1999 and also from sixth five-year plan to ninth five-year plan in most states. Madhya Pradesh is distinctively having the highest forest area cover and this is followed by Orissa, Andhra Pradesh and Maharashtra. Under the terms of JFM, Village Forest Institutions (VFI) is given conditional access to specified forest products in accordance with the guidelines laid by the forest department. The products usually include fuelwood, fodder, and non-timber forest products. Forest departments also provide VFI's with information, training, and wage employment related to forest management. In many states, JFM resolutions mandate that villagers be solicited to make micro-plans for forests. Organising into a VFI can result in access to wage employment and fuelwood through forest management activities such as lopping, clearing of debris, and cutting. In return, VFIs agree to certain conditions such as collective protection of the forest against encroachment, poaching or timber smuggling, and, monitoring of restrictions on some types of use. The organisation structure and membership rules of VFIs differ in each state. For example, in Andhra

¹⁸ *See Id*

Pradesh, all households living in a JFM village are eligible for JFM membership. While membership is optional for the general population of the village, it is automatic for Scheduled Tribes and Scheduled Caste households. In Madhya Pradesh and Orissa, two persons (one of which must be a woman) from each household living in the JFM village are automatically considered members. In Uttar Pradesh, membership to JFM is either automatic to the village residents who are registered in the electoral rolls of the village or those who are existing members of the forest panchayat system. In West Bengal, only “economically backward people living in the vicinity of forests” are considered to be members. However, every family living in the vicinity of the forests has the option of becoming a member. In general, VFIs have an executive committee that makes major decisions. VFIs have no independent legal existence as they are usually registered with the forest department alone.¹⁹

V. Joint Forest Management and the Other Government Schemes and Regulations

A. Forest Rights Act, 2006

Till 2006 it was found that no sufficient provisions are there to protect the rights of forest dwellers. That is why it was felt to make comprehensive legislation to protect the rights of forest dwellers. Responding to the ‘historical injustice’ to forest dwelling and forest fringe tribal communities, especially in central India, the Forest Rights Act, 2006 was passed by the Government of India. The Act provides for a variety of rights in state forests. It includes a provision for Community Forest Rights and Community Forest Resources.²⁰ From the perspective of JFM, the community Forest Rights (CFR) can be viewed to be a natural progression wherein Communities can take over management of their local forests that they have been protecting and the Forest Departments can move into an enabling, supporting and regulatory role. CFR effectively create

¹⁹ Pratap C. Mohanty, Role of Community Participation through JFM for Rural Development in India, p.326, <http://www.coford.ie/media/coford/content/publicatios/smallscaleforestryconference/ns/projectreportMohanty.pdf> (last visited March 26,2021)

²⁰ Dr. Arun Kumar Singh, *Restoration of forest dwellers rights vis-à-vis environment: an analysis in Indian context*, in, *An introduction to environmental rights*, p.138, (Dr. Ratin Bandopadhyay et al. eds.,1st ed.2010)

community tenure within the state forest lands, which cannot be alienated and where there is no provision for further privatisation or land use change, on the assumption that this is the area that communities themselves want to keep as a community forest resource. Moreover, major conflicts have arisen as no areas have been demarcated so far and thus people are claiming lands in different area. Alternative livelihood models could be developed by State and central institutions for FRA transferred areas.²¹

B. National Afforestation Programme (NAP)

The Revised Operational Guidelines (2009) of the National Afforestation Programme (NAP) are being issued to further decentralise the project cycle management of the Scheme with a view to expedite fund transfer to the village-level implementing organisation, that is the Joint Forest Management Committees (JFMCs) and Eco-development Committees (EDCs), to embed the Scheme in the overall forestry development programme of the State and Union Territories, build capacity of the institutional actors a, and promote livelihoods of JFMC members by linking forest development to value addition and marketing of forest products.²² The NAP required formation of JFMCs at the field level to implement the programme. This has led to a rapid increase in the number of JFMCs. However, the functioning of these groups, to protect and manage forests after the funded plantation and maintenance cycle of about 3 odd years is complete, needs to be supported and their capacity enhanced. Few counter provisions emphasising on local decentralised management and the provision for a local village level secretary exist in the state JFM guidelines of some states.²³

C. Green India Mission

One of the eight missions in the Prime Minister's Action Plan on Climate Change, aims to promote adaptation and mitigation measures that increase

²¹ Joint Forest Management: A Hand book, p.48, <http://ifs.nic.in/Dynamic/pdf/JFM%20handbook.pdf>, (last visited March 28, 2021)

²²National Afforestation Programme Revised Operational Guidelines 2009, p.2 http://naeb.nic.in/NAP_revised%20Guidelines%20English.pdf (last visited March 27, 2021)

²³ Joint Forest Management: A Hand book, p. 48, <http://ifs.nic.in/Dynamic/pdf/JFM%20handbook.pdf>. (last visited March 26, 2021)

sequestration in sustainably managed forests and other eco-systems, adaptation of vulnerable species, ecosystems and of forest-dependent communities. Mission objectives are: Increase forest cover (afforestation), as well as improve quality of forest cover, improved ecosystem services including biodiversity, hydrological services and carbon sequestration, and increased forest-based livelihood income for forest dependent households. The Green India Mission has several innovative elements which, if implemented, would be a new inclusive approach of protecting and regenerating landscapes. Further, the Green India Mission document recognises the key role for local communities and decentralised governance for Mission implementation. Taking a pluralistic role, the GIM document states that, “The committees set up by the Gram Sabha, including revamped JFMCs, CFM groups, Van Panchayats, Committees set up under Forest Rights Act; Biodiversity Management Committees etc., will be strengthened as the primary institutions on the ground for nested decentralised forest governance in rural areas”. The Mission proposed revamping JFM on the following lines:

- i. Acknowledge JFMCs and other local institutions as technical bodies of the Gram Sabha, with the right to protect, regenerate and sustainably manage forests, under Indian Forest Act, including rights of a forest officer to the JFMC.
- ii. Add provisions to acknowledge JFMCs as bodies of the Gram Sabha.
- iii. Silvicultural management of JFM areas as per plan approved by Gram Sabha with technical approval of the Forest Department.
- iv. The Forest Department’s role is envisaged as, “to provide demand-based support to the Gram Sabha and its mandated committees to strengthen decentralized forest governance leading to sustainable management of the forests.”

It is thus clear that the role of the Forest Department is expected to transform into supporting communities to sustainably manage forests especially in forest-fringe areas, via a plurality of institutions including revamped JFMCs.

D. National Forestry Plan and Mahatma Gandhi National Rural Employment Guarantee Act 2005, MNREGA

On 7 September 2005, the central government commenced the National Rural Employment Act and subsequently renamed Mahatma Gandhi National Rural

Employment Guarantee Act, or MNREGA. This Act has converted the previous labour based programmes into a Right's based programme. The government is now legally bound to give employment to all those households which demand employment in rural areas. In order to secure rural livelihood, the Act aims at providing a maximum of 100 days of annual employment to every rural household. The Act also aims at improving the condition of those natural resources which provide a means of livelihood, as well as build capacity for adapting to climate change. It is important in the situation where natural resources can be developed through MNREGA. A provision for collaborating with other schemes has also been made under MNREGA. The objective of this collaboration is to improve the economic condition of people residing in or near the forest and reduce their direct dependence on forest so that forest development can take place through the watershed approach. The central government has therefore given orders for uniting the Forestry plan and MNREGA for facilitating natural resource development. Now, the question that arises is that how will the National Afforestation Plan be implemented through MNREGA? The NAP activities to be undertaken through MNREGA will be decided on the basis of the following conditions:

Management

For this purpose, the District Collector will set up a District Resource Group. This group will share the information about MNREGA and other Departments. It will then identify activities that can be undertaken by combining the two schemes. Based on the guidelines for the selected activities, the group will make arrangements for planning, publicity, training as well as technical support and ensure the availability of resources.

Planning

At this level, an annual plan and Perspective plan will be developed for all the activities to be undertaken under the two schemes. The Perspective plan will be prepared according to the district level MNREGA guidelines. The objective of this plan is to highlight the requirements and shortcomings of all the sectors. The Annual Work Plan contains a list all activities approved by the Gram Sabha/Panchayat/Zila Parishad. By combining the two plans, a small plan is prepared related to the solution for soil and water conservation, construction of soil and water conservation structures multipurpose tree plantation, conservation

and plantation of medicinal herbs, plantation of bamboos and shelter belt, agricultural works, discover and promote alternative agricultural activities and publicising new technologies.

Activities

It is necessary to coordinate the activities to be conducted in the current year and those to be undertaken in the years to come.

E. Reducing Emission from Deforestation and Forest Degradation, REDD Plus Benefits for the JFM

The Parties to the United Nations Framework Convention on Climate Change met (UNFCCC) and the decision was taken on reducing emission from deforestation and forest degradation in developing countries and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in the developing countries (REDD-plus). India's national strategy aims at enhancing and improving the forest and tree cover of the country and thereby enhancing the quantum of forest ecosystem services that flow to the local communities. These services include fuel wood, timber, fodder, and also carbon sequestration. It is important to note that in Indian context, carbon service from forest and plantations is one of the co-benefits and not the main or the sole benefit. Initiatives like Green India Mission (GIM) and National Afforestation Programme (NAP), together with programmes in sectors like agriculture and rural development would add or improve existing forest and tree cover in our country. However, the Joint Forest Management Programme, which is being implemented in India over the last two decades, has helped in increasing the forest cover in some rural parts of India. The local communities, through Joint Forest Management Programme, are involved in protection and management of forest and through this programme they are getting the livelihood benefits. In some parts of India this programme is going on very successfully, which is not only enhancing the forest carbon stock but also reducing considerable emission from deforestation and forest degradation through sustainable management of forests but there exist instances where considerable shortcomings have also been witnessed. Hence possibilities need to be explored for the JFM committees to be eligible for the REDD plus benefits.²⁴

²⁴ *See id*

F. Climate Change Adaptation

A study on “Climate Proofing of JFM” was undertaken by Inspire Network for Environment to find out whether the option of adaptation to the Climate Change was mentioned in the guidelines of the State Joint Forest Management Programme and how the communities have been adapting with the climate variation happening over the years in the rural areas of India. The guidelines of the JFM programme have been drafted in 1990-91, the discussion on issues of climate change and adaptation came much later part. Through the implementation of the JFM programme and the JFM associated activities the forest cover over time has been increased, the socio-economic condition of the local communities especially the vulnerable section of the people got enhanced which helped them to cope up with the changing climatic condition over time.²⁵

VI. Present Status of Joint Forest Management in India

The experience of implementation of JFM in different States reveals that the whole concept still remains to be institutionalised. The essence of the programme is the empowerment at the grass root level. However, necessary decentralisation has not been attempted in the Forest Department nor, any change has been noticed in the hierarchical structure. Further delegation of power and decentralisation of authority are yet to take place at various levels. Entry point activities have not been able to stimulate the local villagers to participate fully in the developmental activities. In many areas, people have been found to demonstrate withdrawal system once entry point activities have been completed and the periodic input intervention by the Department is either withdrawn or made irregular. Examples of Arabari in West Bengal, Harda in Madhya Pradesh and so many other places point out this fact that villagers are not prepared to participate voluntarily in the overall developmental activities without regular intervention from the different agencies. Absence of clear-cut relationship between JFM committee and the existing village Panchayat has made the smooth progress of entire JFM process quite difficult in many places. Because of absence of productive functional relationship between the JFM bodies and Panchayats in the wake of increased decentralisation of power to the Panchayat Raj institutions through the 73rd Constitutional Amendment Act, 1992 lot of problems are coming to the fore. Poor marketing linkage of Forest

²⁵ See *Id*

Protection Committee (FPC) has adversely affected the sustainability of the entire programme. Concept of voluntary labour is found to be missing in many villages. Monitoring and evaluation mechanism has not been developed properly to get regular feedback so as to ensure remedial measures in between. The linkage of this programme to different departments and organisations has not institutionalised in the absence of clear-cut guidelines from respective State Government.²⁶

A. JFM and Income Generation Activities

In order to reduce pressure on forests, interventions for increasing the current income levels of forest user communities have been attempted through creating opportunities for wage employment, providing agricultural implements, developing irrigation infrastructure, undertaking dairy development, capacity-building, etc. Investments in providing different agricultural inputs and irrigation infrastructure have successfully increased agricultural productivity especially in Andhra Pradesh, Madhya Pradesh, and Haryana. However, training programmes by themselves have failed to create any significant impact on the economic status of the people in Andhra Pradesh owing to the low skill levels, inadequate capital, etc. In West Bengal, while piggery is the most successful project, it is limited to the ST community owing to social taboos. The challenge for the JFM implementers lies in designing and introducing employment generation schemes in consonance with the socio-economic and other conditions of the area to elevate the status of the poor within a specified time frame.

B. Role of Rural Development in JFM

While the initial aim of JFM was the provision of forest usufructs, today the emphasis is shifting to a facilitation of overall village development. The emphasis on village development needs to become a common feature in all the states and should include programmes to increase agricultural productivity, soil and water conservation measures, introduction of school and community buildings, inputs of seeds, fertilizers, planting of trees on agricultural bunds and homesteads, establishment of fuelwood and fodder plantations, etc.

²⁶ Joint Forest Management: The need for the fresh approach <http://www.fao.org/3/XII/0196-C1.htm#:~:text=Present%20Status%20of%20JFM&text=Around%2010.25%20million%20ha.,different%20states%20as%20on%201.1.> (last visited March 23, 2021)

C. Norms for Participation and Equity in JFM Institutions

A lack of equity has been observed in JFM areas especially in multi-village and -hamlet protection committees. This can be avoided by bringing about changes in government resolutions that ensure representation of all hamlets of a village or all villages of the protection committee, castes, gender, etc. In multi-village and hamlet committees the sharing of responsibilities on a rotational basis would improve access to equal opportunities. Therefore, the resolutions specify that priority in all wage labour and employment activities be given to the landless, marginal farmers, those below the poverty line, SC (Scheduled Caste) and ST (Scheduled Tribe), etc. The executive committees and the general body must ensure that women, landless and those below the poverty line have a representation in the JFM institutions. Equity in benefit-sharing needs to shift from the current focus on forest usufructs to the other benefits derived from this programme -wage labour, development and income generating programmes, etc.²⁷

However, for Joint Forest Management to attain long-term sustainability and become a viable long-term option, it is important not to lose sight of the complexity and diversity of local people's dependency on forests. The challenge is to move beyond community forest protection to develop options for the sustainable satisfaction of essential needs for forest protected by local people.

VII. Conclusion

The experience of management of forests in India made one thing clear that neither people themselves nor the forest department alone could manage the forests but the combine efforts of these two are required to effectively manage forests in a mutually beneficial manner. The *de facto* forest control by a large number of organised local communities had a major influence on forest development policy, forcing the states and centre to recognise the validity of their involvement in forest management. The various events and policy measures having some significance to or impact on participatory forest

²⁷ Binodini Majhi, Joint Forest Management Programme in India and Community participation, p. 322, (2016) <http://euroasiapub.org/wp-content/uploads/2016/09/31ESSMarch-3213-1-3.pdf> (last visited March 23, 2021)

management in India mobilise the community to become important stakeholders and active partners in the affairs of forestry through JFM programme. The JFM guidelines have been revised from time to time to devolve more powers to the community so as to facilitate the sustainability of the programme in the long run.

Further, it is important to have uniform guidelines across different states with regard to the legal status of Forest Protection Committees, tenurial rights to the FPCs, sharing of usufruct benefits and revenue by the protecting communities on the principle of equity and allocation of certain share of the revenue for the protection and sustainable management of JFM areas. Efforts need to be made to strengthen the involvement of local communities in the implementation of JFM programme, which alone would be useful in striking a balance between the self-consumption needs of the community and ecological and environmental sustainability of forests in the country.

From the above study, it could be recommended that proper implementation of the JFM could potentially increase the adaptive capacities of the JFM communities. The state guidelines still need to be field tested in light of the adaptation to the climate change in both the cases where JFM is successful and wherever, it is not successful. Location specific adaptation strategy needs to be included in the guidelines. Capacities of the local communities and the local level government officers needs to be built to undertake different adaptation strategies at the local level. Awareness generation activities on climate change and adaptation needs to be undertaken in all the states for the local communities as well as the local level government staff. JFM guidelines regarding the benefit sharing part can be modified depending upon the respond of the communities and depending upon their contribution towards forest protection. JFMCs should be registered as a legal entity to have more stakes and decision making capacity in the forest management. Local rule making, local enforcement and local monitoring are the key to the success of Joint Forest Management in the current time.

Environment Protection and E-Waste Management in India

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Abstract

E-waste is nowadays one of the emerging pollutants which draw the attention of people throughout the world. Management of e-waste is a serious concern for the International community. Pollution caused by it is not only for India but for other developed and developing countries. In absence of any specific legislation on E-waste, the options available are Rules and Regulations made by government in India. The latest introduction of the scheme of the government in the form of E-waste (Management) Rules, 2016 provides an opportunity to look into the existing e-waste management process and also ponder on the effectiveness of the same. The unique feature of Environmental regime in India is to have different legislations on different environmental issues. In order to prevent and control water pollution and air pollution, the Water (Prevention & Control) Act, 1974, the Air (Prevention & Control) Act, 1981 have been enacted by the Parliament. To tackle the issues of environmental protection comprehensively, an umbrella and enabling legislation namely, the Environment (Protection) Act, 1986 has been passed. The Rules of 2016 which replaced 'the E-waste (Management and Handling) Rules, 2011' made under this Act of 1986. There are many issues which require serious consideration and compelling need to make identification and compliance. The matters pertaining to fraudulent traders, environmentally unsound practices and some changes introduced by the new Rules on e-waste management require severe scrutiny and review. Electronic equipments, especially computers, are often discarded by the people from time to time on invention of latest and sophisticated technology which has rendered existing equipments and related knowledge obsolete and undesirable. The process of recycling or collection or taken back policy of e-waste is the need of the hour.

Keywords: *E-waste, Environment, Hazardous waste, Handling, Dealers, Producers.*

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I. Introduction

Environmental awareness is so much significant today as it was never before. The discourse of environmental protection which was started at the latter half of 20th Century has been now in definite shape. The world community appreciated the importance of environment and therefore, the issue of environment protection is the topmost agenda of developed and developing countries. At the time of Stockholm Conference (1972), self assertion of interest of each State was the major premise of the Countries. But, the importance of environment protection was realized by the nations and they favoured global ecological good. Developed and developing countries started to enact different legislations incorporating the environmental concern of that State in their legal system and have also given the due importance to Environmental principles which were emerged at the international level.

There are two developments which compelled to analyse the existing e-waste regime in India. The first is the initiative of the Central government i.e. the constitution of a *high-level committee (2014)* under the chairmanship of *T S R Subramanian* to review key environmental laws. The purpose for constitution of the committee is to fast-track environmental clearances for industrial projects. The committee came out with various important recommendations which met with both appreciation and criticism. The second reason is past experiences regarding e-waste management after making the Rules of 2011. An appraisal of implementation of Rule of 2011 has revealed that desired results have not been achieved by the prescribed authorities due to different reasons. There is need to give thrust on e-waste minimization, recycling, and proper disposal of e-waste. The e-waste management is a crying demand for the sustainability of the environment. The concept of sustainability and claim of environment conservation cannot be translated into reality without taking steps for proper management of e-waste. Therefore, in order to achieve the desired goal of protection of public health and environment, a need has been come up to analyze *the provisions of the E-waste (Management) Rules, 2016*.³

This chapter takes a critical look at e-waste management regime in India. It also focuses on the comparative analysis of Rules of 2016 with Rules of 2011. This

³ The Draft Rules made by Ministry Of Environment, Forest & Climate Change Government Of India, Notification dated 10th June, 2015 G.S.R. 472(E).

chapter also looks on the importance of conceptualizing a sustainable e-waste Framework and acknowledges a greater need to integrate the experiences of the other nations. It has been tried to address the e-waste management issues in the context of India not only through legislative perspective but also addresses environmental and social challenges associated with proper implementation of law.

II. Impact of E-Waste on Environment and Human Health

It is not a conclusion of one or two committees but pointed out by various Committees and Project reports that Environment protection laws which have been enacted with specific purpose, have failed to achieve their objectives. These laws are not stringent enough to adequately deal with the issues relating to domestic waste or hazardous waste including e-waste imported from other countries. Due to absence of any proper strategy and planning for accumulation and recycling, e-waste is creating many environmental problems and posing serious health hazard to the human being.⁴ Information technology and globalization are responsible for bringing many unpredictable changes in the world.

The emergence of new information technology transformed the whole pattern of human life. It has contributed much in bringing changes in the life. Countless benefits and generation of wealth to all users are the significant contribution of the information technology. Industrial revolution was mainly praised for improving the quality of life and for creating employment to the people. The globalization accelerated the pace of creativity and potential of innovation. It has significantly affected the rights of consumer and enhanced the availability and affordability of the products to the people. The availability and affordability of products including electronic products made human life more comfortable, secure, easy and faster. Another face of these advancements is indiscriminate use of natural resources and uncontrolled generation of waste including e-waste. The quick development of technology and rising advanced technical innovations and a towering pace of production of new items in the electronics industry have led to unrestrained generation of e-waste. The lure of luxuries life has made people more dependent on whole range of electrical and electronic goods. The

⁴*Ibid at 2*

use of refrigerators, washing machines, computers and printers, televisions, mobiles, i-pods, etc are now days a normal affair. The frequent development of technology and urge of people to have latest product have created electronic waste in large amount. Many of which contain toxic materials. Due to absence of proper disposal system and management, e-waste is posing a serious danger and risk to the environment and human health. We are lacking proper and adequate strategy and technology on tackling these problems.

Significant quantities of toxic metals and harmful chemicals like mercury have been found in the waste of electronic items. The developed countries are taking lead to phase out these substances from the goods.⁵ The electronic waste contains many toxic substances such as cadmium and lead, polychlorinated biphenyls, brominated flame retardants, dioxins and furans etc. E-waste is responsible for various chronic diseases to the human beings. It has inclination towards causing serious damage to the vital organs and nervous system of the *homo sapiens*.

The municipality which is already overburdened is expected to deal with the e-waste management. The e-waste management is a cause of concern to the whole world. India is not an exception to it which is facing environmental problems in the management of enormous and mounting quantities of electronic waste. Despite the establishment of various treatment, storage and disposal facilities for hazardous waste management, India is facing acute difficulties in tackling these issues. The reason is inadequate handling capacities of governments and shortage of staff in the agencies. The poor implementation of laws is also a ground of apprehension. The excessive generation of such types of e-wastes and poor management and handling processes are leading to serious pressure to environment degradation.

The crisis of managing of e-waste in India is twin:-

- (i) The shortage of recycling mechanism, illiteracy, poverty and lack of awareness are making people in general and women and children in particular more vulnerable to potential danger and serious health hazard of e-waste.

⁵ Asha Krishnakumar, 'Importing Danger', *Frontline*, Vol. 20, Issue 25, 06 – 19 December, 2003.

- (ii) It is a common tendency of the developed countries to adopt new and advanced technology and discard obsolete and outdated electronic goods. Unfortunately, India is importing these obsolete electronic items and materials from developed countries.

III. Meaning and Concept of E-waste

E-waste or electronic waste may be described as electrical and electronic items or goods which are loosely discarded, surplus, obsolete, broken or damage.⁶ Though it is not always true but ordinarily the major form of e-waste are all wastes from electronic and electrical items which have reached their *end-of-life* period. It may also be possible that such items or goods are no longer fit for their original intended use and it is difficult to devise plan for recovery, recycling or disposal. E-waste may be in several forms. Computer and its accessories, TV, remote control, mobile phones, chargers, air conditioners, refrigerators are the household appliances which are found in almost every house and offices.

The recent trend is that people are eager to exchange product with product of latest or new features and technology, even though the earlier product was in working condition or in good state of repairs. This use and throw policy is contributing much in creation of domestic e-waste. The attraction of new and advanced technology is compelling the people to discard electrical and electronic goods merely because they have become old fashioned compared to the latest technology available in the market. The more serious issue is that it is a part of business strategy of the electronic industry to develop new software and come out with latest features in such a way that customer is left with the only option to buy the new products.

Electronic waste may be categorized on the basis of source of their generation into domestic, commercial and industrial waste. E-waste may also be categorized into two categories, one is called as hazardous and another is known as non-hazardous e-waste. One of the unique characteristics of these types of wastes is that decomposition, disintegration, dissolution and alteration of electronic wastes are either impossible or involve longer time. E-waste can be

⁶ "Rules on E-waste Management", *The Hindu*, 20 December 2009 available at http://rajyasabha.nic.in/rsnew/publication_electronic/E-Waste_in_india.pdf (Visited on 13 August 2016)

categorized into the category of hazardous waste because of the presence of many metals, plastics, glass, ceramics, rubber and other items. E-waste generated regularly in all over the world. But the problem of India is more severe than other countries. In India, uncontrolled e-waste generation, dumping of e-waste from other countries and absence of proper mechanism for disposal has been posing serious challenges to the environment. The irony of the situation is that India is not having definite official data on the quantity of toxic waste generated or how much is disposed off. The whole estimation is based on the surveys and reports of informal, unorganized organizations or Nongovernmental organizations. Therefore, accuracy and authenticity of the data is always at risk and suspicious.

Individuals and small business industry are also disposing discarded electronic equipments into landfills which are forming part of solid waste. It is illegal to dispose electronics goods such as computers, mobile phone etc. But, there is no any proper monitoring system on disposal of such waste. E-waste is subject to reuse or recycling or export. Most of the electronic items have very short lifespan. Such goods are required to be replaced at regular interval. Developed countries have option either to discard or export it to the developing countries.⁷

Rule 3(r) of E-waste (Management) Rules, 2016 defines e-waste. 'E-waste' means electrical and electronic equipment, whole or in part discarded as waste by the consumer or bulk consumer as well as rejects from manufacturing, refurbishment and repair processes. The expression 'discarded by consumer or bulk consumer' has been newly introduced in the definition by *the E-waste (Management) Rules, 2016*.⁸ However, earlier Rules were applicable to consumer and bulk consumer.

Most of the developed countries are having recycling facilities and they are adopting stringent measures regarding disposal of e-waste. Developing countries are lacking such disposal and recycling facilities. However, due to poor economic condition of developing countries and increasing environmental activism in developed countries, they prefer to export discarded e-waste to the

⁷ Jayanti Ghosh, 'Digital Dumps', *Frontline*, Vol. 25, Issue-05, March 01-14, 2008.

⁸ Under the rule 3(m) of the Draft E-waste Rules, 2015, it means waste electrical and electronic equipment whole or in part or rejects from their manufacturing, refurbishment and repair process which are intended to be discarded as waste.

poorer countries. For both sides, it is profitable or a win-win situation in economic term.⁹

IV. Global Initiatives for E-Waste Management

At the philosophical and theoretical level, all religious teachings engross the concept of protection of environment. Environmental ethics is also part of ancient India. But, there were absence of legal lineage on environmental issues. The international community has done splendid job by organizing United Nations Conference on Human Environment in 1972. This is perhaps the first steps towards formalizing the international environmental law. International environmental law grew and matured with the passing of time by addressing the complex nature of environmental problems and also responding to social, political and economic troubles. *The Basel Convention on the Control of Trans boundary Movements of Hazardous Wastes and their Disposal (May 5, 1992)* is an important initiative taken for e-waste management at global level. It is an international treaty which has been designed with special purpose to reduce the movements of hazardous waste between nations. This treaty is specifically made to prevent transfer of hazardous waste from developed to poorer countries. However, the movement of radioactive waste is outside the ambit of the treaty. Through the various meetings of Conference of Parties important steps have been undertaken regarding e-waste management.¹⁰ Besides these, many other measures have been taken at global level to advancing the management and development of environmentally, economically and ethically sound e-waste¹¹ or

⁹ http://rajyasabha.nic.in/rsnew/publication_electronic/E-Waste_in_india.pdf (Visited on 24 august 2017)

¹⁰ *Mobile Phone Partnership Initiative (MPPI) June 30, 2010.*

¹¹ *UN STEP Initiative 2007: EPA collaborates with the United Nations University - Solving the E-waste Problem.* This initiative is a global consortium of companies, research institutes, governmental agencies, international organizations and NGOs which is dedicated to advance the management and development of environmentally, economically and ethically sound waste resource recovery, reuse and prevention.

identification of greener electronic products¹² and collaborating on waste disposal.¹³

The European Union of Countries (EU) have also concentrated on disposal and collection of the e-waste and issued directive regarding collection schemes. Under the scheme, consumers are given job to return their e-wastes free of charge¹⁴ and restriction on use of dangerous substances commonly in electronic and electronic equipment¹⁵. EU also takes in hand the security of energy supply, energy-related health hazard and environmental issues. EU aimed to make industry more responsible for assessing and managing the risks. They are also given responsibility to provide accurate safety information to their users.¹⁶

V. E-Waste Management Regime in India

Though Environment (Protection) Act, 1986 is having only 26 sections but it has propensity and potential to cover different dimensions of factors responsible for environmental degradation and ecological imbalances. The peculiar feature of the Act is to empower the Central Government to frame Rules and Regulation under Sections 3, 6 and 25 to deal with different issues which will be necessary for achieving the goal. The Central Government has utilized extensive powers given under the Act and framed various Rules including *the e-waste (Management and Handling) Rules, 2011*.¹⁷ According to Rules of 2011, import of hazardous wastes for disposal was not permitted. However, import of waste was allowed for reuse, recycling or reprocessing. In any State or Union territory,

¹² *Electronic Product Environmental Assessment Tool (EPEAT)* is an independent rating system that identifies greener electronic products that meet multiple environmental standards.

¹³ *United Nations-New Agreement on Electronic Waste March 12, 2012*. This is UN system which collaborates on electronic waste disposal.

¹⁴ *EU Directive on Waste Electrical and Electronic Equipment (WEEE) Feb 2003*.

¹⁵ *Restriction of Hazardous Substances (RoHS) Directive Feb 2003*.

¹⁶ *EU Directive on Energy-using-Products (EUP)* and another was *EU Directive on Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) June 1, 2007*.

¹⁷ Before the notification of Rules 2011, there were *the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008* which regulate the export and import or any trade or transboundary movements of hazardous wastes including e-waste.

SPCB or Pollution Control Committee is assigned the duty to monitor the units of recycling hazardous wastes.

A. E-Waste (Management) Rules, 2011

In order to solve the problems of pollution in India two legislations namely *the Water (Prevention and Control of Pollution) Act, 1974* and *the Air (Prevention and Control of Pollution) Act, 1981* have been enacted by the Parliament. These two legislations followed by a comprehensive environmental legislation, *The Environment (Protection) Act*, which was enacted 1986 for the first time defined hazardous waste. This Act is an umbrella and enabling legislation. It empowered the executive to made regulations concerning issues relating to environment. On analysis of many judicial decisions of Apex Court, it now become clear that the precautionary principle and the polluter pays principle including other environmental principles have become indispensable attributes of environmental policy of Indian government. The Government of India, has in exercise of its power under Act of 1986 made two specific regulations namely, *the Hazardous Waste (Management and Handling) (HWM) Rules* and *the Batteries (Management and Handling) Rules*.¹⁸ These Rules are somewhat applicable to e-waste. As per HWM Rules, it is now necessary for any companies or individuals receiving, treating, transporting or storing hazardous waste to make efforts to get authorization from the State Pollution Control Board (SPCB). The central government is also empowered to issue authorisation for reuse or process of hazardous waste.

The scope of the Rules was extended by an amendment to the HWM Rules in 2000. By this amendment Rules incorporated the provisions on import and export of e-waste. The old HWM Rules was followed by *the Hazardous Wastes Management, Handling and Transboundary Movement Rules, 2008*. It is advancement over preceding Rules. SPCB is given more power to give prior authorisation on e-waste handling, recycles or reprocess. The Central Pollution Control Board (CPCB) also came out with guidelines on e-waste management in

¹⁸ Though, the Batteries (Management and Handling) Rules exclusively covering lead acid batteries which have very limited impact on e-waste. Nevertheless, this is a remarkable legislative step to implement aspects of extended producers' responsibility (EPR) in India. Under the Rules the collective take-back system for batteries is responsibility of manufacturers, importers and assemblers. The lack of an effective enforcement mechanism for the take back system is mainly a cause of poor implementation.

2008. These guidelines suggested the voluntary adoption of producer responsibility, restriction of hazardous substances (RoHS) in manufacturing. It also suggested the adoption of environmentally sustainable technologies particularly in e-waste recycling.

The piecemeal approaches of Ministries were culminated into a detailed regulation on e-waste management in 2011. *The E-waste (Management and Handling) Rules, 2011*¹⁹ consists of six chapters, three schedules and five forms. The various terms have been defined under the Rules. The Rules of 2011 broadly cover responsibilities of stakeholders, procedure for seeking authorization and registration, storage of e-waste etc. It also prescribes the duties which are to be performed by producer²⁰, consumer or bulk consumer²¹, collection center²², dismantler²³, recycler²⁴ and regulatory authority. Rules also prescribe the procedural aspects for seeking authorization and registration for handling e-wastes.

The crucial objective of these rules is to channelize the e-waste and to find out the possibility of recycling of the e-waste.²⁵ The e-waste producers have been given job to ensure that their waste products and by products and handling of the e-waste do not cause any harm to the environment or create any health hazards. The proper implementation and financing of effective take-back system are the duty of the producers. The Rules mandated the requirement of unique serial number or individual identification code and imposed responsibility for all previously generated waste branded with their name.

E-waste dealers, refurbishers, dismantlers, recyclers and collection centers are required to register with the concern SPCB or PCC. Dealers of electrical equipment have to collect e-waste by giving collection box. They have to share information about the e-waste collection to the SPCB or PCC. The liability on consumer has also been fixed in form of requirement to dispose of e-waste by

¹⁹ Enforced on 1st May, 2012

²⁰ Rule 4 of The E-waste (Management and Handling) Rules, 2011.

²¹ Ibid. Rule 6.

²² Ibid. Rule 5.

²³ Ibid. Rule 7.

²⁴ Ibid. Rule 8.

²⁵ Lamma, O.A. And A.V.V.S. Swamy, "E-Waste and Its Future Challenges In India" *International Journal of Multidisciplinary Advanced Research Trends*, 15(Volume II, Issue I, February 2015).

taking it to authorised dealers and collection centre's. However, large consumers have option to auction their waste. But with they may auction e-waste to authorized collection centre's, dismantlers, recyclers or to the collection services offered by the producers only. SPCB or PCC are primarily given the responsibility to ensure the enforcement. Every institution registered by the authorities shall submit annual report to SPCB or PCC.²⁶

The Rules 2011 deals with the imports and seeks total ban on illegal imports. But it fails provide instrument to provide any strategy for prevention of illegal import.

The Rules address the informal sector. The Rules devised mechanism to formalize the informal sector by organization, registration and monitoring of their activities. The rules intend to promote EPR solution. The provisions lack measures to give a definite framework for reducing dismantling operations and promoting collective activities and giving any incentives in informal sector. Implementation of the Rules is another problem. The reasons are numerous. Lack of knowledge and awareness of manufacturer, dealers and consumers are the major factor.

B. E-Waste (Management) Rules, 2016

E-Waste (Management) Rules, 2016 consists of 24 Rules. It is divided into six chapters. It also contains different Forms and four Schedules. The Rules of 2016 are advancement over the Rules of 2011. The application of earlier Rules was limited to producers, consumer or bulk consumer, collection centre, dismantler and recycler. The span has been widened. It covers manufacturer, dealer, refurbisher and Producer Responsibility organization. The used lead batteries²⁷ and radioactive waste²⁸ have been left out. The reason is very simple there are specific legal provisions on them. The exemption given to the small industries²⁹ has been taken back. Now, exemption is available to micro industries only. Electrical and Electronic Equipment (EEE) was the subject matter of previous

²⁶ Umesh Kumar & D. N. Singh, "E-Waste Management through Regulations" *International Journal of Engineering Inventions* 13 (Volume 3, Issue 2 (September 2013, 6-14); <http://www.ijeijournal.com>

²⁷ These are covered under the Batteries (Management and Handling) Rules, 2001.

²⁸ It is cover under the Atomic Energy Act, 1962.

²⁹ The reason is that small industries are the major source of electronic waste generation.

Rules. It was realized that electronic waste is not limited to EEE only; it comprises of components, consumable, spares and parts of EEE. So, the lacuna of previous law has been addressed by new Rules by bringing these within the domain of law. It has also been dealing with the Compact Fluorescent Lamp (CFL) and other mercury containing lamp by enlisting the items in Schedule 1 of the Rules.

There is a significant change in the collection mechanism by making producers exclusively responsible for it. The producer can set up collection centres or point where they can arrange buy back mechanism. The authorization from CPCB or SPCB is now not essential as was under previous Rules.

The noteworthy feature of these rules is the incorporation of Extended Producer Responsibility (EPR) concept. The Rules make provision for fixing of phase wise collection target for producers for the collection of e-waste. Such targets can be either in number or weight. Procedure for authorization and management of e-waste is also a significant change. The adoption of target based approach for implementation of EPR is a new concept in the E-Waste (Management) Rules, 2016³⁰. The Rules made provision for Pan India EPR Authorization by CPCB for producers replacing the concept of authorization from SPCBs.

Rules have come up with a defined objectives to establish the responsibilities of manufactures, dealers, collection centres, refurbisher, consumer, bulk consumer, dismantler, recycler and state government. SPCB may grant, cancel or suspend authorization to the manufactures, dealers, collection centres, refurbisher, consumer, bulk consumer, dismantler and recycler.

According to Rule 12, earmarking or allocation of industrial space or shed for e-waste dismantling and recycling in the existing and upcoming industrial park, estate and industrial clusters are the obligation of the Department of Industry or any other government agency authorized by the State Government. Similarly Department of Labour or any other government agency authorized by the State Government is empowered to ensure recognition and registration of workers involved in dismantling and recycling. The department or authorized agency may

³⁰ MoEF & CC, GoI has notified the E-Waste (Management) Rules, 2016 vide G.S.R. 338(E) dated 23.03.2016 which came into force from 01-10-2016.

- (i) assist formation of groups of such workers to facilitate setting up dismantling facilities;
- (ii) undertake industrial skill development activities for the workers involved in dismantling and recycling; and
- (iii) undertake annual monitoring and to ensure safety & health of workers involved in dismantling and recycling.

The State Government has been also given responsibility to ensure safety, health and skill development of the workers involved in the dismantling and recycling operations. The State Government has to set up integrated plan for effective implementation of these provisions. The government shall have to submit annual report to Ministry of Environment, Forest and Climate Change.³¹ In order to ensure proper disposal of electronic waste, duty has been assigned to the Urban Local Bodies to collect and channelized the orphan products to authorized dismantler or recycler.³²

The introduction of Deposit Refund Scheme is an additional economic instrument. In this instrument, the producer has been empowered to charge an additional amount as a deposit at the time of sale of the electrical and electronic equipment. Such amount is returnable to the consumer along with interest at the end of life of electrical and electronic equipment. This is a positive step and certainly it will reduce the generation of e-waste.

The e-waste exchange between authorized agencies or organizations is another revolutionary effort of the government. Under Rule 19, it is provided that the transportation of e-waste shall be carried out as per the manifest system. Under this system the transporter has to carry a document (three copies) prepared by the sender. Liability of manufactures, dealers, importers transporter, refurbisher, dismantler and recycler for damages caused to the environment or third party due to improper management of e-waste have also been discussed under Rule 21. Such liability may be to levy any financial penalty in case of violation of any provisions of the Rules.

³¹ Rule 12 of the E-Waste (Management) Rules, 2016.

³² Ibid. Rule 24.

VI. Conclusion

There is no doubt that Rules, 2016 has some advantages over Rules of 2011. But it is also not free from its weaknesses. The main weakness of Rules of 2016 is that it has not been capable to take care of measures needed for monitoring and enforcement. The strategy regarding informal sector's regulation and putting imposition of ban on import is not very convincing. Three more stakeholders are included but the Rules also lack proper monitoring of compliance of e-waste management which poses threat to environment and health hazard. The CPCB and SPCB are already overburdened and suffering from shortage of staff. Adding more responsibility to them cannot yield proper result. Sometimes, the other authorities or officers responsible for it are also not able to make proper implementation because of their incapacity. The regulated and restricted import of e-waste is allowed. However, the regulation suffered from many setbacks. It is not easy job for customs officials to check each and every container imported e-goods. The department is already facing the problem of shortage of staff. They are also unable to do random check because of insufficiency of machinery. The scanners available with custom officials have its own limitations. In these circumstances, proper compliance of Rules cannot be expected.

Both sectors formal and informal are struggling hard to come up with their situations. They are struggling hard to survive in the market. The formal sector has more challenges than informal sector. Such difficulty induced them to switch over illegally to informal sectors. Due to huge informal sector, organized sector is lacking proper collection, disposal mechanisms and appropriate technology. Any likelihood of strict control and management of e-waste will depend upon the ability of the respective bodies responsible for enforcement. The financial constraint is another hindrance in proper compliance.

Under the Rules of 2016, it is a mandate of CPCB to prepare any guidelines on various issues including the concept of extended producer responsibility, environmentally sound dismantling and recycling, collection centres, storage, refurbishment, channelization, transportation and random sampling for RoHS testing. CPCB prepared guidelines on EPR except refurbishing and random

testing for RoHS parameters.³³ The praiseworthy approach of Rules of 2016 has been introducing a phase wise Collection Target for e-waste in accordance with EPR Plan. The targets are in increasing order from one year to next coming year. But this advantage has been replaced by making amendment and by this way putting new targets for industries. This is not one time measure. The Ministry of Environment, Forest and Climate Change (MoEF) again on March 22, 2018, came out with more reduced EPR targets. This is done by amending the Rules of 2016.³⁴ Therefore, the new move of the government to reduce the fixed targets is questionable and doubtful. It raised a serious question on the motive of the government on e-waste management. It is not understandable why the MoEF don't push the industry to fulfill their obligations?

For the proper electronic waste management, the following steps are required to be taken so as achieve the goal of environment protection:

- (i) There is an urgent need to create greater awareness among consumers on e-waste management.
- (ii) The taken back policy introduced in the Rules of 2016 should be promoted. It may be more successful by giving tax rebate to the firms, institutions or companies using such initiative.
- (iii) Efforts should be taken to guard against becoming a place of disposal of e-waste materials by other nations particularly developed states.
- (iv) The deposit Refund Scheme as an additional economic instrument is not feasible and it will not help in any way on e-waste management.
- (v) It is needless to say that the scientific and technological methods must be employed in handling and recycling process of e-waste.

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http://www.indiaenvironmentportal.org.in/files/file/Guidelines_for_environmentally_sound_management.pdf (Visited on 8 August 2018)

³⁴ The E-waste (Management) Amendment Rules, 2018.

Digital Currency: Whose Money is it Anyway!

Dr. Ashish Kumar Srivastava¹

*“Capital as such is not evil; it is its wrong use that is evil.
Capital in some form or other will always be needed.”*

-M. K. Gandhi

Abstract

“Currency is known for its value. It is a legal tender and an insignia of sovereign state. Currency works as a consideration in market and provides wheels to economy via sale and purchase. Currencies are territorial and regulated by Central Authorities in modern legal system. Computer and internet converted the world in a global village. Virtual currency knows no boundaries and rejects the interventions & regulations by third party. Satoshi Nakamoto a pseudonymous creator created virtual currency in 2009 and it became very popular in western world due to being based upon cryptanalysis technology and removal of manipulations by trusted third parties like banks and regulators. Initial coins offerings played a major role in popularizing the digital currency. Technologies like blockchain, Internet of Things, 4.0, Artificial Intelligence and Machine learning have made the virtual currency robust with passage of time. Many jurisdictions raised concerns over its possible abuse in illegal activities. Financial Action Task Force cautioned the countries about its possible abuse. In India Reserve Bank of India banned virtual currency in 2018 by a circular but on 4th March 2020 Supreme Court of India declared ban by Reserve Bank of India as illegal on the basis of proportionality. In this paper the author aims to discuss, debate and deliberate upon the aftermath of the Supreme Court’s Judgement and role of Reserve Bank of India relating to Digital Currency.”

Keywords: *Digital Currency, Regulation of Digital Currency, Role of Judiciary*

I. Digital Currency: The Dawn

Evolution of mankind in the words of Henry Sumner Maine has been from Status to Contract. Anthropology may better explain at what point of time the money was invented for commercial transactions? Primitive and post primitive

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societies ran on barter system. The main problem before the mankind was how to secure transfer value? Man, invented money for facilitation of trade and secured transfer value in evolutionary process of trade and commerce.² In sale process currency notes were duly recognized as proper consideration. Fiat currency, legal tender, gold, gold backed currencies issued and minted by Governments and central banking authorities soon were recognized as a legal tender for transfer of goods and services. Payment modes with the advent of modern banking systems by valuable securities through various payout systems like cheque and other negotiable instruments became very popular but at the same time manipulation, human errors and control by third parties like bankers, regulators and Government increased manifold.³

Modern commercial world reposes faith in international financial system which maintains faith and trust on third parties. Parties to a commercial transaction have to place trust on Governments and banks that they will issue, and manage legal tender and shall not be manipulative to achieve political and economic interests. They have also to maintain their faith that the third-party authorities and payment processors will faithfully execute their orders and payments and in the process will not restrict transfers and leak financial data. In the payment process in physical mode bankers, clearing corporations, mint, government, regulators are involved. It has been witnessed recently that these processors have brought bad name to commercial transaction.

International financial system is controlled and managed by international financial institutions like IBRD, IMF and Bank of America which pressurize third party authorities for their private ends. Any mechanism which affects third party authorities will also affect the international financial institutions.

² WILLEM MIDDELKOOP, "THE HISTORY OF MONEY", "The Big Reset: War on Gold and the Financial Endgame" 13 (Amsterdam University Press, 2016), Nick Szabo, "Shelling Out: The Origins of Money" Online, 2002 available at <<https://fermatslibrary.com/s/shelling-out-the-origins-of-money>> (last visited on March 31, 2020 at 12:12 PM).

³ LUIGI MANZETTI, "POLITICAL MANIPULATIONS AND MARKET REFORMS FAILURES" 55 *World Politics*, 316 (Apr., 2003), Vera C. Smith, *The Rationale of Central Banking* (P.S. King & Son Ltd, Westminster, England, 1936), available at <http://files.libertyfund.org/files/1413/0100_Bk.pdf> (last visited on March 31, 2020, at 12:16 PM).

II. Digital Currency: Sunrise

With the advent of computer and internet modern banking system steered in the direction of digital currency. Cryptanalysis & cryptography were introduced to bring authenticity in electronic commerce. Electronic data interchange promoted digital payments. However, this promoted the requirement of encryption due to the problem of hacking and data leakage. This also resulted in increase of third parties who were handling and managing digital platforms processors like VeriSign, Bill desk and Tech Process gained momentum.

Digital currency or cryptocurrency was invented in 2009 by Satoshi Nakamoto a pseudonymous creator in the form of Bitcoin to find an alternative of financial system which was facing crisis in 2008. Bitcoin is a peer to peer digital currency based on cryptography and payer directly transfer the value to payee without involving third party authorities. This terminates the requirement of trusted third-party authorities, banks and Governments in management & supply of physical currency. For decade bitcoin was a subject of forensic investigation.

Digital currency works on blockchain technology and cryptography. Blockchain technology is disruptive distributed ledger technology (DLT) which does not trust the operators. But some argue that blockchain is not a disruptive technology rather it is a foundational technology as it creates new foundations for social and economic purposes.⁴ Bitcoin is an amalgamation of distributed ledgers, cryptography and open source development to maintain a blockchain on secured network. Blockchain is an immutable technology. Blockchain technology rules out any manipulation as hard coded protocol will weed out manipulations automatically. Bitcoin is not manipulative to demand. Bitcoin users do not need to depend upon the third-party authorities, financial institutions and Governments. Bitcoin even transcends the boundaries of a particular jurisdiction. Bitcoin owners can transfer the value without the interventions of third-party authorities and over the decades it removed the problem of trust deficit. The problem of double spending in virtual currency persists as in sale the currency is surrendered by a party to the other while in bitcoin due to duplication the double spending problem may arise. But in bitcoin

⁴ Marco Iansiti & Karim Lakhani, "The Truth About Blockchain" *Harvard Business Review*, January-February 2017, available at < <https://hbr.org/2017/01/the-truth-about-blockchain>> last visited on April 2, 2020 at 07:36 AM).

any transfer of bitcoin is broadcasted on entire bitcoin platform and after broadcast it cannot be modified. Bitcoin can be earned either by mining, by exchange with fiat currency, or in exchange of sale of goods and services. Bitcoin mining is a complex process wherein through bitcoin software, high end systems and networks bitcoins are earned. Normal people acquire bitcoins via exchanges only. Bitcoin is a deflationary currency unlike fiat currency (Currency issued by Government) which is inflationary currency. Bitcoin is not supplied as per demand. It is limited in supply as system halves the nodes in four years and only six blocks are generated per hour. Reward is halved every four years, so if it was 50 BTC in 2009 and in 2013 it became 25 BTC and in 2017 it comes down to 12.5 BTC and this way by the year 2140 it will reach 21 million BTC. It shows that it is a deflationary currency so it has a predetermined fixed money supply.⁵ 2140 is a predicted date for production of a last satoshi 0.0000001 BTC.

Bitcoins are stored in e-wallet which may be stored on computer's hard drive or external hard drive. It can be lost or destroyed. If a computer or its hard drive crashes, the bitcoin shall be irretrievable. The use of cryptography in bitcoins brings the security in it. Public key and private key cryptography ensure the security of dealing in digital currency. Bitcoin process requires gigantic computing powers and its power is more than the combined power of 500 supercomputers of the world.⁶ Bitcoin mining requires low rate energy for such kind of supercomputing and it will flourish in those jurisdictions which has abundant hydroelectric and geothermal power like Iceland or Washington.⁷

⁵ J. Murali, "A New Coinage: Can Bitcoin, the global online digital currency, be the precursor of a new monetary system?" Vol. 48, No. 38 *Economic and Political Weekly*, 78 (September 21, 2013), Jonathan B. Turpin, "Bitcoin: The Economic Case for a Global, Virtual Currency Operating in an Unexplored Legal Framework", 21 *Indiana Journal of Global Legal Studies*, 340 (Winter 2014).

⁶ Jonathan B. Turpin, "Bitcoin: The Economic Case for a Global, Virtual Currency Operating in an Unexplored Legal Framework", 21 *Indiana Journal of Global Legal Studies*, 347 (Winter 2014), Lawrence Trautman, "Virtual Currencies; Bitcoin & What Now After Liberty Reserve, Silk Road, and Mt. Gox?", 20 *Richmond Journal of Law & Technology*, 50 (2014).

⁷ Nathaniel Popper, "Into the Bitcoin Mines", *The New York Times* (December 21, 2013), available at <<https://dealbook.nytimes.com/2013/12/21/into-the-bitcoin-mines/>> (last visited on March 31, 2020 at 11:44 AM).

The digital currency has established digital proprietary interests and digital ownership depends on robust record keeping but records of physical properties are highly inaccurate not update and its retrieval is next to impossible. Any legal system has to go for a robust record keeping of digital assets for its acquisition, management and disposal. But bitcoins operate anonymously and beyond borders so its management like a real property is tough for now unless there is wider acceptability of it by the public.

Bitcoin system is a trustless system wherein the pseudonymous users do away with the requirements of third-party authorities and thus it removes the problems of unilateral manipulation of ledgers and minting unauthorized currency. We still do not know about Satoshi Nakamoto and his purpose of creating the bitcoin. His initial email chain shows that he is a flag-runner of libertarian movements which believes that decentralized network in international financial system have been impervious to Government control.⁸ In 2009 due to ongoing International Distress of 2008 Satoshi wanted to replace corrupt and unstable financial system. We should be mindful that Bitcoin was launched in 2009 after the Financial Crisis of 2008. This bitcoin technology led to 'Bitcoin Philosophy' which was led by crypto-anarchists or cypherpunks. This philosophy is essentially anti-corporation, anti-government, and pro-individual. Tim May, Eric Hughes, Justin Sun, Joh McAfee, Vitalik Buterin, Charlie Lee are some of such cypherpunks.⁹ Bitcoin challenged the Governments and questioned the requirement of third-party authorities.

III. Bitcoin and Legal Tender

Money or physical currency is a medium of exchange, a unit of account and has a store of value as it is backed by Governments and banks. Likewise, all these features are available in bitcoin as well except the validation by third-party authorities. Metal based currencies or gold backed currencies achieved salability

⁸ Satoshi Nakamoto, "Bitcoin: A Peer-to-Peer Electronic Cash System", available at <https://nakamotoinstitute.org/bitcoin/last> visited on March 31, 2020 at 11:44 AM).

⁹ Tim May, "The Crypto Anarchist Manifesto", available at <https://www.activism.net/cypherpunk/crypto-anarchy.html> (last visited on March 31, 2020 at 12:22 PM); Eric Hughes, "A Cypherpunk's Manifesto", available at <https://www.activism.net/cypherpunk/manifesto.html> (last visited on March 31, 2020 at 12:23 PM), See also, available at <https://news.bitcoin.com/35-most-influential-bitcoin-crypto-twitter/> (last visited on April 1, 2020 at 7:44 AM).

due to being durable, portable and having intrinsic value¹⁰. Dealers found the money attractive being backed by third party authorities. Government has been manipulative with the physical currency and it has often increased supply due to political and economic ends which resulted in loss of value for savers/investors due to high inflation. Investments lose their matured value due to inflation. The monetary debasement has been the result of manipulative financial system. Gold backed currencies again promoted the manipulations as the individuals were kept away from the metallic source of value. With the advent of digital payment system, the manipulation became easier.

Bitcoin became very popular with the passage of time but price volatility is still working as a barrier. In 2018 bitcoin which has 2/3rd cryptocurrency share crashed from \$20,000 to \$15,000 and its value in 2020 is \$ 6,317¹¹. However, its value has appreciated with the passage of time. In 2015 Amitabh Bachchan invested \$ 2,50,000 in cryptocurrency which in 2017 swelled to \$ 17.5 million.¹² Its store value has good prospects. We know that US dollar is international currency and enjoys the hot seat in international trade. Every country wants to maintain a good foreign exchange reserve in dollar and this results in profits to US treasury and a dominant position to USA in international order & affairs. But we have seen the fragility of dollar in recession even in USA and Bitcoin in long run may replace US Dollar. The mismanagement of physical currency will compel the dealers towards the digital currency as having a good store value. If this happens then supply of money shall be limited to market dynamics of limited stock of bitcoins. This will result initially in banning the bitcoin but people will repose much faith in it due to high volatility of physical currencies and its manipulations by third party authorities.

One of the major problems in Bitcoin or digital currency is that hackers may steal bitcoins from unsecured exchanges. Mt. Gox an exchange which was founded in 2009. In 2011 hackers stole bitcoins of the value of \$8.75 million. Again in 2014 hackers stole 850000 bitcoins and only 200000 could be

¹⁰ These features of money were explained by Aristotle.

¹¹ Morning Star Price.

¹² Available at <<https://www.indiatoday.in/technology/news/story/amitabh-bachchan-rides-the-bitcoin-high-sees-usd-250000-investment-surge-to-usd-17-5-million-1114138-2017-12-20>>(last visited on March 31, 2020 at 11:47 AM).

recovered.¹³ Bitcoins can also be used for tax evasions as we know that it operates beyond boundaries and pseudonymously. So large amount of money exchanged with cryptocurrency may be parked in tax havens. It is not subject to tax due to lack of incidence i.e. a jurisdiction, tax deduction at source, lack of identity due to being pseudonymous.¹⁴

IV. Bitcoin: The Financial System

Unlike international financial system, bitcoin operates on distributed ledger technique (DLT) which is trustless and removes the requirement of a central authority or intermediaries. In physical currency banks, central bank, Governments, mint, clearing houses, clearing corporation, payment corporations, settlement houses are required and if digital platform is involved then more intermediaries like cryptographers, internet service providers, software developers, network operators, security agencies also come in scene which gives more room to manipulations. These financial transactions are regulated, monitored by Government to enforce international trade policy and to stop the abuses like terrorism, money laundering, organized crime, flesh trade, drug peddling etc. In USA, Silk Road and Agora an online platform which was used for online market of drugs, firearms and contrabands used bitcoins heavily and FBI banned Silk Road and seized 30000 bitcoins.¹⁵ In bitcoin the Government will be unable to put surveillance of financial payments by individuals and indirect social regulation shall not be possible. In bitcoin it will be impossible for Government to stop the cross-border transfer of value. In physical currency the management of foreign exchange is possible and in India

¹³ Jonathan B. Turpin, "Bitcoin: The Economic Case for a Global, Virtual Currency Operating in an Unexplored Legal Framework", 21 *Indiana Journal of Global Legal Studies*, 365 (Winter 2014), Takashi Mochizuki & Eleanor Warnock, "Mt. Gox Head Believes No More Bitcoins Will Be Found," Wall Street Journal (June 29, 2014), available at < <https://www.wsj.com/articles/mt-gox-head-believes-no-more-bitcoin-will-be-found-1403850830>> (last visited on March 31, 2020 at 5:56 PM).

¹⁴ Jonathan B. Turpin, "Bitcoin: The Economic Case for a Global, Virtual Currency Operating in an Unexplored Legal Framework", 21 *Indiana Journal of Global Legal Studies*, 356 (Winter 2014); Omri Y. Marian, "Are Cryptocurrencies Super Tax Havens?", 112 *Michigan Law Review*. First Impressions 38, 39 (2013).

¹⁵ Rachel Abrams & Sydney Ember, "U.S Prepares for Sale of Bitcoins Seized in Its Raid on Silk Road", The New York Times (January 18, 2014), available at <<https://dealbook.nytimes.com/2014/06/26/u-s-prepares-for-sale-of-bitcoins-seized-in-silk-road-raid/>>(last visited on March 31, 2020 at 11:49 PM).

Reserve Bank of India (RBI) with the help of Enforcement Directorate manages the foreign exchange but any possible control of forex to maintain the reserve would fail in case of bitcoin and this happened in Cyprus in 2013.¹⁶ It happened in Greece, Argentina and Venezuela as well. Bitcoin is being seen as a potential threat to power of Government, third party authority, social activists but this threat is very premature and enterprises and individuals have not shown much faith till now in bitcoin.

V. Third Party Authorities and Bitcoin

Digital currency challenges the very foundation of third-party authorities as it aims to uproot the manipulations and undermines the power of Government and Central Banking Authority like RBI in India. Bitcoin can also be seen as autonomy of individual, property rights, freedom of association found in the great slogan of mankind of 'Liberty, Equality and Fraternity' and it dispenses the requirements of State and Government. One may argue about individualism for the sake of bitcoin and third-party authorities & State will argue for socialism and abuse of technology & digital currency for commercial and sexual exploitation of women & children, money laundering, transnational organized crimes, terrorism etc. and therefore the third party authorities will argue for the ban of bitcoin but one may be foolish to say so because as long internet will be there so long bitcoin will remain. In 1995 what was word wide web to us in 2009 onwards it is blockchain to us. Bitcoin should not be seen as a threat to third party authorities rather it promotes the value of transfer, removal of manipulations, promotes free market dynamics.

VI. Indian Prospects: The Eclipse

Bitcoin due to above stated reasons became very popular and India was not skeptic to it. Indians started investing in bitcoins. Being skeptic to bitcoin like western world Reserve Bank of India (RBI) in 2013 and 2017 cautioned Indian public about possible risks in bitcoins. In 2013-14 Unocoin, Zebpay, Coisecure like bitcoin exchanges started in India. In spite of such warning people invested in virtual currency. In 2013, Financial Action Task Force (FATF) issued New Payment Products and Services Guidance known as NPPS Guidance 2013 to familiarize people about digital currency and its possible abuse in money

¹⁶ Cyprus imposed freeze on assets leaving country but Cypriots evaded the freeze through bitcoins.

laundering, terrorism and transnational organized crimes. Enforcement Directorate raided two Indian firms in Ahmedabad which were dealing in bitcoins. FATF issued new guidance in 2015. RBI's Financial Stability Report in 2015 even examined the idea of having its own digital currency. Sweden, Japan and China also want to do the same. These countries are proposing to have their own digital currency. In 2017, 1.5million customers traded in cryptocurrencies.¹⁷ In 2017 Interdisciplinary Committee submitted a report and warned people about use of bitcoins and cryptocurrency and recommended for penalizing the users and operators of digital currency. In 2017 cryptocurrency exchanges rose to a dozen from just three. G20 raised its concern about digital currency and maintained that it may be abused against the consumers unfairly, damage market integrity and promote money laundering and terrorist financing but it acknowledged the digital currency for its inclusiveness and efficiency. RBI in such a backdrop issued a circular on 6nd April 2018 about prohibition on dealing in Virtual Currencies. Prohibition was on maintaining accounts, registering, trading, settling, securitizing, opening accounts on exchanges deal with them and transfer and receipts of virtual currencies. A draft bill as Crypto Token and Crypto Asset (Banning, Control and Regulation) Bill, 2018 was also in place to penalize dealing in virtual currency with up to ten years imprisonment. In October 2018 Unocoin Exchange co-founders Harsh BV and Sathvik Vishwanathan were arrested by Bengaluru Police for installing a cryptocurrency ATM without permission. Meanwhile many companies and platform flourished in India. In 2019 Binance which is a Malta based Cryptocurrency Exchange acquired Indian exchange WazirX. Two writ petitions challenging the circular of ban by Internet and Mobile Association of India (IAMAI) and Companies dealing in Cryptocurrency like WazirX, CoinDCX etc. were filed in Supreme Court of India before the bench of Rohinton Fali Nariman, Aniruddha Bose and V. Ramasubramanian, JJ.¹⁸ Supreme Court applying the doctrine of proportionality held that circular or measure of RBI of banning virtual currency is not proportionate and so it held the ban as illegal. Supreme Court said that RBI has always maintained that it is just a measure and not a ban and legislature has not passed the Crypto Token Regulation Bill, 2018

¹⁷ Shelly Singh, "Coin Toss", *The Economic Times*, March 29, 2020, p. 16.

¹⁸ *Internet and Mobile Association of India v. Reserve Bank of India*, 2020 S.C.C. OnLine SC 275

and Banning of Cryptocurrency and Regulation of Official Digital Currency Act, 2019. If it would have passed RBI would have got a monopoly to regulate the virtual currency. Supreme Court discussed that the doctrine of proportionality has four parameters (i) the measure is designated for a specific purpose, (ii) the measure is rationally connected to the fulfilment of the purpose, (iii) there is no less invasive alternative, (iv) there is a proper relation between the importance of achieving the aim and the importance of limiting the right. The Supreme Court discarded the regulation by RBI of virtual currency and held that (i) RBI in last five years could not establish any illegal activities of virtual currencies, (ii) the consistent stand of RBI has been that it did not completely prohibited virtual currencies, (iii) inter-ministerial committee which recommended for Crypto Token Regulation Bill, 2018 believed that a ban of virtual currency is an extreme step and the same can be achieved by regulatory measures but suddenly RBI recommended for ban alongwith a draft law entitled as 'Banning of Cryptocurrency and Regulation of Official Digital Currency Act, 2019' which appears to be not based on empirical findings. On the basis of these grounds though the court found Virtual Currency equal to money and conceded that RBI can take even preventive measures within its powers but in the instant case the impugned measure of RBI is not proportionate.

VII. The Diamond Ring Effect

This judgment of Supreme Court has imbibed a ray of hope in India netizens. Binance has launched a \$50 million blockchain for India. CoinDCX pledges \$3.1 million to promote digital currency. But still volatility and its stability are an issue and due to Covid-19 digital currency lose \$50 billion in value. The fluctuation is a real repelling factor for investment in cryptocurrency. On 31st March, 2020 the value of Bitcoin is Rs. 4,82,917, Bitcoin Cash is Rs16,362 and Bitcoin SV is Rs. 12,394, Ethereum is Rs. 9,885 and Binance coin is Rs. 927.¹⁹ On 17th March the value of Bitcoin was 392,439 which on 20th March on the judgment day rose to Rs. 4,16,195. After this judgment we can expect a surge in cryptocurrencies. Digital currencies are traded on its own exchanges and operators make money by commission as Wazir X charges 0.2% commission on buying and 0.1% for selling. The beauty is that a bitcoin can be bought up to

¹⁹ Available at <<https://www.coinbase.com/>>(last visited on March 31, 2020 at 12:32 PM).

eight decimal and can be sold like one can buy 0.000000001 bitcoin.²⁰ In days to come exchanges may waive commission which may range from 0.1% to 8% now to augment the cryptocurrency. However, due to lack of regulations and high speculative in nature and volatility and possible abuse in terrorism, money laundering and organized crime Sovereign nations may not back it but it will evolve as unregulated financial system and will keep on challenging the third-party authorities and Governments. Government in 2018 before the ban collected Rs. 100 crores on cryptocurrency so Indian Government should now concentrate on taxing regulations of cryptocurrencies. Cryptocurrencies shall be used for investment. It will stand for liberty of people and it will democratize the money. Fiat currency now after pandemic like Covid-19 and further slump of economy will challenge the fiat currency.

The Think Tank of Indian Government 'NITI Aayog' in its first part of draft discussion paper released in January 2020 supports the use of blockchain technology for some pilot projects and for some proof of concept (PoC) projects like, land records, subsidy of fertilizers, drug supply chain and verification of certificates and in PoCs like immunization, enhancing the efficiency of chit funds, insurance, electrical vehicle battery swapping, organic farming, energy trading. The second part which is yet to be released proposes that India must be a hub for blockchain and it must create a blockchain ecosystem and it also analyses the feasibility of cryptocurrency in India.²¹ This shows that now Indian government is not skeptic about using blockchain technology and entrusting trust to this trustless technology which will reap better fruits for India.

VIII. Regulation Needed

We can learn from USA in regulating the digital currency. In USA one possibility is to use the Stamps Payment Act of 1862 for regulation of digital currency which penalizes private companies which issues or circulates currency less than \$ 1 to be circulated as a replica of US currency but it has its own

²⁰ J. Murali, "A New Coinage: Can Bitcoin, the global online digital currency, be the precursor of a new monetary system?" Vol. 48, No. 38 *Economic and Political Weekly*, 78 (September 21, 2013).

²¹ "Blockchain: The India Strategy –Towards Enabling Ease of Business, Ease of Living and Ease of Governance" available at <https://niti.gov.in/sites/default/files/2020-01/Blockchain_The_India_Strategy_Part_I.pdf> (last visited on April 2, 2020 at 07:36 AM).

issues. One may also use Securities Act of 1933 and bitcoin investment may be covered in investment in securities. The Electronic Funds Transfer Act 1978 may also be a potential law for regulating bitcoins. On 7th March, 2018 Security Exchange Commission maintained that one which wants to deal like exchange must be registered with it. It was regarding cryptocurrency exchange. Federal Judiciary has aptly responded to the issues of cryptocurrencies. The famous cases may be seen in USA like SEC v. Shavers²² where Shavers made a Bitcoin Saving and Trusts which was declared as a Ponzi Scheme by SEC. Shavers diverted bitcoins of trust's investors for personal use and accordingly the bitcoins were held as investment and he was held liable in Securities Act, 1933. Likewise, in *United States v. Faiella*²³ which was a case connected with Silk Road held that bitcoin is money and so subject to Financial Crimes Enforcement Networks (FinCEN) regulations. The court held that bitcoin qualifies to be money as it can be easily purchased in exchange for ordinary currency, acts as a denominator of value, and is used to conduct financial transactions.

In *United States v. Ulbricht*²⁴ which is the famous case of Silkroad and the sole argument was that federal laws are inapplicable in the case of bitcoin as it does not amount to be a fiat currency which can be equated with investment and funds an essential ingredient for constituting the offence. But court held that bitcoin is investment and fund and can be equated with money. In *Florida v. Espinoza* a case relating to money laundering of bitcoin was filed. In *NYAG v. Ifinex Inc*²⁵ a case of misappropriation of \$850 Million via bitcoin is filed. In *SEC v. Kik* a case is filed by SEC against Kik which through ICO for developing an ecosystem flouted the Commission's norms to the tune of \$98million.

These cases and laws show that regulation of cryptocurrency is possible. In India likewise in Foreign Exchange Management Act, 1999, Information Technology Act, 2000, Prevention of Money Laundering Act, 2002, Foreign Contribution Regulation Act, 2010, Securities Contract Regulation Act, 1956 and Securities Exchange Board of India Act, 1992 and under its various regulations regulation of cryptocurrency can be done if the need be. It can be

²² 2013 US Dist LEXIS 130781.

²³ 39 F. Supp 3d 544.

²⁴ 31 F. Supp 3d 540.

²⁵ *James v. Ifinex Inc*, 2019 NY Slip op. 32454.

concluded that legal regulation of abuse of cryptocurrency shall be brought to justice at any cost but not at the freedom and liberty of honest users and dealers of cryptocurrency. Apex court in India has never turned its back to dispense justice in any situation where rogues and unscrupulous people have abused liberty and freedom of individuals. Probable and possible abuse of technology based upon unsubstantiated facts cannot be a ground for unnecessary cessation of cryptocurrency.

Cryopreserved Pre-Embryos: An Exordium to the Person or Property Discourse in Indian Legal Context

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Abstract

Scientific advancements in reproductive technology allow couples to combat problems with conception through various alternatives in assisted reproduction. However, with the advancement of science and technology, particularly in assisted reproductive technologies (ART) and the infertility business, several specific questions are posed, largely overshadowed by legal and ethical dilemmas. From the Indian legal context, this paper attempts to address the recent legal question of whether a cryopreserved pre-embryo is to be considered a person or a property. Exploring the status of a cryopreserved pre-embryo, the paper delves into a debate of whether the cryopreserved pre-embryo is to be treated as a person, thereby applying family law principles; or as property by applying property law jurisprudence while determining the pre-embryo ownership, particularly in a situation where the partners involved in the creation of the pre-embryo intend to dissolve their marriage. The present research does not attempt to resolve the controversies; instead, it analyzes the extent of legal recognition given to a pre-life form across various legislations in India. By perusing different judicial approaches, such as the right to life position, the property approach, and the special respect position that have been elucidated in several foreign judgements dealing with this issue, an effort has been made to highlight the legal dilemmas in this area. In conclusion, the paper suggests strict regulations to prohibit the commercialization of embryos because of public welfare concerns stemming from cryopreservation, and advances the argument in favour of the special respect position of cryopreserved embryo acknowledging the personhood analysis.

Keywords: *Assisted Reproductive Technology (ART), Indian Legislative Framework, Judicial Approach*

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I. Introduction

The term “property” connotes the idea of interest over something or everything recognized and protected by law.³This definition appears to be insufficient in these modern times with the progress of highly advanced technology posing a myriad of legal questions to the existing legal frameworks, including property jurisprudence, which lacks the ambit to address such unforeseen matters.⁴ While addressing the danger of a legal system failing to address such legal questions, Justice Michael Kirby observed: *"It is for our society to decide whether there is an alternative or whether the dilemmas posed by modern science and technology, particularly in the field of bioethics, are just too painful, technical, complicated, sensitive and controversial for our institutions of government."*⁵ Among the various developments that we have seen, the infant of assisted reproductive technology, more particularly the "infertility business"⁶ has in the last few decades, raised numerous disquiets having both medico-legal and ethical dimensions.⁷ In this present research, the authors focus on the relatively modern technology of cryogenic preservation of embryos mainly because the focus of the technology lies in creating new life. By its very nature, the issue of cryopreserved embryos represents numerous moral and ethical implications

³This recognized and protected interest is known as right. Therefore, proprietary right means the legally recognized and protected interest over anything and everything (movable or immovable, tangible or intangible), over which a man by his own force or persuasion can carry out his wishes, either by his own acts, or by influencing the acts of others, he has the 'right, so to carry out his wishes. See, Thomas Erskine Holland, THE ELEMENTS OF JURISPRUDENCE 70 (The Lawbook Exchange, Ltd., New Jersey, 2006).

⁴ Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86(7) U. Pa. L. Rev. 691-732 (1938).

⁵ Keenan, *Science and the Law - Lessons from the Experience of Legislating for the New Reproductive Technology*, 59 AUSTRALIAN L.J. 488, 489 (Aug. 1985).

⁶ The global [In Vitro Fertilization \(IVF\) Market](https://www.globenewswire.com/news-release/2020/02/20/1987683/0/en/In-Vitro-Fertilization-Market-will-Reach-USD-36-39-Billion-by-2026-Increasing-Cases-of-Infertility-Among-Men-to-Positively-Influence-Growth-says-Fortune-Business-Insights.html#:~:text=20%2C%202020%20(GLOBE%20NEWSWIRE),in%20males%20thann%20female%20partners) size is prophesized to reach USD 36.39 billion by 2026, with a CAGR 10.1% by 2026, (last visited on June 17, 2020), [https://www.globenewswire.com/news-release/2020/02/20/1987683/0/en/In-Vitro-Fertilization-Market-will-Reach-USD-36-39-Billion-by-2026-Increasing-Cases-of-Infertility-Among-Men-to-Positively-Influence-Growth-says-Fortune-Business-Insights.html#:~:text=20%2C%202020%20\(GLOBE%20NEWSWIRE\),in%20males%20thann%20female%20partners](https://www.globenewswire.com/news-release/2020/02/20/1987683/0/en/In-Vitro-Fertilization-Market-will-Reach-USD-36-39-Billion-by-2026-Increasing-Cases-of-Infertility-Among-Men-to-Positively-Influence-Growth-says-Fortune-Business-Insights.html#:~:text=20%2C%202020%20(GLOBE%20NEWSWIRE),in%20males%20thann%20female%20partners).

⁷ Sufiya Ahmed, *Embryo Freezing and Donation: Ethical-Legal Issues*, 137 Summer Issue, ILI LAW REVIEW (2018).

embroiled in great controversy.⁸ The focus of this paper is not on critiquing the technology but analyzing a unique legal problem that has arisen in contemporary times with the use of in-vitro fertilization (IVF)⁹, one of the more widely known types of assisted reproductive technology (ART). Recently, courts face the question of what should become of a cryopreserved embryo when the couple who initiated the process decides to dissolve their marriage.¹⁰ In 2018, the Court in Ontario, Canada, while dealing with a case related to a cryopreserved embryo, recognized the embryo as property. The Court also asked the wife who wished to retain the cryopreserved embryos to **reimburse** her ex-husband with his share of the **cost incurred for the embryo's cryogenic preservation**.¹¹ Various other cases addressing the issue of ownership of cryopreserved embryos have shown that this is an issue that falls in the intersection of property law, family law, contract law, and principles of equity. Because of significant development in property jurisprudence, the authors attempt to answer whether a cryopreserved embryo should be considered a person or property.¹²

II. The Science of an Embryo¹³

The question of whether an embryo is a property or a person invites an understanding of the science behind the creation of a cryopreserved embryo

⁸ *Kass v. Kass*, 696 N.E.2d 174, 178 (N.Y. 1998), the Court dealt with the mind-numbing ethical and legal questions related to reproductive science.

⁹ Many scholars describe the IVF procedure as a "miracle of modern science". For example, see Andrea Michelle Siegel, Comment, *Legal Resolution to the Frozen Embryo Dilemma*, 4 OHIO N.U. J. PHARMACY & L. 43 (1994).

¹⁰ See, e.g., *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989).

¹¹ NATIONAL POST, *Judge allows Ontario woman to use frozen embryo despite ex-husband's objection in 'acrimonious' divorce*, (last visited on June 18, 2020), <https://nationalpost.com/news/canada/judge-allows-ontario-woman-to-use-frozen-embryo-despite-ex-husbands-objection-in-acrimonious-divorce>.

¹² About the legal status of a prelife form, see John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437 (1990)

¹³ Analysis of the individual steps of the IVF procedure can be found in Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH. L.J. 257, 265 (1990).

through an IVF procedure.¹⁴ Although both moral and legal questions persist, the fertility experts have successfully created human embryos outside of the human body through IVF techniques, contributing to the worldwide growth of the "infertility business."¹⁵ The IVF process is initiated by first stimulating a woman's ovaries so that the ovaries release multiple eggs beyond the usual one egg per month produced naturally, thereby increasing the chances of successful fertilization later on. This is done by injecting follicle-stimulating hormones into the woman's ovaries, thereby stimulating the ovarian follicles to produce more eggs. These eggs are removed via a surgical process such as laparoscopy or by ultrasound-directed needle aspiration. The extracted eggs are then placed in a petri dish, where the sperm cell collected from the male partner is inseminated into the egg for fertilization.¹⁶ After a span of a few days, these fertilized eggs reach a particular stage of development, though still unicellular (also known as pre-embryo), and at this stage, which is also known as the morula stage, the eggs are frozen in liquid nitrogen for preservation and storage. This process is known as cryopreservation, and these frozen fertilized eggs are called cryopreserved pre-embryos. The fertilized egg is known as a pre-embryo at this stage as it lacks any form of cellular differentiation.¹⁷

In the course of a normal, natural pregnancy, this pre-embryo would multiply to become multi-cellular and subsequently implant itself on the uterine walls. At this point, it becomes an embryo, and after another eight weeks of development, it becomes a foetus. A foetus is of two types; viable and non-viable. A viable foetus can potentially live outside the mother's womb, albeit with artificial aid,

¹⁴ In-vitro fertilization (IVF), also known as gestational surrogacy or "Host Uterus," is a procedure that creates an embryo in a laboratory environment for subsequent transfer to a gestational surrogate for carriage. CHRISTINE L. KERIAN, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113 (1997).

¹⁵ For a comprehensive understanding on the issues related to this- SHIRLEY DARBY HOWELL, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, 14 DePaul J. Health Care L. 407-440 (2013).

¹⁶ JANETTE M. PUSKAR, *Prenatal Adoption: The Vatican's Proposal to the In Vitro Fertilization Disposition Dilemma*, 14 N.Y.L. SCH. J. HUM. RTS. 757-763 (1998).

¹⁷ HAUT, MARK C., *Divorce and the Disposition of Frozen Embryos*, 28(2) Hofstra Law Review (1999).

whereas a non-viable foetus cannot survive even with aid.¹⁸ Though colloquially, a successfully fertilized egg is referred to as an embryo, the authors in this paper specifically discuss the pre-embryo stage at which the fertilized egg is frozen.¹⁹ The basic understanding of these various distinctions is essential to analyse better the extent to which existing legal frameworks deal with pre-life entities.

III. Recognition of Pre-Life and Existing Legislative Framework

The legal implication to these different stages of development of a pre-life entity, more specifically, the creation of a cryopreserved embryo through an IVF procedure, has remained a contentious issue in legal literature.²⁰ The question about the status of an “unborn child” has been debated since the time of Aristotle²¹; however, the clarification on this now has become a necessity.²² In 1986, the State of Louisiana passed a statute that recognized embryos as being

¹⁸ Michelle F. Sublet, *Frozen Embryos: What Are They and How Should the Law Treat Them*, 38(4) Clev. St. L. Rev. 585-616 (1990).

¹⁹ For a comprehensive analysis about the stages of embryonic development, see Clifford Grobstein, “The Early Development of Human Embryos” 10(3) *J. MED. & PHIL.* 213-236 (1985).

²⁰ There are numerous critical and scholarly works dealing with the debate of embryos’ legal status as to property or persons. For example, see Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 *HIGH TECH. L.J.* 257 (1990); David A. Rameden, Note, *Frozen Semen as Property in Hecht v. Superior Court: One Step Forward, Two Steps Backward*, 62 *UMKC L. REV.* 377 (1993); Lori B. Andrews, *The Legal Status of the Embryo*, 32 *LOY. L. REV.* 357 (1986); Katherine R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 *U.C. DAVIS L. REV.* 193 (1997).

²¹ Recently during the bail hearing at the Delhi high court for Jamia Millia Islamia student Safoora Zargar, presiding judge Rajiv Shakhdher had asked for the legal regime on the rights of an unborn child. For a discussion on Indian domestic law recognises the personhood of an unborn child, [THE WIRE STAFF](#), “In Considering Bail for a Pregnant Woman, the Personhood of Her Fetus Has to Be a Factor”, (last visited on September 20, 2020), <https://thewire.in/law/in-considering-bail-for-a-pregnant-woman-the-personhood-of-her-fetus-has-to-be-a-factor> .

²² US NATIONAL LIBRARY OF MEDICINE NATIONAL INSTITUTES OF HEALTH, “Determining the status of non-transferred embryos in Ireland: a conspectus of case law and implications for clinical IVF practice”, (last visited on July 7, 2020) , <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2714322/>.

"persons".²³ Contrary to that, the Indian legislative framework lacks such distinct clarity. In the Indian context, one might observe that across various areas of law, numerous references are made concerning an unborn child, though there is no definition for the term.²⁴ A few examples are taken for discussion within the scope of this paper from the Transfer of Property Act, the Indian Penal Code, the law of Torts, and the Medical Termination of Pregnancy Act.

A. Transfer of Property Act

Section 13 of the Transfer of Property Act deals with the transfer of property for the benefit of an unborn child. While the Act does not define the term "unborn child", it is commonly understood under this Act that an unborn child not only refers to a foetus in a woman's womb, but can also refer to a non-existent person who may eventually be conceived and given birth to in the future.²⁵ Section 5 of

²³ Timothy Stoltzfus Jost, *Rights of Embryo and Foetus in Private Law*, 50(3) AJCL 633-646 (2002).

²⁴ The "rights of unborn child", as defined in Black's Law Dictionary makes it clear that the rights of an unborn child are recognised differently in various different legal contexts. For *e.g.* in *Jabbar And Ors. vs State*, 1966 CriLJ 1363, Justice M. H. Beg while upholding the conviction of the appellant under Section 304A of the Indian Penal Code, dealt with the meaning of the child in mother's womb held:

"As he then was an unborn child can be regarded as a living entity with a life of its own. The word "person" is defined in the Shorter Oxford English Dictionary in two ways: firstly, it is defined as "an individual human being" or "a man, woman, or child"; and, secondly, as "the living body of a human being". I do not think that it can be denied that an unborn child in advanced stages of pregnancy has a being or life of its own and that it has a body. It may be that its life and body are not independent of the mother's existence so that the unborn child cannot be said to have a separate exist-once. The word "person" has not been defined in such a way as to involve a separate existence or the living creature spoken of as "a person". As there is no such technical definition, I prefer to adopt the ordinary meaning of the term "person" as including a "child" whether born or unborn. Even if the child is unborn and within the womb of the mother, it is capable of being spoken of as a "person" if its body is developed sufficiently to make it possible to call it a "child". The post mortem report shows that the child had developed sufficiently to have an identity of its own as a child? That would, in my opinion, be enough to satisfy the definition of the term "person" as used in Section 304a, I.P.C."

²⁵ In the words of Coke: "The law in many cases hath consideration of him in respect of the apparent expectation of his birth". *Quoted in State of Andhra Pradesh v. Malladi Rama Subbaiah*, Civil Revision Petition Appeal No. 1578 Of 7976.

the Act lays down that the transfer of property can only happen between one or more living persons, wherein the term "living person" has been said to include a company, association or body of individuals etc. By a joint reading of the sections along with the adoption of the harmonious construction of the two provisions, it becomes evident that a property may not be transferred directly to an unborn child. Section 13 necessitates the transfer of a prior interest to another party until the unborn child takes worldly birth. This legal arrangement to transfer property for the interest of the unborn person clearly indicates the intention not to recognise the unborn children as legal person having rights and duties in itself. However, they can be conferred with successive interest, only through a living person. According to Salmond, "*There is nothing in law to prevent a man from owning property before he is born. His ownership is necessarily contingent, indeed, for he may never be born at all; but it is nonetheless a real and present ownership.*"²⁶ The Supreme Court in *Raj Bajrang Bahadur Singh v. Bakhtraj Kuer*²⁷, reaffirmed this position and observed that "*It is quite true that no interest could be created in favor of an unborn person but when the gift is made to a class or series of persons, some of whom are in existence and some are not, it does not fail in its entirety; it is valid with regard to the persons who are in existence at the time of the testator's death and is invalid as to the rest.*"²⁸ Section 14 further provides that the unborn person, in whose favor the interest is created, must have come into existence on or before the expiry of the life or lives of the person in whose favor the prior interest is created as required under Section 13. Therefore, Section 13 works in tandem with Section 5 in that a transfer can only validly take place between living persons. If it is the case of a non-living entity like an unborn child, a living person will have to hold prior interest until such a child is born for such transfer to be valid. From the viewpoint of property law, we see that a pre-life entity is not given the same recognition as a living person. Thus, an embryo does not share the same legal personality as a living individual for the purpose of property law.

²⁶ P. J. FITZGERALD, SALMOND ON JURISPRUDENCE, 354-355(2nd ed., Sweet & Maxwell, 1966).

²⁷ AIR 1953 SC 7.

²⁸ *Ibid.*

B. Indian Penal Code

This differential treatment in the value given to a living individual as opposed to a pre-life form also exists in the Indian Penal Code. Section 312 of the IPC lays down punishment for voluntarily causing a miscarriage, other than for the purpose of saving the life of the mother.²⁹ Under this provision, depending on the extent of the foetus' development, the punishment prescribed ranges from a fine to an imprisonment of three years or even up to seven years, if the woman is quick with the child. The phrase "quick with the child" refers to a foetus in the 15th to 20th week of its development (varying from woman to woman), wherein the mother is able to feel the motion of the foetus in her womb.³⁰ Now, to compare this with Section 299 of the IPC, which deals with culpable homicide amounting to murder, the punishment prescribed for it under Section 302 is a sentence of life imprisonment or death and is also liable to a fine. When comparing Sections 299 and 312, it is evident that there is a common thread of voluntary death being caused in both instances. However, the vast difference in punishments meted out can be reasonably attributed to the lives involved. In the former case, it is the death of any living individual that incurs liability, while in the latter, a miscarriage involves causing the death of a pre-life form. Even in that, a distinction has been made between a miscarriage caused to a woman and a woman who is quick with a child, that is, a woman carrying a more developed foetus. Therefore, it is interesting to note that there is no bar on the age of the deceased victim under Section 299, and punishment under Section 302 is equally applicable to all deaths caused to a living person. While, under Section 312, firstly, a lower punishment is meted out for the same consequence, that is death caused intentionally, and secondly, a differential punishment has been provided in accordance to what the law perceives to be a higher or lesser form of life, even between pre-life forms. It is, therefore, reasonable to observe that in the eyes of the Indian Penal Code, there is a hierarchy in the value attached to the different stages of life.³¹ There are no variations in the punishments given for any

²⁹ K.D. Gaur, *Abortion And The Law In India*, 28(3) JILI 348-363 (1986).

³⁰ Sidhanth Mor and Mahima Chowdhary, *Comparative Analysis of Right to Privacy of Woman v. Right to live of the Unborn Child*, (last visited on August 8, 2020), <https://www.latestlaws.com/articles/comparative-analysis-of-right-to-privacy-of-woman-v-right-to-live-of-the-unborn-child/>.

³¹ *Prakash v. Arun Kumar Saini*, (2010) 167 DLT 311.

intentional death caused to a living person, and the age of the victim does not in any way mitigate or aggravate the punishment given. However, in the case of intentional miscarriages, which are also a crime involving the causing of intentional death, a substantially different stance is adopted. Pre-life forms are given lesser value than a living person, and even within pre-life forms, a high value is assigned to the life of a foetus that is more developed.³² From this, it can be concluded that the legal status of an embryo is definitely not equivalent to that of a living person, though, it could be considered as being acknowledged as a form of life.³³

C. Law of Torts

In the olden times, with the lack of advanced technology, it was nearly impossible to determine whether a foetus was living or had died due to the perpetrator's misconduct. This largely contributed to the fact that pre-natal tortious injuries could not be recognized as a civil wrong. However, with the progress of innovative technology, it has become possible to point out the cause of death of a foetus with almost utmost certainty. Consequently, cases of wrongful death, wrongful birth etc. are areas in which tort law has been newly emerging. Courts have been faced with several issues that had been unusual so far. For example, the right of action by an unborn against his mother for her failure to provide a healthy womb – such as when the mother does not abstain from activities such as alcohol and drug consumption during her pregnancy, thereby causing grave detriment to the welfare of the growing child; and the right of action against the mother for an attempt to self-abort, resulting in a disability of the child.

D. Medical Termination of Pregnancy Act

Abortions are legally allowed up till twenty weeks of pregnancy under the Medical Termination of Pregnancy Act. Moreover, certain conditions need to be

³² In *Oriental Insurance Co. Ltd. v. Santhilal Patal*, (2007) 4 ALD 855, the Court while dealing with the question whether a child in the womb of the mother can be called as a person, held that "it is pertinent to discuss different stages of birth of a child in the womb of a mother". In the opinion of the Court an unborn child aged five months onwards in the mother's womb till its birth can be treated as equal to a child in existence, and the unborn child of a woman in her seventh month of pregnancy shall be regarded as life.

³³ *Ibid.*

fulfilled for a legal abortion to take place. Of the four conditions, three of them are focused on the consequences to the mother's health and the personal choice of the mother, while one condition alone allows for abortion in case of the foetus having any severe abnormality.³⁴ It may therefore be reasonably deduced that in the case of an abortion, the embryo's right to life is placed only second to the concerns of the living person, that is, the mother bearing the child. We see that the mother's choice and health are given greater importance.³⁵ Similar to the previous observations, we once again see that a greater value is attached to the life of the existing living individual as opposed to a pre-life form. It may be observed that under this law too, "a doctor can lawfully, by statute do to a foetus what he cannot lawfully do to a person who has been born."³⁶ A reference to the abovementioned legislation helps one to arrive at the conclusion that the present legal framework certainly does not place a pre-life form such as an embryo at an equal pedestal to that of a living person. What may be derived is that there are traces of recognition of a pre-life form as a form of life or rather an animate object,³⁷ though that is all the status that is given. Hence, an embryo is certainly not treated as equivalent to a living person in the eyes of the law MTP legislative framework as well.

IV. Commodification³⁸ of Embryos

³⁴ Saurabhk9431, *A Critical Analysis on the Abortion Laws in India*, (last visited on August 16, 2020), <https://blog.ipleaders.in/critiquing-indias-abortion-laws/>.

³⁵ While dealing with the women's right to abortion it has been observed that, the Court's obligation is not to mandate a moral code regarding abortion, but to examine the constitutional issue regarding whether a state can regulate a woman's decision to have an abortion. See, *Planned Parenthood v. Casey*, 505 U.S. 833, 850-51 (1992).

³⁶ *McKay v. Essex Area Health Authority* [1982] 2 AER 771 at 781.

³⁷ Some authors concluded that embryos are not legal subjects sui iuris as well as they are not legal objects. The embryos are the product of biological process and the bio-ethical nature of parent-child relationship makes the embryos the 'legal subjectivity' of their parents. For e.g. Robbie Robinson, *The Legal Nature of the Embryo: Legal Subject or Legal Object*, 21 *Potchefstroom Elec. L.J.* 26 (2018).

³⁸ The term 'commodification' means to turn something into a commodity. From economic point of view, the concept describes the assignment of economic value to a thing which previously has not been assessed in economic terms., Hitesh Bhasin, "What is Commodification – Its advantages and disadvantages", (last visited on July 22, 2020), <http://www.marketing91.com/commodification-advantages-and-disadvantages/>.

A critical analysis of legal and political trends in recent years shows that the commodification of eggs and embryos is gaining the status of a principal question to be decided in contemporary embryo-disposition suits and "infertility business" in almost every jurisdiction in some forms or other.³⁹ Apart from the differential treatment of pre-embryos and fetuses under the law as discussed above, wherein pre-life forms are not seen as an equal counterpart of a living individual, there are some laws that surely perpetuate this attitude. In other words, we may seek and refer to the instances wherein embryos are allowed to be dealt with in the manner of a commodity rather than a child or a person. For instance, it is a fact that the donation and sale of eggs from willing women is entirely legal.⁴⁰ If we took the stance of an egg/embryo of being a person in itself, the sale and commodification of an egg/embryo in this manner would undoubtedly amount to slavery, which is illegal. Such transactions are justified only due to the unsaid legal stance that a pre-life form is not a person.⁴¹ Moreover, most IVF procedures are governed by a contract, willingly entered into by the parties, which lays down terms regarding what is to be done with an embryo in case of dissolution of a marriage. The Courts have placed contractual obligations as the first point on the hierarchy of considerations while determining to whom the embryos should be handed over to, in the disputes concerning the ownership of embryos.⁴²

In the English case of *Kass v Kass*⁴³, the Kass couple had undergone an IVF procedure in 1993, before which the couple had signed several consent agreements, making their own informed choices. In these agreements which they signed, it was stated that neither Mr Kass nor Mrs Kass will have a claim

³⁹ Browne, Colleen M. and Hynes, Brian J., *Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law*, *The Note*, 17(1) J. Legis. 97 (1991).

⁴⁰ US NATIONAL LIBRARY OF MEDICINE NATIONAL INSTITUTE OF HEALTH, "Indian egg donors' characteristics, motivations and feelings towards the recipient and resultant child", (last visited on May 18, 2020) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5341288/>.

⁴¹ Robbie Robinson, *The Legal Nature of the Embryo: Legal Subject or Legal Object*, 21 *Potchefstroom Elec. L.J.* 1 (2018).

⁴² Donna M. Sheinbach, *Examining Disputes Over Ownership Rights to Frozen Embryos: Will Prior Consent Documents Survive if Challenged by State Law and/or Constitutional Principles?* 48 *Cath. U. L. Rev.* 989 (1999).

⁴³ *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).

over the pre-embryos, and they were to be disposed of in case of death or other unforeseen circumstances. Divorce was not mentioned as one of the grounds. Sixteen eggs were retrieved from MsKass, out of which nine of them were fertilised and cryopreserved as pre-embryos. Soon after, the couple ended up filing for an uncontested divorce. However, during the divorce process, Mrs Kass instituted a matrimonial suit claiming custody over the pre-embryos. This case went through multiple levels of appeal but what was held by the Court of Appeals finally was that the issue of disposition was to be dealt with as if it were a contract case.⁴⁴ The Court expressly observed that, although in this case, the agreement did not deal with how the pre-embryos should be handled in a situation of divorce, if the same had been stated, the Court would have gone by the terms of the contract.⁴⁵ Similarly, in the case of *Litowitz v Litowitz*⁴⁶, the Court of Appeal strictly held that the terms of a contractual agreement would determine the outcome of disposition.⁴⁷ Hence, in the situation where a divorced couple contends for the ownership of an embryo, courts have taken to interpreting and relying on the contract that was signed at the time of consenting to the IVF procedure and have abided by the same. In the circumstance where this is an uncertainty, then the courts have proceeded to looking at other considerations. This is certainly not the case of an actual child custody matter where the reasoning of *parens patriae* is adopted. In such cases, the best interests of the child are analyzed using family law principles to determine who deserves the custody of the child. Due diligence and caution goes into ensuring that the child is placed in good hands.⁴⁸ This is not so in the case of embryos belonging to divorced couples. This very fact that the ownership of embryo can

⁴⁴The Court reasoned that;

“The first inquiry should be directed at whether the parties have made an expression of mutual intent which governs the disposition of the pre-zygotes under the circumstances in which the parties find themselves.”

⁴⁵Following the approach in *Kass v. Kass*, in the case of *Cahill v. Cahill*, 757 So 2d 465 (Ala Civ App 2000), the court refused to release the embryos for implantation to the wife stating the expressed intent of the parties on disposition of embryos.

⁴⁶*Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002)

⁴⁷Jessica Wilen Berg, "Owning Persons: The Application of Property Theory to Embryos and Fetuses" 173 *Faculty Publications* (2005), (last visited on May 18, 2020), https://scholarlycommons.law.case.edu/faculty_publications/173.

⁴⁸ In *Davis v. Davis*, the trial court concluded that the preembryos were "human beings" and therefore relied on a "best interest of the child" analysis.

be decided based on contractual terms rather than on the basis of family law principles and without looking into issues of welfare further perpetuates the notion that an embryo is not a person but rather, a property of sorts. The same principle was upheld in another embryo battle of *Davis v Davis*⁴⁹. In the *Davis* case, the couple decided to dissolve the marriage after the IVF process, and while the wife wanted to implant the embryos, the husband was vehemently against the same.⁵⁰ Of the many issues involved, the relevant observation here is the fact that the Tennessee Supreme Court had recognized that "*embryos are neither people nor property, but occupy an interim category that entitles them to special respect because of their potential for human life.*"⁵¹ This observation by the Court substantiates the authors' view that a pre-life form is given a status of what may potentially be termed as a quasi-property.

A. Embryo as Property: *SH v DH*

A landmark judgement that perhaps tilted the scale entirely in favour of recognizing an embryo as a property is a decision made by a judge in the Ontario Supreme Court. In the case of *SH v DH*⁵², Justice Robert Del Frate had to deal with a dispute wherein he had to determine the fate of an embryo that the couple had bought from a fertility center. The key difference to note from the previously mentioned cases is the fact that the embryos, in this case had no biological connection to the couple who had bought it. The cost of the donated eggs and sperm was approximately USD\$11,500. While doing so, the couple signed a contract in the Georgian fertility center where they bought the eggs, agreeing that in the event of a separation of the two, the legal ownership of the preserved embryo would be upon the court to determine and that the same

⁴⁹ 842 S.W.2d 588 (Tenn. 1992). A detailed discussion establishing Guidelines for resolving disputes over frozen embryos can be found in Dan Fabricant, *International Law Revisited: Davis v. Davis and the Need for Coherent Policy on the Status of the Embryo*, 6 CONN. J. INT'L L. 173-207 (1990).

⁵⁰ *Davis v. Davis*, 842 S.W.2d 588, 601 (The Court emphasized that "procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation").

⁵¹ ANNA STOLLEY PERSKY, "*Contentious battles between couples over frozen embryos raise legal and ethical dilemmas*", (last visited on August 6, 2020), https://www.abajournal.com/magazine/article/contentious_battles_between_couples_over_frozen_embryos_raise_legal_and_eth?icn=most_read%3E.

⁵² 2018 ONSC 4506

would be considered as a property. Once again, the couple signed a contract in the fertility center in Ontario (where the purchased embryos were delivered from Georgia to be implanted in the wife), which stated that in the event of a separation, the patient (*i.e.* the wife) would be the one to make the decision. Hence, there was a direct conflict in the two contracts signed. The judge took to interpreting the same harmoniously and read it as the wife being able to make a decision that would be facilitated by the Court. Additionally, he also held that since USD\$11,500 was spent on the four embryos, making each embryo worth USD\$2,875, he ordered the wife to pay compensation to the husband for the embryos she was keeping.⁵³ In this case, not only do we see that the embryo is being treated as a commodity in that, a numerical value is being attached to its worth, something that is not done to human life, but an outright stance is also being taken to consider an embryo as a property. Moreover, Justice Robert Del Frate himself had mentioned in the judgement that given the infancy of cases of this nature, until an intervention is made in the form of legislative changes to the current law, it is necessary for the court to decide disputes like the one in hand based upon the agreements that have been signed and entered into by the parties and interpret their intentions from such agreements. Additionally, as highlighted previously, one of the reasons for the Court interpreting the dispute in this manner was due to the fact that there was no biological connection of the embryos to the parties. Once again, through this line of reasoning, we see a differential value of life being attached to an embryo that lacks biological connection to the parties, and this would be in violation of principles of equality.

V. The Different Judicial Approaches

Every society has its own social and moral regulations regarding the use and control of gametes and embryos, which is primarily based upon the individual choice of reproduction⁵⁴ and responsible parenthood.⁵⁵ However, if there are

⁵³Financial Post Staff & Laurie H. Pawlitz, “*Battle over embryo highlights family law's new fertility frontier*”, (last visited on May 14, 2020), <https://business.financialpost.com/personal-finance/battle-over-embryo-highlights-family-laws-new-fertility-frontier>.

⁵⁴Emphasising individual's choice to reproduce and safeguarding the privacy of an individual in doing so the Court in *Jack B. Anglin Co. Inc. v. Tipps*, 842 SW 2d 266 at 600 (Tex 1992), observed;

several options among which the people can choose due to the scientific advancement in IVF, then advance directives in the form of legal standards are necessary to limit the individual's right to dispose of their genetic materials, including gametes and embryos. Moral restrictions were always there as procreation, marriage, sexuality, and family were considered to be private affairs,⁵⁶ and it was largely accepted that the parental project stops with the death of one of the partners and that post-mortem use of genetic materials is not morally justifiable.⁵⁷ However, in view of the continuing disposition of genetic material and advancement in IVF, different courts have been holding different views when it faced with legal disputes. These outcomes can be broadly divided into three approaches: the right to life, the property approach, and the "special respect" position. The present research, essentially engages with the property approach while superficially addressing the other two.

A. Right to Life

Under this position of right to life, it is advocated that life starts at the point of conception and hence, embryos are placed on an equal pedestal to human beings; and therefore, embryos must be legally protected from the moment fertilization occurs.⁵⁸ The destruction of a pre-embryo is seen as destroying a human being.⁵⁹ Here, we see the Courts giving minimal importance to a

"For the purposes of this litigation it is sufficient to note that, whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance the right to procreate and the right to avoid procreation."

⁵⁵ Kayhan Parsi, *Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos*, 2 DEPAUL J. HEALTH CARE L. 703 (1999).

⁵⁶ In many occasions the Court has recognized the individual right to determine, free from unjustified governmental interference, whether to bear or beget a child. For *e.g.* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

⁵⁷ Guido Pennings, *What are the ownership rights for gametes and embryos: Advance directives and the disposition of cryopreserved gametes and embryos*, 15(5) Human Reproduction 979-986 (2000).

⁵⁸ Browne, Colleen M. and Hynes, Brian J., *Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law*, *The Note*, 17(1) J. Legis. 118 (1991).

⁵⁹ For more analytical presentation with the help of judicial observation, see Mark C. Haut, *Divorce and the Disposition of Frozen Embryos*, 28(2) Hofstra Law Review: 497-499 (1999).

husband's right to refrain from procreation and higher weightage to a mother's desire to bear the child. This was the position taken in the *Davis* case.⁶⁰

B. Property Approach

A polar opposite to the right to life position is the property approach. Previously in a plethora of cases, the court was governed by the "no property rules" for human biomaterials⁶¹; there are sufficient reasons to consider or treat human biomaterials capable of being a legitimate object of property in the eye of law.⁶² It is important to note that the objective of this approach is not to label a pre-embryo as property but to identify whether there are property interests that may be legally recognizable, calling for the application of property law principles while determining disposition.⁶³ In the *Davis*⁶⁴ case, it was argued that the frozen embryos were property jointly owned by the parties; they did not constitute life, but instead had the potential for life.⁶⁵ This approach centers on the parties' rights, emphasizing on the intentions of the parties as opposed to characterizing the embryo as property. In the situation where embryos are considered as property, there is a shift in perspective and the legal framework which governs the ownership of pre-embryos is one that focuses on factors such as control, contract, and protection of creators' rights.⁶⁶ Under this position, neither party is allowed to implant the embryo, if another party does not consent to it. Here, the contractual obligations agreed by the two parties are given greater importance than the right to life of the pre-embryo. A pre-embryo is

⁶⁰ Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86(7) U. Pa. L. Rev. 691-732 (1938).

⁶¹ For a review of the debate, see Phillippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195 (1996).

⁶² For details see, Muireann Quigley, *Propertisation and Commercialisation: On Controlling the Uses of Human Biomaterials*, 77(5) Mod. L. Rev. 677-702 (SEPTEMBER, 2014).

⁶³ W. N. Hohfeld describes property as legal interest that exists only between persons in respect of things. W. N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23(1) Yale L.J. 22 (Nov., 1913).

⁶⁴ *Davis v. Davis*, No.E-14496 (Blount Co. Tenn. Cir. Ct. Equity Div. Sept. 21, 1989) (WESTLAW, 140495).

⁶⁵ Transcript of Proceedings, *Davis*, Vol. II at 153.

⁶⁶ Jessica Wilen Berg, "Owning Persons: The Application of Property Theory to Embryos and Fetuses" 173 *Faculty Publications* (2005), (last visited on May 18, 2020), https://scholarlycommons.law.case.edu/faculty_publications/173.

treated as an asset over which the couple, being an equal contributor of gametes, holds joint ownership and therefore has an equal say over its disposition.⁶⁷ More simply expressed, it is treated as somewhat like a matrimonial asset. This appears to be a sound approach to follow, especially in the case of the absence of a contract dictating the same. An instance in which this stance was taken, as previously discussed, is in the case decided by the Supreme Court of Tennessee, wherein the judge observed that embryos neither squarely fit into the category of people nor that of property. Instead, he observed that it was best suited in an interim category for which the pre-embryo was entitled to some form of special respect, keeping in mind the viability of human life to arise from the same.⁶⁸ Under this approach, the most relevant and most potent property interest that exists is that of ownership.⁶⁹

Fundamentally, like all other biotechnological innovations that create or alter life, the science of IVF is also faced with much ethical backlash for its intervention in the procreation of life. Taking a property approach further dehumanizes and devalues the life potential that the pre-embryo holds. Moreover, from the perspective of family law principles, this dehumanization of a pre-embryo goes against the most fundamental of welfare principles that guide the decisions made in family law disputes. A property approach is definitely a cold approach in the sense that it does not consider the latter part of life of the pre-embryo.⁷⁰ The whole idea of treating biomaterials, such as embryos, as property based upon the notion of “separability”, which emphasizes that there is a difference between “us” and “our bodies”; and there is some sort of separation from the person who is the source of those materials.⁷¹ However, many

⁶⁷ Contrary to this, some scholar also argued that women have a greater interest in gaining the right to implant their frozen embryos because sperm are "cheap" and plentiful. For example see, Ruth Colker, "Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not" 47 *HASTINGS L.J.* 1063 (1996).

⁶⁸ *Ibid* at 178.

⁶⁹ *Ibid* at 209-210.

⁷⁰ However, scholars have attempted to clarify that the notion of property does not signify that the embryos can be treated as property in all respects, but rather it merely grants decision-making authority regarding the disposition of the fertilized egg. See, e.g. John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 454-455 (1990).

⁷¹ JE Penner, *The Idea of Property in Law* 111(OUP 1997).

commentators argue that a separability criterion is not sufficient enough to draw a distinction between the whole body and its separated parts for the proprietary purpose; and penetration of such separability notion will result in the wrongful commodification of the body by allocating them to the third parties for various purposes.⁷² Given that the very reason such disputes arise is because of one parent's desire to implant the pre-embryo and bring up the child in the near future, the lack of consideration of these essential factors makes one skeptical of the property approach. This seems like an immediate solution to the dispute at hand in ignorance of the implications that will foreseeably arise in the future.

C. Special Respect Position

This view has earned support from a couple of benches. In the *Davis*' case, the appellate court disagreed with the trial court's classification of the cryopreserved embryos as persons or children. On appeal to the Tennessee Supreme Court, the court affirmed that "[P]re-embryos are not, strictly speaking, either "persons" or "property," but occupy an *interim category* that entitles them to *special respect* because of their potential for human life. It follows that any interest that Mary Sue Davis and Junior Davis have in the pre-embryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the pre-embryos, within the scope of policy set by law."⁷³ Unlike the right to life position and the property approach, this approach focuses on striking a balance between the competing interests of both sides wherein it recognizes that the granting of the right to procreate to one individual results in depriving another of the right to avoid procreation. The way in which this conflict can be overcome is by striking a balance between these two interests or by identifying a hierarchy in the interests and giving them preferences accordingly. The supporters of this approach hold that when a couple decides to undergo an IVF procedure, it is done with the objective of creating and implanting a pre-embryo, at a later time. Given this, there is a bilateral exchange of promises between the

⁷² Muireann Quigley, *Property in Human Biomaterials—Separating Persons and Things?*, 32(4) Oxf. J. Leg. Stud. 659-683 (Winter 2012).

⁷³ *Davis v. Davis*, 842 S.W.2d 589 (Tenn. 1992); For details see, Igor A. Brusil, "Fifty Shades of Gray Area: Are Cryopreserved Embryos Property" 30 *Prob. & Prop.* 58-63 (2016).

couple and hence, a party's right to procreation should prevail over that of abstention.⁷⁴

VI. Arriving at a Middle Ground

From the detailed analysis of the implications of the various approaches that courts have been taking, it is evident that the issue is not black and white, that can be single-handedly resolved entirely by the adoption of any one of the abovementioned approaches. However, what the authors do feel would be the soundest most approach out of the existing approaches would be adopting a middle-ground approach such as the special position approach; though the same may be accompanied by various legal obstacles due to the shortcomings of the current legislative framework. Additionally, the authors feel that since courts have recognized pre-embryos are being a form of quasi-property, there is a need to consider more human considerations such as the future welfare of the pre-embryo while determining cases of disposition.⁷⁵ Since the matter is not merely a question of who gains ownership of the pre-embryo but rather a matter of who will nurture this child, employing certain family law principles would be quite reasonable and prudent while arriving at a decision in this regard. In terms of striking a balance between the right to procreate and the right to avoid procreation, it is beyond doubt a highly emotional matter for both parties. So long as one party is for and the other against, it is a stressful deal for the opposing parent to ignore the existence of his/her biological child. Hence, such decisions cannot be unilaterally decided on and given in the hands of one party, in detriment to the other. From this point of view, it may be claimed that contractual obligations are the most straightforward cut way of dealing with disposition⁷⁶, but that again is based on the premise of treating a pre-embryo as a

⁷⁴ Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86(7) U. Pa. L. Rev. 718 (1938).

⁷⁵ Considering the vast difference between the couples who use alternative reproduction to further their procreative decisions, as well as the physicians who aid them, and individuals who harm an embryo in violation of the progenitors' wishes. Because of the fundamental importance of procreative decisions, the author argued for recognition of legal status of the embryos. See generally, Lori B. Andrews, *The Legal Status of the Embryo*, 32 Loy. L. Rev. 357-409 (1986).

⁷⁶ In *Johnson v. Calvert*, 851 P.2d 776, 782-84 (Cal. 1993), the Court held that an intent-based or contractual analysis should be used to establish parentage in the context of surrogacy arrangements.

property, rather than a living being. The authors believe that perhaps the arena of property law is also not sufficiently suited to deal with an issue such as this, which involves emotional intricacies. Inevitably, the notion of the commodification of a pre-embryo occurs in pursuance of this approach, which the authors believe is unethical to human life. Therefore, the creation and adoption of an approach that recognizes pre-embryos as animate objects/quasi property and involves humane reasoning in the form of welfare principles will impact the future of the unborn child. In this approach, contracts that have been entered into by parties should not be interpreted as the conclusive determinant as to who gets the pre-embryos, but as a reflection of the parties' intentions that have to be jointly considered with other abovementioned factors.

VII. Summing Up

In the context of embryo-disposition, the rights and obligations of the parties must be fixed and regulated by the State.⁷⁷ Considering its living nature, adequate disclosures relating to preservation, implantation, or destruction of the embryos must be made to the regulatory bodies or enforcing agencies constituted under the law, including the financial and legal responsibilities of any resulting child.⁷⁸ The above discussion concerning the legal status of an unborn child and an embryo at the different stages of development within the existing legal framework in India establishes that a sub-person status is given to pre-life forms. The laws in place perpetuate the commodification of eggs and embryos, and therefore are more likely to be considered a property than a person. As scientific advancements continue to be made in creating a frozen embryo by way of an IVF procedure, it is time for the State to accord a balanced and reasonable legal status to frozen embryos addressing widespread legal issues such as abandonment, divorce, negligent destruction affecting frozen

⁷⁷ While initiating any such legislative mechanism the government should take for proactive role to ongoing advances in biotechnology, promote public debate, canvassing informed opinion to have a detailed legislation in such politically sensitive area. See, Alison Burton, "Women, the Unborn, the Common Law and the State" 5 S. Cross U. L. Rev. 188 (2001).

⁷⁸ Mary Ziegler, *Beyond Balancing: Rethinking the Law of Embryo Disposition*, 68 Am. U. L. Rev. 515 (2018).

embryos.⁷⁹ In the absence of such legal status and comprehensive legislation the courts will continue to be forced to confront the issues of personal injury, property, contract and probate, and application of family law at a time when embryo donation has already become the new normal in our modern life, and it will create more ambiguity rather than resolving the issues relating to a cryopreserved embryo.⁸⁰ It is not only the cryopreserved embryo that results in a child; the law must address the liabilities and responsibilities of medical and technical professionals by the specific legal norms and principles.⁸¹ This research highlights the contemporary legal issue unique to the assisted reproductive technology wherein couples deciding to dissolve their marriage post entering into the IVF procedure, contend for custody of the cryopreserved pre-embryos at the time of separation. The most significant controversy in this issue has been the debate on whether a pre-embryo is to be considered as a person or a property.⁸² Many commentators argue for strict regulations to prohibit the commercialization of embryos because of public welfare concerns stemming from cryopreservation. They also argue for prohibiting the sale of embryos or gametes for implantation, and require that the donation of embryos for implantation be anonymous to prevent genetic manipulation through selective reproduction for preserving the dignity of the human being.⁸³ Therefore, the jurisprudential determination based on family values and human rights, whether it can be recognized as property or person, has become much more relevant in order to preserve our social health, safety and well-being.

⁷⁹ Legal status of the embryo is particularly significant, especially to the divorcing couple in a marriage dissolution proceeding. For details See, Natalie K. Young, "Frozen Embryos: New Technology Meets Family Law" 21 Golden Gate U. L. Rev. (1991).

⁸⁰ See generally, Charles P. Jr. Kindregan & Maureen McBrien, "Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos" 49 Vill. L. Rev. 169 (2004).

⁸¹ Sufiya Ahmed, *Embryo Freezing and Donation: Ethical-Legal Issues*, Summer Issue, ILLI LAW REVIEW 134 (2018).

⁸² For an interesting analysis of changing dynamics in relation to property jurisprudence, see generally Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325-367 (1980).

⁸³ See generally, Tamara L. Davis, *Protecting the Cryopreserved Embryo*, 57 Tenn. L. Rev. 507-537 (1990).

Significance of TPDS in the Light of Indian Legal Regime - An Overview

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Abstract

Poverty, hunger and food insecurity omnipresent reality in India. Government has implemented many programmes, schemes and policies to control poverty and foster development. Right to food is a basic human right and deeply linked with right to live with dignity. Articles 21, 39(a) & 27 of the Constitution mandates the states to provide adequate means of livelihood, raise the level of nutrition and standard of living of the citizens. As per the data report of national and international agencies, a large number people in India are suffering from malnutrition, undernourished, underweight and stunted. In many cases Indian Judiciary has taken serious concern about the socio-economic offences. Targeted Public Distribution System is a major and wide-ranging poverty alleviation programme in India that leads towards the socio-economic welfare of the people. Essential foodstuffs like rice, sugar, wheat, kerosene and other goods are supplied to people through this system at a cheap price. Though it is commendable step to ensure food security to the needy people but could not achieve its desired results because of widespread corruption, leakage of funds and other reasons.

Key Words: *Human Development, Constitution, Malnutrition, Hunger, Judiciary, Targeted Public Distribution System, Corruption, Leakage.*

I. Introduction

Poverty and lack of development have been the main fact of human history. Poverty is a perpetual feature of Indian society and economy. Poverty reduction is the supreme objective of development planning in India. Since independence, our Government at different point of times has undertaken many programmes, schemes and enacted legislations for poverty alleviation as well human development, taking into considerations many factors like infrastructural development, development in health and education sector, creating scope for participation of women labour force, asset creation etc.

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Human rights are considered as inherent and inalienable for the existence of human being. The basic objectives of human rights are to protect human life and liberty, to preserve dignity of people, promoting healthy environment, maintaining equality etc. the right to food is one of the basic human rights strongly linked to the right to life. The 1990 UN Global Consultation on the Right to Development as a Human Right, stated that the right to development is an inalienable human right with the human being as the central subject to the right and that all the aspects of the right to development set forth in the Declaration of the Right to Development are indivisible and interdependent and these include civil, political, economic, social and cultural rights. India has been committed to ensure the protection and preservation of these rights.

II. Objective of the Study

The present study has been undertaken with the following objectives-

1. To know the some important provisions of NFS Act and EC Act in relation to Targeted Public Distribution System.
2. To highlight the important features of TPDS.
3. To the study and understand the Constitutional provisions and Judicial response in respect with PDS System.
4. To study and understand the impact of this System on the socio-economic welfare of the people in India.

III. Methodology

The methodology adopted in this study is mainly doctrinal. The study is based on secondary sources of data such as books, records, official documents of Governments, journals, magazines, News Paper Reporting and official websites etc.

Public Distribution System (PDS) is one of the significant and extensive poverty alleviation programmes in India that contributes towards the socio-economic welfare of the people. Essential commodities or foodstuffs like rice, sugar, wheat and kerosene are being supplied to the people through the PDS at reasonable prices. PDS is considered to be a sound policy for the people living below the poverty line. But this system could not achieve its desired results because of widespread corruption, leakage of funds and other reasons.

With the objective of reducing the financial burden of food subsidy and targeting it better and helpful to the really needy people, the Government of India adopted and re-launched the Targeted Public Distribution System from June 1997. The basic purpose of this TPDS is to provide food grains to people below poverty line at highly subsidized prices from the PDS. Under the TPDS, states are directed to formulate and implement proper and well built arrangements for the identification of the poor for delivery of food grains.

Under the TPDS, the Central Government is responsible for procurement, allocation and transportation of the food grains upto the selected store of the Food Corporation of India. The residual responsibility of the State Governments and Union Territories is that to distribute the food grains received from the Central Govt. to the eligible beneficiaries.

IV. Right to Food – A Constitutional Obligation

The Right to Food is inevitable element to life with dignity. Article 21 of the Constitution of India guarantees fundamental right to life and personal liberty. The conjoint reading of Articles 21, 39(a) and 47 explains the nature and obligations of the state in order to ensure the effective realization of this right. Article 39(a) of the Constitution, embodied as one of the Directive Principles which is fundamental in the governance of the country, requires state to direct its policies towards securing that all its citizens have the right to an adequate means of livelihood, while Article 47 talks about the duty of the state to raise the level of nutrition and standard of living of its people as a primary responsibility. Thus, from the above provisions it can be said that Constitution makes the right to food a guaranteed Fundamental Right which is enforceable by the strategy of the constitutional remedy provided under Article 32 of the Constitution.

A. Statistical aspects of Poverty

As per United Nation's Millennium Development Goal (MDG) Programme 270 million or 21.9% people out of 1.2 billion of Indians lived below poverty line of \$ 1.25 in 2011-12. This number is expected to reduce to 20.3% or 268 million people by 2020.²

According to the latest report of the Planning Commission, the number of people living below the poverty line has shrunk to 21.9 percent in 2011-12 from

²Poverty in India, (04 May 2016) http://www.en.wikipedia.org/wiki/Poverty_in_india.

37.2 percent in 2004-05 because of increase in per capita consumption. The latest numbers on poverty levels are dramatic, they show that the numbers of people below poverty line (as mentioned by the Tendulkar Committee) has shrunk from 37 percent of the population to 22 percent, in the seven years to 2011-12. This is an unprecedented diminish in poverty levels, some 40 percent of those who were poor in 2004-2005 were no longer poor seven years later.³

India's position in the achievement of global food security is not commendable. According to FAO 2018 report, 195 million people are undernourished populations in India. About 41 percent of the world's underweight children live in India, says UN Hunger Taskforce.⁴ One in every four people in India is hungry and every second child is underweight and stunted. According to the Global Hunger Index 2018 Report, India is among 45 countries that have serious level of hunger. India has ranked 55th among 77 countries in the Global Hunger Index.

B. Relevance of the Essential Commodities Act, 1955

The Essential Commodities Act, 1955 enacted by the Parliament to ensure the supply and distribution of certain commodities or products like foodstuffs, drugs, fuel, fertilizers, petroleum products, steel, paper etc. The Central Government can include new commodities as and when the necessity arises and excludes any item if the situation improves. The object of the Act being control of production, supply and distribution of such commodities, trade and commerce therein, in the interest of the general public, the supplies of such commodities to be maintained or increased securing the equitable distribution and availability thereof to the general public at fair prices are within the scope of the Act.⁵ Section 7 of the Act prescribed the punishment and it says that if any person

³ Government of India Press Information Bureau. Poverty estimates for 2011-12, (12 April 2016, 6:50 pm)

http://www.planningcommission.nic.in/pre_pov2307.

⁴The State of Food Security and Nutrition in the World. Safeguarding Against Economic Slowdowns and Downturns. Food and agricultural Organization of the United Nations, UNICEF, International Fund for Agricultural Development, World Health Organization, World Food Programme, 2019, (12 April 2016, 6:50 pm)<http://www.fao.org/3/ca5162en/ca5162en.pdf>.

⁵ B. K. SHARMA & VIJAY NAGPAL, *Treaties ON ECONOMIC & SOCIAL OFFENCES*, ALLAHABAD LAW AGENCY, 2007, p. 173

violates any provisions of Section 3 in relation to production, supply and distribution of essential commodities, he shall be punished with the maximum imprisonment seven years and also liable to fine.

V. The Importance & Significance of the NFS Act, 2013

The National Food Security Act, (NFSA) 2013 has enacted in the year 2013 marks a paradigm shift in the approach to food security from welfare to rights based approach. The primary objective of this law is to provide food and nutritional security by making food accessible both quantitatively and qualitatively at cheap rate to the unprivileged households with a hope to provide them proper nourishment.

The Act legally entitles upto 75% of the rural population and 50% of the urban population to receive subsidized foodgrains under Targeted Public Distribution System. About two thirds of the population therefore is covered under the Act to receive highly subsidised foodgrains⁶.

Under this Act, foodgrains is allocated at the rate of 5 kilogram per person per month for priority households category⁷ and at the rate of 35 kilogram per family per month for AAY families at a highly subsidized costs of Rs. 1/-, Rs. 2/- and Rs. 3/- per kilogram for nutri-cereals, wheat and rice respectively. Presently the Act is being implemented in all 36 States/Union Territories and covers around 81.35 crore persons. The annual allocation of foodgrain under

⁶ Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution, Govt. of India, (23 December,2019), <https://dfpd.gov.in/nfsa-act.htm>.

⁷Prior to the implementation of NFSA, there were mainly three types of Ration cards issued by the State Govt. such as APL, BPL and Antyodaya (AAY) Ration Cards. According to NFSA 2013, APL group and BPL group have been re-classified into two categories – Non-Priority and Priority. Thus NFSA prioritizes household's needs considering not only their income but other socio-economic imbalances in the society. "NFSA Ration Card Categories-Antodaya(AAY), Priority (PHH), Non-Priority (NPHH), State Priority, (23 December,2019), <https://www.lopol.org/article/nfsa-ration-card-categories>.

National Food Security Act and other Welfare Schemes is about 610 lakh metric tons.⁸

VI. Status of TPDS

In order to prevent the violation of the provisions of TPDS (Control) Order 2015⁹ and NFSA 2013, the Department of Food & Public distribution has implemented a Scheme on 'End-to-End Computerization of TPDS Operations' under 12th Five Year Plan (2012-2017) on the basis of cost sharing between Central Govt. and States/UTs. The activities mentioned in the Scheme such as digitization of ration cards and other databases of beneficiaries, computerization of supply-chain management, setting up of transparency portals and grievance redressal mechanisms and installation of ePoS (Electronic Point of Sale) devices at fair Price Shops and issuance of foodgrains through biometric authentication. Apart from this, all States/UTs have been also directed to insert the Aadhaar numbers in the ration Card database. The scheme would facilitate the removal of bogus or ineligible ration cards and better targeting of food subsidy, make availability of foodgrains to intended beneficiaries at Fair Price Shops (FPS), check leakage and diversions of foodgrains etc. As on 24th January 2017, 100% digitization of ration cards and 72.97% seeding of Aadhaar has been achieved and 1.78 lakh ePoS are currently operating¹⁰ at Fair Price Shops.¹¹

⁸ National Food Security Act" Ministry of Consumer Affairs, Food & Public Distribution, Press Information Bureau, Government of India, (23 December,2019), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=191101>.

⁹ MINISTRY OF CONSUMER AFFAIRS, FOOD AND PUBLIC DISTRIBUTION (Department of Food and Public Distribution) ORDER New Delhi, the 20th March, 2015 G.S.R. 213(E), (30 December,2019), s<https://dfpd.gov.in/nfsa-act.htm>.

¹⁰ 75% of the rural population and up to 50% of the urban population receiving highly subsidized food grains, Ministry of Consumer Affairs", Food and Public Distribution, Distribution of Food grains under TPDS. Government of India, Press Information Bureau, 03-Februray -2017 15:26 IST., (23 December,2019), <https://pib.gov.in/newsite/PrintRelease.aspx>.

¹¹ A Public Distribution Shop is also known as Fair Price Shop (FPS), is a part of India's Public Distribution System established by the Government of India which distributes rations at a subsidized price to the poor. Locally these are also known as Ration Shops or Public Distribution shops and mainly sell wheat, rice, sugar, kerosene and essential commodities at a price lower than the market price. In order to purchase goods from

A. Issues relating to Irregularities in TPDS

As per the report of various studies made by the academicians, organizations and other agencies it has been revealed that targeting mechanisms such as PDs are prone to large inclusion and exclusion errors. TPDS suffers from large leakages of food grains during transportation to and from ration shops into the open market. In an evaluation of TPDs, the erstwhile Planning Commission found 36% leakage of PDS rice and wheat at the all-India level¹².

The Food Corporation of India is the main government agency which is authorized to store the food grains in the central pool. FCI does not have adequate storage capacity to accommodate the huge food grains. As a consequence, Food Corporation hires space from government agencies and private parties. In one occasion, the Comptroller and Auditor General (CAG) stated that there is sub-optimum utilization of the existing storage capacity available with FCI and states. It is noticeable that inadequate storage will result in wastage of food. Therefore, proper infrastructure of storage is much required for logistic management. The FCI officials have sincere responsibility to perform their duties in regard to inspections and preservations etc. of food grains¹³.

A study conducted by the Planning Commission itself, it is revealed that, leakages from the Targeted Public Distribution System are higher than those under the Public Distribution System(PDS). Leakages and diversion to unintended beneficiaries have indicated that only 42 percent of the subsidized grain released from the central pool actually reach to the poor people under

these shops beneficiaries should have valid Ration Card. These shops are regulated throughout the country jointly by Central & State Govt. it is the largest distribution network in the world. For details see, "Public Distribution System", (23 December,2019) https://en.wikipedia.org/wiki/Public_distribution_system.

¹²Public Distribution System, functioning, limitations, revamping, (23 December,2019) <https://www.civilserviceindia.com/subject/General-Studies/notes/public-distribution-system-functioning-limitations-revamping.html>.

¹³Public Distribution System, functioning, limitations, revamping (23 December,2019) <https://www.civilserviceindia.com/subject/General-Studies/notes/public-distribution-system-functioning-limitations-revamping.html>.

TPDS. Various estimates have shown that leakages under the PDS at 31-37 percent.¹⁴

As per the statement of Planning Commission Official, “Certain kind of leakages, however, cannot be captured and actual leakages may well be above the 58 percent that the study found”.¹⁵

VII. Judicial Observations

A good number of cases reveal that the judiciary in India has taken a serious concern of socio-economic offences. In *PUCL (PDS Matters) v. Union of India*,¹⁶ the Supreme Court focused on the Wadhwa J CVC report, the report mentioned that PDS which is the largest food distribution network in the world suffers due to corruption. The apex court directed the Governments to give immediate measures so that poor people can get benefit out of this system.

In *Swami Achyutananda Tirth v. Union of India*,¹⁷ a PIL filed to frame a comprehensive policy on the production, supply and safety of healthy, hygienic and natural milk. The Supreme Court showed concern about adulteration of milk and its hazardous effect on public health.

In a significant case of *Nimmagadda Prasad v. CBI*¹⁸, while refusing to grant bail to the accused, the apex court held that economic crimes unlike other crimes are committed with cool calculations and deliberate design with an eye on personal profit regardless of consequences to the community. Keeping in mind that economic crimes are a class apart and those involved are big shot people, the decision of the Court is appreciable.

VIII. Conclusion

Crimes in whatever form or category they may fall in impact mankind in multifarious ways. Socio-economic crimes signify mainly such kind of crimes

¹⁴PDS leakage more in targeted scheme”, Mamata Singh, New Delhi, Last updated February 6, 2013, (23 December,2019) <https://www.business-standard.com/article>.

¹⁵ Ibid.

¹⁶ (2013) 2 SCC 663.

¹⁷ 2013(5) SCALE 23.

¹⁸ (2013) 7 SCC 466.

and which affect the health and moral principles of the public and affect the economy of the country. Some examples can be unfair completion, black marketing, breach of contracts, adulteration of food and drugs etc. The most fundamental of all socio-economic rights is an individual's right to food. Food is inevitable for survival and basic right for all individuals. The plight of poor people is miserable, where protection of rights and interests of each and every individual is priority. The Targeted Public Distribution System is a commendable effort of government responding to nutrition and food security for the needy people. If implemented effectively this system may reduce the levels of hunger and malnutrition in India.

In Search of an Identity

Dr. Shraddha Subedi¹

Abstract

Human being is always in need of identity, he is always ascribed to a particular sex or gender. The moment he is born he is accorded a gender. His or her gender always plays an important task for his identity. This gender identity becomes more important when necessary biological development starts to take place in his body. The situation becomes gruesome when biological development may not be in compliance with the biological development which is acceptable to the society. The norm of the society is only to accept the male and female version of the gender and nothing more than that. Gender recognition, apart from the male and female, has never been talked about. In common parlance, the excluded gender is the transgender or the third gender and more precisely, the LGBT. The third gender group has horrific stories to share with and it is an irony that we, as society have never understood them, be it in terms of their biological needs, their existence, their privacy and encompassing all, their right to life.

The present paper makes an endeavour to analyse the socio-legal condition of the transgender and how far they have reached in their battle to live with dignity.

Keywords- *Transgender, LGBTQ, Social recognition, Legal issues*

I. Introduction

The subject of providing transgender has started to gain momentum in recent years. The transgender has been in this world together with us; however, the only thing was that they were hidden from the society and family. The identity of transgender was never given recognition as the other gender of our society. Our society was habituated to recognize only the male and the female gender. However, in recent times, the issues relating to transgender have become prominent, the transgender are now not only fighting for their existence but for their rights in the field of family, employment, health and political rights. The transgender owe all the chaos in their body to biological development which is entirely the gift of chromosomes, hence, we as member of this society; have no right to ridicule the transgender.

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II. Evolution of Transgender

To trace the history of transgender, we find that the transgender has existed since the 9th century B.C., which basically comprises of *Hijras* (biological males who reject their masculine identity in due course of time), *Enuch* (emasculated male and intersexed to a person whose genitals are ambiguously male like at birth), *Kothis* (biological males who show varying degree of femininity), *Aravanis*, (hijras of Tamil Nadu), etc. Our society has categorized transgender to belong to different socio-religious cultural group. We find their mention in early Vedic texts, Manu Smiriti texts and even in mythological stories. The earliest text of Hindu law, the Manu Smiriti explains the biological origin of the three sexes: “A male child is produced by a greater quantity of male seeds; a female child by the prevalence of the female; if both are equal, a third-sex child or boy and girl twin are produced; if either are weak or deficient in quantity, a failure of conception results. In Vedic astrology, the nine planets are each assigned to one of the three genders: the third gender, *trithya-prakriti*, is associated with Mercury, Saturn and in particular *Kethu*. In the Puranas there are also references to three kinds of divas of music and dance; *apsaras* (female), *ghandharavas* (male) and *kinnars* (neuter).

Lord Rama, in the epic Ramayana, was leaving the forest upon being banished from the kingdom for 14 years. He turns around to his followers and asks all the ‘men and women’ to return to the city. Among his followers, the *hijaras* alone felt not bound by his order and decide to stay with him as they were neither men nor women. Impressed with their loyalty, Rama sanctioned them the power to confer blessings on people on auspicious occasions like child birth and marriage, and also at inaugural functions, which, it was supposed to set the stage for the custom of *badhai* in which *hijaras* sing, dance and confer blessings.

In yet another tale, where Aravan, the son of Arjuna and Nagakanya in Mahabharata offer to be sacrificed to Goddess Kali to ensure the victory of the Pandava in the Kurushethra war, the only condition that he made was to spend the last night of his life in marriage. Since no woman was willing to marry one who was doomed to be killed, Krishna assumes the form of a beautiful woman called Mohini and married him. The *hijaras* of Tamil Nadu considered Aravan their progenitor and call themselves *Aravanis*. The Mughal Empire too had their presence. In certain cases, they occupied high positions and guarded the holy places of Mecca and Medina. During the British regime their positions changed

drastically, they were denied the rights and privileges they were habituated to. They were criminalized and civil rights were denied to them. Draconian laws like “The Criminal Tribes Act 1871” were passed against the transgender (*hijaras*) community. This Act treated the transgender person as criminal and penalized for dressing up as women etc. and this legislation was ultimately repealed in the year 1949.

III. Gender and Sexual Orientation

Before we dwell upon the matter related directly to transgender, it becomes important to discuss matter which is ancillary to it. In the first instance, we need to talk about two terms – sex and gender, which would help us in understanding the term transgender. We are often in the habit of using the term “gender” and “sex” synonymously in everyday speech, however, the two words carry with them two different connotations. Sex is more of a biological phenomenon wherein an individual may be a male or a female. It also refers to reproductive capacity or potential of human being, the sperm producers are said to be of the male sex while the egg producers are said to be female sex. While determining sex, the chromosomes play an important role and hence, biological importance is attached to sex. On the other hand, the term gender is derived from the word “*genre*” meaning “kind” or “type”, it being a more cultural phenomenon giving it the term “men” and “women”. Taking this background into consideration we talk about only two genders either a male or a female, where these two genders carry sexual desire or orientation towards a member of the opposite sex. Apart from this, we could also have “*heterosexual*” wherein desire is towards a member of different genders; ‘*bisexual*’, where the desire is towards a member of any gender, ‘*homosexual*’, where the desire is towards a member of the same gender. Likewise, ‘*intersex*’ refers to a spectrum of condition for those born with non-standard sexual biology of a male or a female. To illustrate, a male body due to genetic irregularities may cause it to look like a female at birth or it may happen that babies are born with genitals that may look like a female at birth or look like a mixture of typically male and typically female shapes. Such variation in the human body is often referred to as ‘*intersex*’. The medical term used for such variation is known as “Disorder of Sexual Development (DSD)”. There are a number of more such biological phenomena which are not talked about or rather people shy away to talk on such topic due to social stigma

attached to such kind of sexuality.² However, a transgender does not fall into any of the above categories. Study reveals that transgender may have sexual orientation towards any one.

Having dwelt with certain pertinent biological phenomena which could help us in understanding the concept of transgender, we now come to the most fundamental question as to who are transgender. The term 'transgender' most generally refers to any and all kinds of variation from gender norms and expectation. It refers only to those who identify with a gender other than the one they were assigned to at birth or who seek to resist their birth-assigned gender without abandoning it, or to those who seek to create some kind of new gender location.³ If we happen to go by the dictionary meaning, 'transgender' means 'of relating to, or being a person whose gender identity differs from the sex the person had or was identified as having at birth; especially of relating to, or being a person whose gender identity is opposite the sex the person had or was identified as having at birth' – *Merriam Webster*. In transgender communities, people commonly use the words 'transmen', 'transgender men', 'transsexual men' when they are talking about people who were born with female bodies but consider themselves to be men and live socially as men (FTM). Likewise, the words, 'transwomen', 'transgender women' or 'transsexual women' refer to people born with male bodies who consider them to be women and live socially as women (MTF).

For the purpose of our study, having defined the term 'transgender', it now becomes imperative to outline how we make use of English pronoun in the present context. As we know that for distinguishing a male and a female the English language uses the pronoun 'he' or 'she', 'her' or 'him' respectively. In case of transgender it becomes difficult to address with these pronouns. The use of pronoun 'it' is not very correct for humans and to be more specific it does not indicate a gender, referring basically to a non-living entity. In recent times, new

² Transvestite, who wear clothes generally associated with a social gender other than the one assigned to them at birth, or cross dresser which is similar to Transvestite, or they could be called queer which was initially the term used for homosexual, transsexual – refers to those persons who have or are in the process of changing their anatomical sex by a surgery.

³ SUSAN STRYKER, *TRANSGENDER HISTORY 19* (Seal Press Publication, Perseus Book Group, 2008)

words have been coined like '*ze*' or '*sie*' in place of 'he' or 'she' or the word '*hir*' instead of 'his' or 'her'. Sometimes, in writing, people use the unpronounceable word *s/he*'.⁴

IV. Social Issues and Complexity of the Problem

The recognition of 'right of choice' as a universal principle, gives the transgender community the right to choose their identity which is crucial for their existence in this universe. The right to choose an identity according to their need gives them an opportunity to face the innumerable identities which come in conflict with their right to existence. If an identity is denied to them, they face psychological disorder as their justification for identity is the truth that they are swallowed in a wrong body. As human being, they face inner conflict with self and hence, dread social interaction which hinders their normal mental and physical growth.

The gender-variant groups are kept under an umbrella term of 'transgender' and often the acronym LGBT (lesbian, gay, bisexual and transgender) is used for referring the sexual minorities. Though the term 'transgender' is in vogue to refer to different sexual minorities, but the transgender activists are not happy for inclusion of all sexual minorities under the term 'transgender'. The reason varies from different personal and political aim. For example, some transsexuals who undergo sex reassignment surgery are not compassionate towards those who do not assume such surgery and yet seek government recognition. Transsexuals who undergo surgery feel that it is imperative for them to obtain such surgery because they are trapped in a wrong body and hence to move ahead in life they should submit to the surgery which in turn would help them to overcome distress and impairment in the society. In contrast the use of the term "intersex" under transgender community is also detested. The rationale for excluding is that this "inter-sex" state is more of a biological occurrence which is apparent at the birth of the child and which can be corrected by medical science whereas in case of a transgender situation, it is said to be more of a psychological phenomenon not manifest until the age of 3 or older, hence the transgender activist avoid the inclusion of inter-sex in this category.

Hence, what we find is that the 'transgender' when used as an identity label rather than a broadly descriptive term, often refers to those who live

⁴*Id.*

permanently in a social gender they were not assigned to at birth, might or might not use hormones, might or might not have chest surgery, but who usually don't have genital surgery. The right term to use in reference to any particular person really isn't in the eye of the beholder – it is determined by the person who applies it to him/her or self.⁵

The impact of anonymous life of transgender is that they face social exclusion and marginalization. This social exclusion may be within the family as well as in the society. This exclusion is linked to self-perception and sense of being human. This may then contribute to depression, anxiety and inferiority complex where they may find it difficult to face the society and their friends and hence commit suicide. Not only this, many transgender people lack legal recognition of their affirmed gender and therefore, are without identity paper that reflects who they are. Without appropriate identity papers, transgender people are excluded from education and employment. Transgender people face discrimination, violence and lack of access to appropriate health care. All these factors contribute to increasing the vulnerability of transgender people to HIV. Further, transgender people also experience bullying and harassment at school, which, apart from the physical and psychological efforts can undermine learning opportunities and educational achievement, thus affecting their employment prospects.⁶

V. Legal Recognition of Transgender

At the outset, having defined and discussed the social issues which govern the transgender and now that the term transgender is of a wide import including within its ambit the Gay, Lesbian, Bisexual, Cross-Dressers and also the queer. The Supreme Court,⁷ through its recent decision used the term '*Self-Identified Gender*' to understand the transgender identity. In this context, now it becomes significant to deal with the legal recognition which has been granted to the transgender in India because we are governed by the 'Rule of Law' where equality pervades the entire thread of justice. In the grant of legal recognition, we might still remain behind because much has to be done for this community.

⁵Ibid.

⁶The GAP Report 2014, www.unaids.org/sites/default/files/media at p 5&7, accessed on 25-04-2017.

⁷National Legal Services Authority v. Union of India and Others, (2014) 5 SCC 435 (India).

The Constitution talks about equality under Article 14 of the Constitution where this equality extends to persons. Article 15 of the Constitution uses the expression 'citizen' and 'sex' with reference to prohibition of discrimination and Article 21 of the Constitution has used the expression 'person'. All these expressions do not point to a specific gender or identified gender only. Non-application of these constitutional provisions to the transgender cannot be ruled out and we also cannot say that these provisions are applicable to male and female only. The Constitution in its true spirit prohibits discrimination on the ground of sexual orientation and gender identity and discrimination by way of exclusion, prohibition, penalties and restriction would defeat the very purpose of equality before law and equal protection of law. The transgender have every right to be recognized as part of this social structure and they deserve protection of their right and social existence.

In the international field, the United Nations has been influential in protecting the rights of the third gender, the UDHR, the ICCPR and the ICESCR talk about the inherent dignity of the human being under various Articles. In recent years, the Yogyakarta Principle, were developed by a distinguished group of human rights experts. They drafted, developed, discussed and reformed the principles in a meeting held at Godjah Mada University in Yogyakarta, Indonesia from 6 to 9 November 2006 which culminated into Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Minorities Orientation and Gender Identity. The Principles provides that human beings of all sexual orientation and gender identities are entitled to the full enjoyment of all human rights. The Principle casts an obligation upon the State that it shall embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislations and ensure the practical realization of the universal enjoyment of all human rights.

United Nations governing bodies, Regional Human Rights Bodies, National Courts, Government Commissions, and Council of Europe have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the obligations of states to respect, protect and fulfill the human rights of all persons regardless of their gender identity. Keeping this principle in mind, many countries have come forward and endorsed for recognizing the rights of transgender persons who have undergone either complete or partial

SRS. These countries include United Kingdom, Netherland, Germany, Australia, Canada, Argentina, etc. To cite one example, the U.K has passed the General Recommendation Act, 2004. The Act provides legal recognition to the acquired gender of a person and it also highlights the rights and entitlements in various aspects of marriage, parentage, succession, social security and pension etc.

In India, the question of applicability of Section 377 of the Indian Penal Code arises towards homosexual and transgender. Section 377 criminalizes same-sex conduct putting them under “Unnatural Offences”.⁸ Section 377 of the IPC has been justified on the ground of preserving public decency and morality. In this pretext, Section 377 IPC was vehemently misused and it was used by the law enforcement agencies to harass and exploit the homosexual and transgender. However, this penal provision was challenged in a case before Delhi High Court⁹. The judgment had far reaching consequence, because, it recommended the deletion of the provision. However, further episode took place to justify the issue related to the retention of the same provision and the Supreme Court has been at its best to give them what has been due to the very citizens of this country.

VI. Judicial Response to the Issue of Transgender

In India the judiciary has always played a proactive role in protecting the rights of endangered and susceptible lot and in this context, it would mean the transgender too. The doors of the judiciary have been knocked on various occasion to ponder upon their rights. In a landmark decision of *National Legal Service Authority*, (2014), the Apex Court identified the transgender and coined the word ‘self-identified gender’.

The issue of transgender was brought before the Court for the first time in 2001¹⁰ wherein the Court, for the first time, acknowledged the pathetic treatment meted out to ‘homosexuals’ who are one of the identities of transgender. In this case, a non-governmental organization, the NAZ Foundation filed a writ petition

⁸Section 377 of Indian Penal Code, 1860

⁹ NAZ Foundation V. Govt. of NCT of Delhi and others, WP (C) NO 7455/2001, Delhi High Court; Decision on 2nd July 2009.

¹⁰NAZ Foundation V. Govt. of NCT of Delhi and Others, WP (C) NO 7455/2001, Delhi High Court; Decision on 2nd July 2009.

in the Delhi High Court challenging the legitimacy of Section 377 of IPC, claiming that the law violates Article 14, 15, 19 and 21. A Bench consisting Chief Justice B.C. Patel and Justice Badar Durez Ahmed dismissed the petition in 2004, and the petitioners approached the Supreme Court. The Supreme Court directed the High Court to examine the matter, deeming it worthy of consideration. Hence, the Delhi High Court reconsidered the petition. The Delhi High Court in its judgment “decriminalized consensual sex between homosexuals and transgender which simultaneously served as a source of protection from maltreatment and viciousness at the hands of the law enforcement officials”. The High Court stressed the importance of upholding the values of equality, tolerance and inclusiveness in Indian society by stating “...if there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of ‘inclusiveness’. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a role in society for everyone. Those perceived by the majority as ‘deviants’ or ‘different’ are not on that score excluded or ostracized.”

This decision of the High Court was challenged in Suresh Kumar Koushal¹¹ wherein the Supreme Court opined that act which fall within the ambit of section 377 IPC can only be determined with reference to the act itself and to the circumstances in which it is executed. It went on to add that Section 377 IPC does not criminalize a particular people or identity or orientation and only identifies certain acts which, when committed, would constitute an offence. Such prohibition regulates sexual conduct regardless of gender identity and orientation. The panel of two Supreme Court judges deciding the case allowed the appeal and upturned the decision of NAZ Foundation, finding its declaration to be ‘legally unsustainable’. The Supreme Court ultimately found that Section 377 of IPC does not violate the Constitution and dismissed the Writ Petition filed by the Respondents

¹¹Suresh Kumar Koushal and Another V. NAZ Foundation and Others, Civil Appeal No 10972 of 2013 at p. 61

In a matter before the Supreme Court¹², the National Legal Services Authority, constituted under the Legal Services Authority Act, 1997, to provide free legal services to the weaker and other marginalized sections of the society, had come forward to advocate their cause by filing Writ Petition No. 400 of 2012. The contention put forth before the Court was that, “whether non-recognition of the identity of *Hijaras*, a Transgender Community as a third gender, denies them the right to equality before the law and equal protection of law guaranteed under Article 14 of the Constitution and violates the rights guaranteed to them under Article 21 of the Constitution”. The Court was apprised of a number of facts by the counsel and other government agencies that appeared before the Court. The Supreme Court taking care of the situation declared the transgender as ‘third gender’ for the purpose of safeguarding and enforcing appropriately their rights guaranteed under the Constitution. The Court observed thus “by recognizing transgender as third gender, this court is not only upholding the rule of law but also advancing justice to the class, so far deprived of their legitimate natural and constitutional rights.” It is, therefore, the only just solution which ensures justice not only to TG but also justice to the society as well, Social Justice does not mean equality before law in paper but to translate the spirit of the Constitution, enshrined in the Preamble, the Fundamental Right and the Directive Principles of State Policy come into action, whose arms are long enough to bring within its reach and embrace this right of recognition to the transgender which ultimately belongs to them.”¹³

Justice A.K.Sikri has exhaustively described the term “Transgender” as an umbrella term which embraces within itself a wide range of identities and experiences including but not limited to pre-operative/post-operative transsexual people who strongly identify with the gender, opposite to their biological sex i.e., male/female. Such a person carrying dual entity simultaneously, would encounter mental and psychological difficulties which would hinder his/her normal mental and even physical growth. It is not easy for such a person to take a decision to undergo SRS procedure which requires strong mental state of affairs. However, once that is decided and the sex is changed in tune with psychological behavior, it facilitates spending the life smoothly. Even the

¹² National Legal Services Authority V Union of India and Others (2014) 5 SCC 435

¹³Ibid.

process of transition is not smooth. The transition from a man to a woman is not an overnight process.

The Court in this case acknowledged the mental and psychological harassment the transgender face and also the, deplorable socio-economic condition they encounter. The court was of the opinion that the appropriate authority should consider the situation of the transgender in consonance with the judgment pronounced. It was this decision that led to introduction in the Lok Sabha in 2nd August 2016 The Transgender Person (Protection of Rights) Bill 2016. The Bill seeks to protect the rights of the transgender as well as their welfare and for matter incidental thereto. The Bill still awaits the process of becoming an effective legislation.

It appeared that things were working well in protecting the rights of the transgender especially after the decision of the Supreme Court in *National Legal Services Authority case*¹⁴ and *the decision in NAZ Foundation*¹⁵ which took the view that Article 15 of the Constitution prohibits discrimination on several grounds including sex and that the time has come to give an expansive interpretation of sex and hence it prohibits discrimination on the ground of sexual orientation. The court further opined that “where a society displays inclusiveness and understanding, the LGBT’s can be assured of a life of dignity and non-discrimination”. And that in this context Section 377 of IPC turns out to be violative of Articles 14, 15 and 21 of the Constitution in so far as it criminalises consensual sexual act of adults in private”. A review petition was filed which was dismissed then on April 3, 2014 a curative petition was filed to be heard in open court which was finally referred to Constitutional Bench. This matter was heard and disposed of in 2018¹⁶. Before this case was decided, the Supreme Court dealt upon the concept of “right to privacy - being a fundamental right or not “in *K.S.Puttaswamy v. Union of India*¹⁷ the court while upholding this dynamic notion also held that sexual orientation is essential component of right guaranteed under the Constitution which are not formulated on majoritarian favor or acceptance. The opinion expressed on the Right to Privacy

¹⁴ Ibid

¹⁵ NAZ Foundation V Govt. of Delhi & others (2009) 111 DLR 1

¹⁶ Navtej Singh Johar & ors v/s U.O.I WP (Crim) No. 76 of 2016. Other Writ Petitions were joined with this case.

¹⁷ K.S.Puttaswamy and another V Union of India others (2017) 10 SCC. 1

case also helped in formulating the decision of the Navtej Singh Johar case. The present judgment rendered by a Five Judge Bench elaborately dealt with far reaching consequences of Section 377, through their separate judgment however concurring in their opinion. The court did not deny the fact that for all these years injustice was being meted out to them and that they had suffered due to ignorance and the human tendency of not accepting. The community has suffered due to the indifferent attitude posed by the society. The nation should break the silence and stigmatization in the name of morality which prohibits their relationship in the ground that they are against the order of the nature. Justice Nariman observed that persons who are homosexual have a fundamental right to live with dignity, which, in the larger framework of the Preamble of India, will assure the cardinal constitutional values of fraternity such groups are entitled to be treated in society as human beings without any stigma attached to them and that Section 377 in so far as it criminalizes homosexual sex and transgender sex between consenting adult is unconstitutional.¹⁸ Similar views were expressed by Justice(Dr) D.Y.Chandrachud, who observed that “the choice of whom to partner, the ability to find fulfillment in sexual intimacies and the right not to be subjected to discriminatory behavior are intrinsic to the constitutional protection of sexual orientation” and that section 377 is unconstitutional. The judgment no doubt would have far reaching consequence in compensating the injustice the LGBTs have suffered in the recent past, the gates being now open for the legislature to do the needful.

VII. Conclusion

The Constitution of India under Article 15(3) of the Constitution provides that a person should not be discriminated on grounds of sex only. This duly includes persons of different sexual orientation. LGBT are humans and this identity needs to be recognized starting right from the family because it is the family which makes them the first victim of abhorrence. The family needs to understand their biological need and helplessness of their being different, instead of making them to leave the house and become the victim of the society. The issues related to LGBT have gained much substance in recent years starting very much with Suresh Koushal and National Legal Services Authority Case, though the application of both the case is different. And the recent Supreme Court judgment on Right to Privacy changed the application of privacy to

¹⁸Ibid at p 97

transgender also. The LGBTs were very happy when the Supreme Court changed the dimension of Right to Privacy. The Supreme Court in the recent judgment held that discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. It is the mind-set of the people that needs to be changed and the groups need to be brought in the mainstream. Society and the law which governs us should not destroy an individual's sexual autonomy and orientation and allow them to live as we also.

Accountability of Civil Servants under Indian Laws: A Critical Analysis

Ekta Gahlawat¹

Abstract

The civil servants are accountable to both political-executive and citizens for ensuring transparency and honest policy implementation. The administration in India has acquired a vast power in the name of socio-economic development. Thus, the chances for administrative abuse are more. So, there is need to establish effective institution (Ombudsman) for the efficient working of the administration. This article focuses on the accountability of the civil servants under the Indian laws. First part of this article deals with the introduction of the civil servants. The second part, describes the provisions related to the civil servants under Indian Constitution (Article 308-311). The third part deals with the accountability of civil servants towards public and political-executive. It also describes the relevant recommendation of committees. Fourth, the most important part deals with the mechanisms to control the civil servants so as to prevent the abuse of power under the administration. The fifth part of the article deals with the lacunas which prevent the proper implementation of all these mechanisms. Finally, the article concludes that Lokpal has provided effective implementation of all mechanisms which can help to eradicate the menace of corruption

Keywords: *Civil Servants, Accountability, Administrative, Constitution, Lokpal*

I. Introduction

Civil service is the backbone of administration. The political executive is temporary and changeable periodically. Civil servants have fixed tenure. During the British rule in India, civil service played dominant role in administration.² This system continues after the commencement of the constitution of India underlying the important role of civil services, the prime minister while addressing the nation on its sixty-third Independence day on August 15, 2009

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² PETER CLANE, AN INTRODUCTION TO ADMINISTRATIVE LAW, 200-246 (Clarendon press, 1996).

from the rampart of red ford said the benefits of developmental schemes cannot reach the people without the assistance of civil servants³. The civil servant is indispensable to the governance of the county in the modern administrative age. In the welfare state like India, it is the duty of civil servants to execute policies and programmes of the government and also to provide necessary inputs for future policy planning. The bureaucracy thus, helps the political executive in the governance of the country.⁴ The civil servants have played important role in ensuring the continuity of the administrative department. However, they are dictated by rules and procedures which are formulated taking their advice into the account.

The concern of the people in the civil society is that their government must function transparently. In the many countries around the world, civil servants exercise many powers in discharging their functions based on the authority incorporated to them. All the democratic countries like America, Russia etc, have developed systems and procedures of the checks and balances on the powers of the administration so to ensure their proper use of power. These democratic systems can broadly be termed as mechanisms that promote accountability and the transparency. To ensure the transparency and the accountability for performance is not a simple task in government department; there are various complexities involved in making civil servants answerable for the outcomes. The public officials have a close relationship with the citizens through the variety of services it provides. So, the maintenance of ethical behaviour is very important aspect to them. They should act professionally and honestly use their power while delivery their service. For, the good Government system it is very important that their systems and sub-systems of Governance are efficient, economically and ethically. In addition to this the public officials must act in just, fair and citizen-friendly manner. The administration must be accountable and promoting transparency. To ensure that there must be good governance, it lies in the effective implementation of its schemes and programmes for the attainment of the goals in the society. The concept of the good governance implies accountability to people and their involvement in decision making, implementation of the public policies. In this perspective the concept of accountability become very important components of the good

³ K. C. JOSHI, THE CONSTITUTIONAL LAW OF INDIA, 655 (Central law publication, 2016).

⁴TIMOTHY EDICOTT, ADMINISTRATIVE LAW, 226 (Oxford University Press, 2015).

governance as well as of good administration in the developed countries. The Transparency ensure that the citizen should know exactly what is going on in the administration and what is rationale of the decisions taken by the Government servants. The Minister of the government department has taken the advice of the civil servants for the smooth functioning of the government. They assist the ministers of the country regarding the proper flow of work of the department and also solutions of the different administrative problems arising in the normal routine of the government department. Although enacting the policy is the duty of the minister of the country but even for that he is totally depend upon the executives whose experience provide the necessary knowledge for policy. Warren Fisher has defined the role of public officials as “Determination of the policy is function of ministers in the country and once a policy is determined it is the unquestionable business of the public officials to carry out that particular policy with the same goodwill.”⁵

While decisions are being formulated, it is primary responsibilities of the civil servants to make available all the important information to their chiefs and to do this without any kind of fear irrespective of whether the advice thus tendered may or not accord with the minister’s point of view. Furthermore, it is only the civil servants who prepare the answers which the ministers have to give in the both houses (Loksabha & Rajyasabha). The civil servants only prepare the speeches of the ministers. Thus, for all these works to be done, civil servants are required the knowledge and experience but the responsibility lies with the minister. It is very important aspect that they should be accountable to the government. The public views in the today’s society is that the civil servants are unresponsive to the needs and concerns of the people in the society and the government does not address this problem because the mechanisms to ensure accountability of the civil servants do not appear to be adequate.

Keeping in view the significance of civil services, the constitution makes elaborate provisions relating the services under the union and the states. Part 14 (article 308 to 313) deal with matters of interpretation, recruitment and conditions of services, tenure, major penalties and protection, creation of new

⁵ H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, 1250 (Universal Law Publishing, 2008).

all India services and varying and revoking conditions of service of officers of certain services.⁶

II. Provision related to Civil Servants under Indian Constitution

In order to ensure the progress of the country it is essential to strengthen the administration by protecting civil servants from political and personal influence. So provisions have been included in the Constitution of India to protect the interest of civil servants along with the protection of national security and public interest. Part XIV of the Constitution of India deals with Services under The Union and The State.

Article 309 empowers the Parliament and the State legislature to make laws regulating the recruitment, and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State respectively. such law subject to the provision of the constitution. Proviso to article 309 makes interim arrangement and gives power to the President or such person as he may authorise to make rules for the above purposes until provision in that behalf is made by or under an Act of Parliament⁷. similar power given to the governor of a state to make rules with regard to the employees of the state.

According to Article 310, Members of the services, the civil services of the centre and the all India services or persons holding defence or civil posts under the centre, hold office during the pleasure of the president. Similarly members of the civil services of a state or persons holding civil posts under a state hold office during the pleasure of the governor of the state. Article 310 in-corporate the doctrine of pleasure in our constitution. This doctrine has been borrowed from the British system of governance, where in any person holding a post under the crown holds his/her office during the pleasure of the crown. This doctrine applies to all the services under the union and the state, including the All India services, in India.

Article 310(1) will not apply where the constitution expressly provides for secured tenure. The Supreme Court Judges (Art. 124), Auditor-General

⁶ N. NARAYANAN NAIR, THE CIVIL SERVANT UNDER LAW AND THE CONSTITUTION, 276 (The Academy of Legal Publications, 1973).

⁷ M. P. JAIN, INDIA CONSTITUTIONAL LAW, 1558 (Lexis Nexis, 2010).

(Art.148), High Court Judges (Arts, 217, 218), a member of a Public Service Commission (Art 317), and the Chief Election Commissioner have been expressly excluded by the Constitution from the rules of pleasure⁸.

Cl. (2) of article 310 especially empowers the government to enter into service contracts with persons having special qualifications.⁹ The doctrine of pleasure can be qualified or limited by such service agreements. Thus, in order to secure the services of any person, the government may include in the service agreement a provision for compensation in case of premature abolition of the post or retirement not due to misconduct.¹⁰

Article 311 is the bulwark of civil servants. This is an important guarantee which severely restricts the doctrine of pleasure contained in articles 310(1) of the constitution. The object of imposing the restrictions on the doctrine of pleasure is to see that the bureaucracy may not become autocracy, and exploit the savants. To save the civil servants, certain restrictions are framed in the constitution. Article 311 envisages three major penalties which may be inflicted on a civil servant. They are dismissed, removal and reduction in rank. Article 311 gives more protection to a civil servant against these penalties. Article 311 gives more protection to a civil servant against these penalties. Reduction in rank does not end the services of an employee and has been treated differently. Article 311 (1) provides that no person who is a member of a civil service of the union or of an all India service or a civil service of a state or holds a civil post under the union or a state shall be dismissed or removed by an authority subordinate to that by which he was appointed. Article 311 (2) no civil servant can be removed or dismissed or reduced in rank, except after an enquiry in which he has been made aware of the charges against him and also given a reasonable opportunity to defend himself. Under article 311 civil servants cannot be removed without hearing. It expressly talks about the principles of natural justice.

⁸ I. P. MESSY, ADMINISTRATIVE LAW,590 (Eastern Book Company, 2017).

⁹ PETER CLANE, AN INTRODUCTION TO ADMINISTRATIVE LAW, 200-246 (Clarendon press, 1996).

¹⁰ WENDEY VAN DUYN, ADMINISTRATIVE LAW GUIDE FOR PARALEGALS, 269 (Wiley Law Publication 1994).

Legislative power as well as rule making power under article 309 is subject to 310 which contains “doctrine of pleasure” and article 311 which provides for certain safeguards. Article 311 controls both the articles 309 and 310. The directive principles of state policy incorporated in the Indian Constitution in the part 4 imply the certain duty to be taken by the state government while framing their policies or for the governance while, the directives of the state policy are not enforceable in the court of law. There is the need to examine that there is any other Article of the Constitution of India which will facilitate the adoption of accountability for the public officials in the system. It is the Article 350 in the Indian Constitution which stated that: Every person shall be entitled to submit a representation for the redress of any grievance of any officer or authority. It represents the accountability.

III. Accountability towards Public

The primary concern of a citizen in a good civil society is that, their government must be fair and good. For a government to be good it is essential that there system of governance is efficient, reasonable, fair and citizen friendly.¹¹ The civil servants have always played a pivotal role in ensuring continuity and change in administration. However, they are dictated by the rules which are formulated taking their advice into account. It is the Rule of Law rather than the Rule of Man that is often blamed for widespread of abuse of power and maladministration among government servants.¹² The concept of the Accountability also means answerability by the public officials is that the questions asked of civil servants have to be answered by them. There are two types of questions can be asked. First one is under the Right to information Act merely seeks information and involves one way transmission of information and the data. It promotes transparency & accountability of the civil servants in the Government. The second type of the question is not just as to what was done but why and therefore involves a two ways flow of information with the people of the society usually providing a feedback in respect of working of government departments.

¹¹ S. K. DAS, CIVIL SERVICE REFORMS AND STRUCTURAL ADJUSTMENT, 235 (Oxford University Press, 1998).

¹² H.W.R.WADE, ADMINISTRATIVE LAW, 346 (Oxford University Press, 2014).

The civil servants are accountable to both the political-executive in charge of the department and to the citizens for ensuring responsive, transparent, and honest policy implementation. but in practice the accountability is vague and generalised nature. It is expected that a civil servant would be imaginative, dynamic, effective, committed, objective, independent, fair, reasonable, and non- political.¹³ However, unfortunately the popular image of a civil servant has gone done considerably. Today, the general impression is that civil servants have become political, useable, and pliable and that there is corruption, indifference and inertia in the services, besides mal administration, non-administration and abuse of power. Today, the discretionary power in the hands of the administrators is widely misused. Many people view that civil services has become politicised over a period of time. There is a growing political interference in administration. Thus this led to administrative deviance. The continuous increase in the instances of maladministration undermines the public faith.¹⁴

A. Relevant Recommendations of Committees

The “SANTHANAN COMMITTEE”¹⁵ made a range of recommendations to fight the menace of corruption. These are red tape, administrative delay, lack of transparency, scope of personal discretion. It further stated that the reason for corruption are where officers on behalf of state engage with private company to perform specific task or public work and these companies collusion with officers indulge in corrupt practices. It also recommended the constitution of the central vigilance commission and changes were also suggested in article 311 of constitution for conducting disciplinary proceeding against civil servants. It was also recommended that offering of bribes should be made a substantive offence.

The first Administrative Reform Commission¹⁶ recommended that the departments and organisations which were in direct charge of development

¹³ NIRANJAN PARIDA, *THE ROLE AND IMPORTANCE OF CIVIL SERVANTS INDIA- A SOCIO LEGAL STUDY*, IJL 24 (2015).

¹⁴ NEIL PARP WORTH, *CONSTITUTIONAL & ADMINISTRATIVE LAW*, 167 (Oxford University Press, 2016).

¹⁵ <https://www.civildaily.com/reforms-needed-in-civil-services-2nd-arc-report-and-other-committee-recommendations/> (retrived on 1 feb., 2020).

¹⁶ PETER CLANE, *AN INTRODUCTION TO ADMINISTRATIVE LAW*, 200-246 (Clarendon press, 1996).

programmes should introduce performance budgeting. The A.R.C also recommended the establishment of two special institutions for the proper functioning of civil services, The Lokpal to deal with the complaints against administrative acts of the ministers and secretaries to the government at the centre and Lokayuktas to deal with such complaints in states.

The second Administrative Reform Commission¹⁷ was constituted in 2005 and submitted its 4th report on “Ethics in Governance” in January 2007. The terms of reference of this (Commission regarding corruption are:-

- *Strengthening pro-active vigilance to eliminate corruption and harassment to honest civil servants.*
- *Addressing systemic deficiencies manifesting in reluctance to punish the corrupt.etc*

The second administrative reform commission in its 10th report pertaining to values and ethics of civil services in India recommended drafting bill on ethics to give code of ethics a statutory basis in the form of “civil services bill”. The commission recommended to upholding the constitutional spirit the civil servants shall be guided by following values:

- *Impartiality and non partisanship.*
- *Objectivity*
- *Adherence to the highest standards of integrity and conduct.*
- *Dedication to public service .etc*

The HOTA Committee¹⁸, 2004 recommended that section197 of CRPC may be amended to protect the honest civil servants from the malicious prosecution of harassment. It also recommended that the code of ethics should be drawn up for civil servants incorporating the core values of integrity, merit and excellence in public services. Another Recommendation of HOTA Committee was that each department should be lay down and bench mark services to be delivered, methods of grievance redressal and public evaluation of performance.

¹⁷ I. P. MESSY, ADMINISTRATIVE LAW,590 (Eastern Book Company, 2017).

¹⁸ Committee on Civil Service Reforms: P.C. Hota Committee (uly 2004).

IV. Mechanisms to control civil servants

There are several mechanisms to control civil servants in India and to prevent corruption, maladministration and abuse of power under the administration such as:

A. Prevention of Corruption Act, 1988¹⁹

Corruption remains one of the leading problems plaguing the country. Corruption was inherited along with the political emancipation of India in 1947. To eradicate the evils of maladministration and corruption done by civil servants, Indian penal code, 1890 was the main tool. In 1974 itself, the government realised that time perceived that corruption had reached a level which required a special law other than penal code to deal with it. Hence, prevention of corruption act was codified. Finding that bribery and corruption had considerably increased after 2nd world war and many officers had amassed huge wealth and Ipc and Crpc were inadequate to tackle this problem. The prevention of corruption act declared such corrupt act, offences as taking bribe, misappropriation, obtaining pecuniary advantage and abusing official position, it define a new offence “criminal misconduct” in discharge of duty is punishable by 1-7 years imprisonment.

B. Delhi Police Act, 1946²⁰

Before 1963, there existed the special police establishment under Delhi police establishment act 1946 to investigate offences committed by central government. In 1963, by an executive resolution the government established CBI under the act for the purpose of investigation.

C. The Commissions of Inquiry Act, 1952

To enable administrations to effectively discharge its multifarious functions it needs to exercise broad powers of conducting investigation and inquiry into various matters. The primary purpose of this technique is to collect information with a view to decide the further course of action in a given situation, or to find correctives to a given problem. Administrations, in today’s complex socio

¹⁹ M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, 1019 (Lexis Nexis, 2017).

²⁰ I. P. MESSY, ADMINISTRATIVE LAW, 590 (Eastern Book Company, 2017).

economic life have increasingly come to depend on investigations to determine facts. It is correct to say that an action taken in ignorance of full facts may not only fail to rectify the given situation, but may even create more problems. Sec 3 of the act says that central and state government may appoint a commission of inquiry for the purpose of making inquiry into any definite matter of public importance to enable the administration to discharge effectively the functions entrusted to it. The phrase “definite matter of public importance” is of wide import and enables the government to launch inquiries practically into any matter. It has powers of a civil court while trying a suit under CPC. The inquiry made by commissions is not judicial/ quasi-judicial. Its only function is to investigate the facts and record its findings and then report to the government in order to enable it to make up its mind as to what legislative or administrative measure should be adopted to eradicate the evil. It is simply a fact finding body, without any power of adjudication. The purpose of the inquiry is to maintain the purity and integrity of administration in the country.

D. Central Vigilance Commission Act, 2003²¹

To curb the corruption practices in the administration the Indian government created central vigilance commission in 1964. It was done on the recommendation of the SANTHANAN COMMITTEE. The CVC is empowered to undertake an inquiry into any transaction in which public servant is suspected/ alleged to have acted in a corrupt manner. In Vineet Narayan & others vs. union of India & another²², popularly known as Jain Hawala, Hon’ble Supreme Court gave directions regarding the superior role of central vigilance commission. It laid down guidelines to ensure independence and autonomy of the CBI and ordered that CBI be placed under the supervision of the central vigilance commission.

To ensure independence of CVC from governmental interference, the parliament has enacted central vigilance act, 2003 in such a way that the commission exercised all the powers and functions entrusted to it so that it will not be inconsistent with this act. The CVC is empowered to undertake the inquiry or investigation into any complaint of corruption, gross negligence,

²¹ K.C. JOSHI, AN INTRODUCTION TO ADMINISTRATIVE LAW, 287 (Central law publications, 2006).

²² Vineet Narayan & others v. Union of India & another, AIR 1998 1 S.C.C. 226.

misconduct or other kind of malpractice on part of civil servants. It has only advisory jurisdiction. It cannot perform adjudicatory function and it cannot inquire into complaints of corruption except to limited extent. When commission gets complain, it refers them to the CBI for investigation. This body will have to send the report to commission after investigation. It exercise superintendence over the functioning of CBI and give direction to CBI for superintendence in so far as it relate to inquiry of offences under prevention of corruption act, 1988.

E. Right to Information Act, 2005²³

Government openness is a sure technique to minimise administrative faults. Brandeis J rightly said, “A government which revels in secrecy... not only acts against democratic decency but busies itself with its own burial”. Information is a core value of democracy and good governance. The parliament has enacted the right to information act in 2005. This right is derived from our fundamental right of freedom of speech and expression under article 19 of the constitution. If we do not have information on how our government and public institutions function, we cannot express any informed opinion on it. The object of the act is to promote openness, transparency and accountability in the administration.

Right to information entitle every citizen to have access to the information controlled by the public authorities. The act also encourages the administration to make voluntary disclosure in relation to their system of functioning and thereby sow’s the seeds of transparency. The need to enact a law is to make an open and transparent government. Section 4 of the act cast duty on public authority to maintain all its records and particulars. Sec 8 of the act provides restrictions on information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interest of state, relations with foreign states, forbidden information, disclosure of which would cause a breach of privilege of parliament or state legislature etc. It was enacted to radically alter the administrative ethos and culture of secrecy and to bring new era of transparency and accountability in governance. The act is meant to harmonise the conflicting interests of government to preserve the confidentiality of sensitive information with the right of citizens to know the

²³ C.K. TAKWANI, ADMINISTRATIVE LAW, 503 (Eastern Book Company, 2017).

functioning of the governmental process in such a way as to preserve the paramount of democratic ideals.

F. The Lokpal and Lokayukta Act, 2013²⁴

There was a need to establish an ombudsman system in India for the efficient working of the administration. M.C. Setalvad also in his speech at the all India lawyers' conference held in 1962, suggested the idea of establishing an institution similar to that of an ombudsman because administration in India has acquired a vast power in the name of socio-economic development. Thus, the chances of administration abuse are more. There was need because this will describes and establishes the important principles and characteristics which create the distinctive culture and ethos of the civil service in the India. If it is properly drafted it can provide a clear framework within which the civil service can carry out its distinctive roles and duties. It describes the legal basis for the legislature to express the important values it wants in the civil service department. It is also the lasting initiative towards better performance and accountability of the civil servants in the India. Basically it is a concept of Sweden. Administrative reform commission report 1966, propounded a scheme for setting up Lokpal and Lokayuktas in India. The word Lokpal is derived from the Sanskrit word "Lokpala" which means people caretaker. Government of India accepted the recommendation and in 1968 the first bill was introduced regarding establishment of Lokpal in India, but eventually it was allowed to lapse. Eight attempts were made but bill was not passed. Finally, In 2011 with efforts of civil society members (Anna Hazare, Arvind Kejriwal, Prashant Bhushan etc) the Jan Lokpal bill was drafted. The salient features of the proposed bill include constitutional position for Lokpal and Lokayukta. The purpose of the Bill is to provide a statutory basis for the Civil Services in India as enshrined in Article 309 and Article 312 of the Constitution of India, to regulate the appointment and conditions of the service of public officials to lay down the basic values of Civil Services.

It is established to inquire the allegation of corruption against public servants. The act mandates for creation of Lokpal for the union and Lokayukta for states. The jurisdiction of the Lokpal is very wide because it includes ex and sitting

²⁴ <http://www.legalserviceindia.com/legal/article-50-lokpal.html> (retrieved on 1 Feb., 2020).

Prime Minister, Members of Parliament; Group A, B, C, D officers, chairperson, officers and employee of the board, company, society or trust established by the act of parliament wholly or partly.²⁵ But it will not inquire the P.M. if the allegation of corruption is related to international relation, external/internal security or public order, Atomic energy and space. The allegation on P.M. can be taken up for inquiry on when full bench of Lokpal consist chairman and all its members consider the initiation of inquiry & at least 2/3 members approve it. The Lokpal has following powers:

- It has power of superintendence over and gives directions to CBI.
- It has powers of confiscation of assets, proceeds, receipts and benefits arisen or procured by means of corruption in special circumstances.
- It has power to authorize CBI for search and seizure operations connected to such case.
- It has power to recommend transfer or suspension of public servant connected with allegation of corruption.
- It has power to give directions to prevent destruction of records during preliminary inquiry.
- The inquiry wing of the Lokpal has been vested with the powers of a civil court.

There are 3 wings of the Lokpal so that to ensure smooth functioning of it, such as:

Inquiry Wing

Lokpal would constitute it, which is to be headed by director of inquiry. Its functions are to conduct inquiry in to the offences committed by public servants punishable under prevention of corruption act, 1988.

Prosecution Wing

Lokpal by notification would constitute a prosecution wing. This wing will be headed by the director of prosecution for the purpose of prosecution of public servants. Director of prosecution files the case before in accordance with findings of investigation report.

Special Courts

²⁵ R.B. JAIN, THE PUBLIC ADMINISTRATION IN INDIA: 21 Century Challenges for Good Governance 152 (Deep & Deep Publications Pvt. Ltd., 2004).

On the recommendation of the Lokpal, the central government shall constitute special courts to hear and decide the cases arising out of the prevention of corruption act, 1988 or under Lokpal act. Such courts are required to finish each trial within a period of one year from the date of the case in the court. This one year period may be extended for 3 months by recording in writing.

V. Gap Analysis

Although in India there are several control mechanisms to prevent the practice of maladministration and misfeasance but all these mechanisms are subject to the several loopholes which prevent their proper implementation. In prevention of corruption act 1988, punishment system is not effective. The punishment awarded to the wrongdoers is less as compared to the acts committed by them. In the commission of inquiry act 1952, after inquiry the report submitted to the appropriate government. The appropriate government lay it down to the house of parliament/ state legislature along the memorandum of action taken within 6 months of the submission of report which is the biggest drawback because it is difficult to follow such kind of procedure and report of commission have also not binding force.²⁶

There are several issues in the constitution and the powers granted to central vigilance commission. When it comes to the appointment of the chief vigilance officer, the system is not transparent and clear. In 2010, the issue was brought to the limelight when PJ Thomas was appointed as the chief vigilance commissioner on the recommendation of selection committee headed by prime minister of India. The selection of the new CVC was marked by controversies, after the Sushma Swaraj, who was part of selection committee, objected to the choice of Thomas, citing the pending charge sheet against him. The Supreme Court quashed the appointment of Thomas as the chief vigilance commissioner noting that the selection committee did not consider the relevant material pending on the pending charge sheet.

Another important issue which also shows the lack of accountability and transparency in the administration is in the case of CBI vs. CBI²⁷, the Hon'ble Supreme Court relied upon the Jain Hawala case, set aside the centre's decision

²⁶ I. P. MESSY, ADMINISTRATIVE LAW, 590 (Eastern Book Company, 2017).

²⁷ <https://www.livemint.com/Politics/nllRikkA7cRDBETxEcpkIM/CBI-vs-CBI-SC-reinstates-Alok-Verma-as-CBI-director-sets-a.html> (retrieved on 3rd feb., 2020).

divesting CBI director Alok Verma and sending him on leave. Reinstating Mr. Verma, the apex court said that any further decision against Mr. Verma would be taken by the high powered committee, which selects and appoints the CBI director. And while hearing the case it also questioned the government's haste in removing Alok Verma without consulting a selection committee as is the rule. Another main problem in CVC is that it is an agency of executive not of the legislature. The commission does not have any investigation mechanisms and cannot investigate any complaints and should depend on other bodies for their investigation report.

The another important issue which shows the lack of the accountability of public officials is when the report of the Auditor General on the 2G spectrum submitted in the 2010 describes the loss caused to the Central government of the India about Rs.1.76 lakh crore. The CBI decision to arrest the former Telecommunications Secretary Mr. Sidhartha Behura along with the Minister A. Raja in relation with this case revives an debate over the connections between the public officials and the politician. The issue shake the entire bureaucracy especially the officers of the Indian Administrative Service and the Indian Police Service. Till now there is nothing that suggests that Mr. Behura had been dishonest and received monetary benefits from the companies. Only the Central Bureau Investigation charge sheet will lead to the process of confirming his integrity in the department. There is a chances that while being honest he had been more than willing to do the Ministers bidding in order to stay in the good books because he had worked under Mr. Raja earlier in the Ministry of the Environment.

Even after the 14 years, since the right to information act, 2005 was passed; there are several drawbacks in implementation and lack of accountability among some public officials. People fear of being victimized on using the right to information act. To stop the victimisation of activists, there is need to amend the right to information act, 2005. People misuse the act to obtain information and blackmailing the government officials. Another criticism is the large chunk of population is unaware about the act and its rules. The act also reinforces the controlling role of the government official, who retains wide discretionary powers to withhold information. The recent amendment is the stringent criticism

that was to be made allowing file noting except those related to social and developmental projects to be exempted from the purview of the act.²⁸

Though the Lokpal and Lokayuktas act, 2013 has offered a productive solution to combat the never ending menace of corruption and prevent maladministration but at the same there are loopholes which need to be corrected. It is not free from political influence as an appointing committee itself consist parliamentarians. The biggest loophole in the act is delay in its implementation after 6 years of enactment, the Lokpal appointed in 2019 whose chairman is former judge of Supreme Court Pinaki Chandra Bose. Further, the act provides no concrete immunity to the whistle blowers. There is no foolproof way to determine whether the person who is appointed as the Lokpal will remain honest throughout.

The biggest lacuna is the exclusion of judiciary from the ambit of the Lokpal. The act provides for the Lokpal itself dealing with the complaints against its officers, which seem to be contrary to very rationale for setting up an independent body. The Lokpal is also not given a constitutional backing. There are no adequate provisions for appeal against the Lokpal. The powers, composition and scope of Lokyuktas do not find any mention of the act. There is a long way to go to ensure transparency and crusade against corruption are still on and yet to reach its destination.

VI. Conclusion and Suggestions

It is rightly said by Publius Cornelius Tecitus that “the more corrupt the state, the more laws”. Any good system of administration, in the ultimate analysis, has to be responsible and responsive to the people.²⁹ There is the huge problem of transparency and accountability of the anti corruption agencies. The motive behind implementation of Lokpal and Loksyukta act, 2013 is that people can raise their voice against the maladministration without any fear. The institutions like CVC and CBI have failed to ensure accountability and transparency towards administration. The concept of the Accountability of the executive arm

²⁸ MAHABIR PRASAD JAIN, CHANGING FACE OF ADMINISTRATIVE LAW INDIA AND ABROAD 45-78 (NM Tripathi, 1982).

²⁹ HENRY WILLIAM RAWSON WADE, ADMINISTRATIVE LAW, 345 (Oxford University Press, 2004).

of the government to Parliament and to the citizens is of course the fundamental feature of a democracy.

Even though Lokpal has provided the effective implementation of all the mechanisms but a single Lokpal act will not help to solve the problem of maladministration. In fact, there is no single law which can help to eradicate this malice. There are many bills pending in the parliament which are complimentary to the Lokpal act and promote transparency and accountability of public servants which are necessary to eradicate the evil of corruption. So, there is necessary to effective implement all those bills and effective implementation of them.

To stop the menace of corruption and to tackle the problem of corruption, the institution of ombudsman should be strengthened so that to check abuse of power in the administrative system. More right to information and transparency is required along with the great leadership. The government of India should address the issues based on which people are demanding a Lokpal. Merely in addition to the strength of the investigative agencies will enhance the size of the Indian government but not improve the governance system. The slogan of the less government and more governance should be followed in letter. The ombudsmen appointments must be transparently done so as to reduce the chances of the wrong people getting in. The biggest loophole is the exclusion of judiciary from the ambit or sphere of the lokpal. So there is a need to include the judicial system in the sphere of lokpal for its proper functioning and for maintaining the accountability.

“Corruption will be out one day; however, one may try to conceal it: & the public can as its rights and duties, in every case of justifiable suspicion, call its servants to strict account, dismiss them, sue them in a court of law, appoint an arbitrator to scrutinize their conduct, as it likes”

-Mahatma Gandhi

Illegal Migration and Issues of Citizenship in India: A Critical Review

Dr. Diganta Biswas¹

Abstract

The citizenship is a subject of entry 17 of Union List of Seventh Schedule of the Constitution and the Govt. of India has amended the Citizenship Act, 1955 in a number of occasions to address the issue relaxing the norms. Migrating population from one country to another is a global problem. Not only India but some developed countries like United Kingdom, the United States of America and Canada are facing the heat of migration particularly from Asian countries. In India, the situation is really grim. Ever since the birth of Bangladesh in 1971, there has been continuous influx of Bangladeshis into India from our Eastern Border while More than 80,000 refugees from West Pakistan, largely Hindus, have been living in Kashmir since Independence without citizenship rights. This paper aims to study the different issues in connection with illegal immigration and scope of citizenship.

Key words: *Migration, Citizenship, Integration and Assimilation, Allocation of Resources, Expulsion.*

I. Introduction

Illegal migration is a problem even for the resourceful countries. The probable result of the free movement of individuals across the border may be considered “casual aggregates” devoid of any internal cohesion and incapable of being a source of patriotic sentiments and solidarity.²In India the picture of illegal migration is very grim. Our population growth is already high, 17.19% in a decade according to last Census of 2011.³With more than 130 crores of

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²Walzer, M., 1983, Spheres of Justice. A Defense of Pluralism and Equality, New York: Basic Books.

³Available at https://www.business-standard.com/article/economy-policy/census-2011-population-growth-rate-declines-to-17-111040100090_1.html, accessed on 25th June, 2020 at 1.14 PM.

population our resources are over stretched, infrastructures are bursting to the seams. There is water shortage, fewer works for hands. The trains and roads are overcrowded. While there is urgent need of curbing our growth rate of population through the adoption of the policy of birth control, the influx of illegal migrants from bordering countries is aggravating problem. This paper aims to discuss the various effects of illegal migration through border and study the system of immigration in India in the backdrop of the Citizenship Amendment Act, 2019.

II. Reasons for the Inflow of Migrants

Illegal migration is caused by several factors, together with economic condition, overpopulation, trade liberalisation, and wars in countries of origin. It will have serious impacts on the economy of the destination country similarly as on the lives of the illegal migrants themselves. The continued influx of Bangladeshi nationals into India has been on account of a range of reasons together with religious intolerance and economic. There are several push and pull factors responsible for continuous influx of illegal immigration in India which are as under-⁴

The important **Push Factors** on the part of include: -

- steep and continuous increase in population;
- the sharp deterioration in land-man ratio;
- low rates of economic process significantly poor performance in agriculture;

The **Pull Factors** include: -

- ethnic proximity and kinship enabling simple shelter to the immigrants;
- porous and simply negotiable border with Bangladesh;
- better economic opportunities;
- interested religious and political elements encouraging immigration;

III. Meaning of Migration and Consequences thereof

The probable result of the free movement of individuals across the border would be “casual aggregates” devoid of any internal cohesion and incapable of being a

⁴ Report filed by the Government of India in Writ Petition No. 125 of 1998.

source of patriotic sentiments and solidarity.⁵ Generally, the illegal migrants may be classified as- a) *those who came with valid visa/documents and overstayed*; b) *those who came with forged visa/documents*; and c) *those who entered surreptitiously*. In India, the term illegal migrant has been defined as⁶a foreigner who entered India-

- (i) without a valid passport or other prescribed travel documents or
- (ii) with a valid passport or other prescribed travel documents but remains in India beyond the permitted period of time.

Now, let's have a discussion over some of the most important effects:

A. Social Consequences

Issue of integration and assimilation

Integration does not strictly entail assimilation⁷; it can be accomplished through additive acculturation, a process whereby immigrants learn what is necessary to adapt to their new environment without forfeiting the practices and values that constituted their identity prior to immigration. Public order arguments includes inter alia, the arguments relating to its cultural integrity or way of life. The integration principle may be subject to two qualifications. **First and most obviously** the principle applies *only other things being equal and other things may not be equal* if the very lives of prospective immigrants are under threat and there is no reasonable way of allaying the threat other than by granting them refuge, a compelling moral argument to do so will hold regardless of how difficult it might be to integrate them. The **second** is *the chauvinism of the native community – its racism or religious prejudices*, for example – and the moral relevance of that fact might be captured in an anti-chauvinist proviso.⁸ Migration across state boundaries necessarily involves moving from one

⁵Walzer, M., 1983, Spheres of Justice. A Defense of Pluralism and Equality, New York: Basic Books.

⁶Section 2(1)(b), The Citizenship Act, 1955.

⁷ Assimilation involves leaving one culture and joining another. And so what we count as assimilation depends on what we take “culture” to mean in this connection.

⁸ Eamonn Callan, IMMIGRATION, INTEGRATION, AND ASSIMILATION, Available at <http://www.mit.edu/~shaslang/mprg/CallanIIA.pdf>, accessed on 27th March, 2020 at 4.55 PM.

political and societal culture to another, though for more privileged individuals it may involve little or nothing in the way of assimilation. Hence, after Micheal Dummett, any country has the right to limit immigration if its indigenous population is in danger of being rapidly overwhelmed.⁹

Multicultural Issues

Emmanuel Kant spoke about perpetual peace as one of the most important objectives to be attained by the states. When different sections of people with different cultural backgrounds join together, a cultural shock may be experienced by the communities which many a time leads to conflicts. In this context the idea of **Multiculturalism** views that cultures, races, and ethnicities, particularly those of minority groups, deserve special acknowledgement of their differences within a dominant political culture.

a. Crisis of Identity

A person crossing the international border illegally firstly will suffer from crisis of identity. Prof. Amartya Sen expressed, that the identity as a basis of violence due to- *Civilizational clash, Religious rivalry, West and anti-West, Cultural differences, Opposition to globalisation*. He opined, at the background of ‘Clash of Civilizations’, it is doubtful whether these civilizations actually clashes and the basis for unique categorisation into different civilizations is under question.¹⁰The inflow of immigrants creates a crisis of identity among the native section of individuals. Their cultural survival many a time tends to in jeoardy, their political management is weakened and their employment opportunities are undermined by such illegitimate migration.

b. Cultural integrity and Assimilation

Integration and Assimilation of the migrated section of people with the community migrated, is a very important issue to address. The two primary theories or models of multiculturalism as the manner in which different cultures are integrated into a single society which is namely, the “melting pot” and the

⁹ Michael Dummett, *On Immigration and Refugees*, Routledge, 2001, p. 52

¹⁰ Amartya Sen, *Identity and Violence: The Illusion of Destiny*, Penguin Books. London, 2006.

“salad bowl” theories. The *melting pot theory* of multiculturalism assumes that various immigrant groups will tend to “melt together,” abandoning their individual cultures and eventually becoming fully assimilated into the predominant society. The tragedy of multiculturalism revolves round a story of two confusions. The first is the confusion between cultural conservatism and cultural freedom and secondly, ignoring the fact that, while religion may be an important identity for people there are other affiliations and associations – political, social, economic – that people also have reason to value.¹¹ For example, the U.S. [Indian Reorganization Act of 1934](#) forced the assimilation of nearly 350,000 Indians into American society without any regard for the diversity of Native American heritage and lifestyles.¹²

c. *Cultural Conflicts*

Sometimes, the problem of illegitimate migration led to agitation and unrest and the government even fails of the govt. to retort the same. The outstanding example of this can be the Assamese unrest beneath the leadership of All Assam Gana Sangram Parishad (AAGSP) and every one Assam Student’s Union (AASU). Assam witnessed governmental instability, sustained direct action campaigns and worst cases of ethnic violence. Assam Accord was the results of this agitation.¹³ The *salad bowl theory* describes a heterogeneous society in which people coexist but retain at least some of the unique characteristics of their traditional culture. Like a salad’s ingredients, different cultures are brought together, but rather than coalescing into a single homogeneous culture, retain their own distinct flavours. In the United States, New York City, with its many unique ethnic communities like “Little India,” “Little Odessa,” and “Chinatown” is considered an example of a

¹¹ Amartya Sen, Multiculturalism: unfolding tragedy of two confusions, available at <https://www.ft.com/content/c90fd530-313b-11db-b953-0000779e2340>, accessed on 26th march, 2020 at 12. 37 PM.

¹² Available at <https://www.thoughtco.com/what-is-multiculturalism-4689285>, accessed on 26th march, 2020 at 12. 01 PM.

¹³ J. Das & D Talukdar (2016) Socio-Economic and Political Consequence of Illegal Migration into Assam from Bangladesh. J Tourism Hospit 5: 202. doi:10.4172/2167-0269.1000202 at pg. 3.

salad bowl society.¹⁴The French and the Germans are very doubtful of the wisdom of the approach, and Denmark and the Netherlands have already reversed their official policies. Even Britain is full of misgivings.¹⁵The Commission on Integration and Cohesion anointed by the government of India to study the status of the illegal Bangladeshi immigrants in India, particularly in Assam, found that even after staying such a long time in Indian territory, tension sometimes exists with the presence of high levels of migration mix with alternative kinds of social exclusion like economic condition, poor housing etc. Sometimes, the problem of illegitimate migration led to agitation and unrest and the government even fails of the govt. to retort the same. The outstanding example of this can be the Assamese unrest beneath the leadership of All Assam Gana Sangram Parishad (AAGSP) and every one Assam Student's Union (AASU). Assam witnessed governmental instability, sustained direct action campaigns and worst cases of ethnic violence. Assam Accord was the results of this agitation.¹⁶

Collective consciousness

International migration produces a “mismatch between citizenship and the territorial scope of legitimate authority” with “citizens living outside the country whose government is supposed to be accountable to them and inside a country whose government is not accountable to them”.¹⁷The “political community is probably the closest we can come to a world of common meanings. Language, history, and culture come together to produce a collective consciousness”¹⁸. Politics itself, moreover, as a set of practices and institutions that shape the form

¹⁴ Longley, Robert. "What Is Multiculturalism? Definition, Theories, and Examples." ThoughtCo, Feb. 11, 2020, [thoughtco.com/what-is-multiculturalism-4689285](https://www.thoughtco.com/what-is-multiculturalism-4689285). accessed on 26th march, 2020 at 12. 01 PM.

¹⁵ Amartya Sen, Multiculturalism: unfolding tragedy of two confusions, available at <https://www.ft.com/content/c90fd530-313b-11db-b953-0000779e2340>, accessed on 26th march, 2020 at 12. 37 PM.

¹⁶ J. Das & D Talukdar (2016) Socio-Economic and Political Consequence of Illegal Migration into Assam from Bangladesh. J Tourism Hospit 5: 202. doi:10.4172/2167-0269.1000202 at pg. 3.

¹⁷ Available at <https://plato.stanford.edu/entries/citizenship/>, accessed on 21st January, 2020 at 5.02 PM.

¹⁸Walzer, M., 1983, Spheres of Justice. A Defense of Pluralism and Equality, New York: Basic Books.

and outcome those distributive conflicts take, “establishes its own bonds of commonality”.¹⁹ The probable result of the free movement of individuals would be “casual aggregates” devoid of any internal cohesion and incapable of being a source of patriotic sentiments and solidarity. In a world of neighbourhoods, membership would become meaningless. The upshot of this is that we should recognize the political community’s right to regulate admission with a view to securing its cultural, economic and political integrity. To reject political communities’ right to distribute the good of membership is to undermine their capacity to preserve their integrity.

Environmental Plunder

Offering of citizenship even to the illegal migrants may cause Environmental plunder which has the potential to create a 'disguised violence' to environment of a nation as a whole as it slowly but surely poisons the lives and livelihood indirectly. Those who are privileged make their fortune by means of hidden process. At this, the owners of such resources must be responsible to cause pollution, congestion, noise and accidents; the poor suffer the most. In a majority of times, it has been noticed that the massive areas of forest land were encroached upon by the immigrants for settlement and cultivation which may ultimately cause to environmental degradation.

Difficulty to spot the Illegitimate Migrants

Many a time, due to the similar language is spoken by illegitimate migrants' e.g. illegal migrants living in Assam, Tripura and West Bengal, it becomes difficult to identify and deport the illegal migrants in the region.

B. ECONOMIC CONSEQUENCES

Capability of Allocation of Resources

The division of the world into states is arguably justifiable on functional grounds, to the extent that states appear as “first approximations of optimal units for allocating and producing the world’s resources” (Coleman and Harding 1995, 38). The State being the trustee of natural resources must not cause

¹⁹Walzer, M., 1983, *Spheres of Justice. A Defense of Pluralism and Equality*, New York: Basic Books.

burden to the allocation of resources which may cause over- exploitation to meet the demand of a recognised citizen. If we think that states matter simply as local units of efficient production and distribution, then this would be the main consideration when evaluating immigration policies. The Roman origin, public trust doctrine, states that and the public at large is the real owner of the sea shores, running waters, air, forests and ecologically-fragile lands, while the state is only a custodian.²⁰ Hence, it would be completely unjustified to make them a subject of private ownership unless it is allowed by the public at large.

Disruption in the Economy

Illegal immigration if it happens in amass causes havoc toll to the economy of a state. If an undocumented immigrant has a child born in the country, where they have immigrated, that child is a citizen of that country, and therefore, has the rights to these government services.²¹

Loss of Tax Revenue

Most undocumented workers receive their payments in cash, and therefore, in most of the times that is out f the purview of tax deductions or their contributions are insignificant. The loss of tax income undermines government programs while the government needs to increase the expenditure on education and health facilities to the immigrants.

A Strain on Public Utility Services

Many people argue that these immigrants are costing our government a substantial amount of money by receiving benefits such as education, health care, food assistance programs, and welfare. The illegitimate immigrants usually use public services like health facilities, public colleges, transportation, parks and each alternative service one considers while, they don't pay taxes for the building and maintenance of those utilities.

²⁰**N.D. Jayal** and Anr. v. **Union of India**, [2002] 2 SCC 333.; [Naeem Sadig](#), Environmental plunder and the right to know, available at <https://tribune.com.pk/story/447919/environmental-plunder-and-the-right-to-know/>, accessed on 26th March, 2020 at 8.58 AM.

²¹Camarota, Steven. "The High Cost of Cheap Labor." Center for Immigration Studies (2004). 8 Dec. 2007 <<http://www.cis.org/articles/2004/fiscalexec.html>> accessed on 26th March, 2020 at 9.58 AM.

Problems in the Domestic Labour Market

Illegitimate immigrants in per annum are adding a decent range of individuals. It's one in all the most reasons for the population explosion. Illegal immigrants are usually desperate for a supply of financial gain and don't mind operating for fewer pay which might wouldn't preferably be taken by native folks. Hence, employers within the destination country don't have to be compelled to rent staff whom they have to pay the quality rates/ minimum wages. Moreover, illegitimate staff will take up near to any reasonably work as long it guarantees a steady income. It doesn't matter however arduous or unsafe it's. Illegal migrants can't sue and hardly complain regarding work-related problems. Interestingly, the employers are usually happy while, it's frustrating for the citizens who find difficulty in finding moderately paying jobs. For instance, those without high school diplomas are the ones who are most affected. It is estimated that undocumented immigrants' lower wages by approximately 3 to 8 percent for low-skill jobs. Furthermore, Americans who compete with immigrants for these jobs stand to make an additional \$25 a week if undocumented immigration were to be severely cut down.²² Immigration has a negative effect on U.S. workers without a college degree. That's especially true in agriculture and construction. In 2014, immigrants held 33% of agricultural jobs and almost half of those were documented, according to the Pew Research Center. In construction, 24% of the jobs went to immigrants, and half of them were documented. The biggest share was domestic workers. There, 45% were immigrants and less than half of them were documented. In those industries, immigration lowers wages and drives out native-born workers. That pushes native-born workers into jobs like sales and personal services that require superior communication skills.²³

²²Davidson, Adam. "Illegal Immigrants and the U.S. Economy." National Public Radio (2006). 8 Dec. 2007, available at <http://www.npr.org/templates/story/story.php?storyId=5312900>.

²³Pew Research Center. "[Immigrants Don't Make Up A Majority of Workers in Any U.S. Industry](#)," accessed on 27th March, 2020 at 9.58 AM.

C. Political Consequences

Political integration and assimilation

The capacity of the polity to integrate newcomers in the political culture is considered when setting admissions policies. Under the situation of radical inequality, however, restrictive policies of immigration allow richer countries to “hoard an unfair share of resources” with the idea that “we care equally about the well-being of all individuals, wherever they are born, and however little we interact with them” (Kymlicka 2001, 271)²⁴ Hobbesian nation-state is threatened by migration to a degree that its survival is uncertain, it has a legitimate reason to restrict migration.²⁵ The Governor of Assam in his report dated 8th November, 1998 sent to the President of India has clearly said that unabated influx of illegal migrants of Bangladesh into Assam has led to a perceptible change in the demographic pattern of the State and has reduced the Assamese people to a minority in their own State. It is a contributory factor behind the outbreak of insurgency in the State and illegal migration not only affects the people of Assam but has more dangerous dimensions of greatly undermining our national security. The CAA, 2020 clearly intends to say that the current political system doesn't have the willingness to integrate newcomers particularly belonging to a particular religion in the political culture of the country. There may be different reasons. One of the important reasons is that the nature of treatment of religious minorities in the neighbouring countries. Another reason may be pressure of existing population in the country.

Rise in Law and Order and Terrorist Activities

While a significant number of the illegitimate immigrants are solely searching for employment opportunities, a decent range among them are found involved into criminal activities e.g. The MS-13 The MS-13 gang, which comprised of Central American immigrants, is a good example of illegal immigrant turned criminals. In India, the huge influx of illegal migrants over the decades from Bangladesh has created danger for law-abiding residents. Moreover, it is not

²⁴Kymlicka, W., 2001, “Territorial Boundaries: A Liberal-Egalitarian Perspective”, *Boundaries and Justice. Diverse Ethical Perspectives*, D. Miller, S. H. Hashmi (eds.), Princeton and Oxford: Princeton University Press, 249–276.

²⁵ Harald Bauder, *The Possibilities of Open and No Borders*, *Social Justice* Vol. 39. No. 4, (130) (2014)

easy to track and prosecute illegal criminals.²⁶The very first sentence of the Statement of Objects and Reasons of the IMDT Act, 1983 says "the influx of foreigners who illegally migrated into India across the borders of the sensitive Eastern and North- Eastern regions of the country and remained in the country poses a threat to the integrity and security of the said region." The Preamble of the Act says that "the continuance of such foreigners in India is detrimental to the interests of the public of India." The Supreme Court of India, in 2005 made the following ruling on illegal immigration: "The apex court held the Illegal Migrants (Determination by Tribunal) Act (IMDT) as unconstitutional while, with reference to the Sinha Report, maintained that the impact of the "aggression" represented by large-scale illegal migration from Bangladesh had made the life of the people of Assam specially one of seven sister which is Tripura the land of Tiprasa "wholly insecure and the panic generated thereby had created fear psychosis" in other north-eastern States.²⁷

Reduced motivation for Legal Immigrants

Many people are keen to follow the proper procedures for immigration. However, they may commit to take shortcuts if they're convinced that it's doable and maybe even additional pleasing, to get into a country illegally.

Injury and Illness

The pursuit of better-quality life is that the primary explanation for illegitimate immigration. This can be largely achieved through employment within the destination country and therefore the desperation for employment drives illegitimate migrants to figure in dangerous industries like construction and agriculture since they need restricted ability to uphold safety at work.

Return of Migrants

Return of migrants is an important consequence. Sometimes back, Israel facilitated the entry of a packed plane load of Ethiopian Jews as part of its 'right

²⁶Available at <https://www.earthclipse.com/issue/causes-effects-illegal-immigration.html>, accessed on 5th July, 2019 at 4.57 PM.

²⁷SarbanandaSonowal v. Union of India (UOI) and Another, No. 131 of 2000

of return' policy for all Jews throughout the world. The 'right of return' is a foundational doctrine of Israel. UK, Ireland and Germany too have conceded the rights of individuals who can demonstrate national ancestry to settle in these countries. Indeed, after Brexit there has been a rush of people of Irish origin living in the UK to acquire Irish passports.²⁸ Bangladesh doesn't fully agree to follow the Policy of right to return of the refugees in India.

Aggression

Sometimes migration leads to aggression. The word "aggression" is a word of very wide import. Various meanings to the word have been given in the dictionaries, like, "an assault, an inroad, the practice of setting upon anyone; an offensive action or procedure; the practice of making attacks or encroachments; the action of a nation in violating the rights especially the territorial rights of another nation; overt destruction; covert hostile attitudes.

IV. Illegal Migration and International Law

Article 1 of Chapter 1 of the Charter of the United Nations gives the purposes of the United Nations and the first is to maintain international peace and security, and to that end : to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustments or settlement of international disputes or situations which might lead to a breach of peace. On account of use of expression "acts of aggression" it was thought necessary to define "aggression" and explain what it exactly means. The countries acceded to the 1951 Convention or 1967 Protocol, they agree to protect refugees on their territory and under their jurisdiction, in accordance with the terms of these instruments. Now let's have a look over the issues covered under these two instruments-

²⁸Swapan Dasgupta, West is selective on refugees, so why scoff at India for CAA?, Available at <https://timesofindia.indiatimes.com/blogs/right-and-wrong/west-is-selective-on-refugees-so-why-scoff-at-india-for-caa/>, accessed on 24th February, 2020 at 12.19 PM.

A. The 1951 Convention and 1967 Protocol

The 1951 Convention and 1967 Protocol cover three main subjects:

- The refugee definition²⁹, along with provisions for cessation of, and exclusion from, refugee status;
- The legal status (rights and obligations) of refugees in their country of asylum. This encompasses the duty of refugees to respect the laws and regulations of the country of asylum and their rights in that country, including to be protected from refoulement; and
- States' obligations, including to cooperate with UNHCR in the exercise of its functions and to facilitate its duty of supervising the application of the Convention.

The National Parliamentarians have been urged to monitor the following issues in the context of refugees³⁰-

- To oversee national budget appropriations, and can ensure that adequate and cost-effective funding is provided both to national refugee protection systems and to UNHCR, as the international agency mandated to protect refugees and promote durable solutions to their problems.
- To encourage accession to the 1951 Convention and its 1967 Protocol, and to other relevant international and regional agreements. They can design and adopt national legislation and promote State asylum systems that conform to international standards, and oversee their implementation.

²⁹ According to the 1951 Convention, a refugee is someone who:

- Has a well-founded fear of being persecuted because of his or her: Race; Religion; Nationality; Membership of a particular social group; or Political opinion.
- Is outside his or her country of origin or habitual residence;
- Is unable or unwilling to avail him- or herself of the protection of that country, or to return there, because of fear of persecution; and
- Is not explicitly excluded from refugee protection or whose refugee status has not ceased because of a change of circumstances.

³⁰ Available at <https://www.unhcr.org/3d4aba564.pdf>, accessed on 24th February, 2020 at 4.56 PM.

India has not signed both the Convention and Protocol as yet.

B. International Covenant on Civil and Political Rights, 1966

Article 13 of the International Covenant on Civil and Political Rights, 1966, states if an alien lawfully in a State's territory may be expelled only in pursuance of a decision reached in accordance with law. In *Attorney-General for Canada v. Cain*³¹, where Lord Atkinson said, "One of the rights possessed by the Supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order, and good government, or to its social or material interests." In *Rex v. Bottrill*³², it was said that the King under the Constitution of United Kingdom is under no obligation to admit into the country or to retain there when admitted, any alien. Every alien in the United Kingdom is there only because his presence has been licensed by the King. It follows that at common law the King can at will withdraw his license and cause the Executive to expel the alien, whether enemy or friend. In *Chae Chan Ping v. United States*³³, the United State Supreme Court held: "The power of exclusion of foreigners being an incident of sovereignty belonging to the Government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the Government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone. The powers of Government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. "This principle was reiterated in *Fong Yue Ting v. United States*³⁴, where the court ruled "the government of each state has always the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier. This right is based on the fact that, the foreigner not making part of the

³¹ [1906] AC 542.

³² (1947) 1 K.B. 41, [Ed: [1946] 2 All E.R. 434].

³³ 1930 U.S. 581

³⁴ 149 U.S. 698

nation, his individual reception into the territory is matter of pure permission, of simple tolerance, and creates no obligation. The exercise of this right may be subjected, doubtless, to certain forms by the domestic laws of each country; but the right exists none the less, universally recognized and put in force."

C. The Convention against Torture, 1984

Article 3 of the Convention against Torture has expanded the scope of the protection against expulsion since it explicitly prohibits States parties to "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". It must be noted that, in contrast with article 33 of the 1951 Convention, article 3 of the Convention against Torture does not include any public security exception: every person is protected against expulsion to face torture, regardless of what he or she is or may have done in the past. In addition, according to article 3 of the Convention against Torture, the ill-treatment need not be connected to one of the five grounds enumerated in the 1951 refugee definition (i.e. race, religion, nationality, membership of a particular social group or political opinion).³⁵ India has not acceded the Convention

D. Cartagena Declaration, 1984

The Declaration reaffirms the centrality of the 1951 Convention and its 1967 Protocol, the principle of non-refoulement, as well the importance of international cooperation to solve refugee problems. It recommends that the definition of a refugee used throughout the region be enlarged beyond persons who fulfil the 1951 Convention definition to include those who have fled their country "because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order".

Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, 1985:³⁶The Declaration on the Human

³⁵ OHCHR Discussion paper, Expulsions of aliens in international human rights law, Geneva, September 2006..

³⁶ Hurst Hannum, THE STATUS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW, Available at

Rights of Individuals Who are not Nationals of the Country in which They Live was adopted by the General Assembly, in resolution 40/144 on 13 December 1985, to which the Declaration is annexed. Article 4 of the Declaration states that the Aliens shall observe the laws of the State in which they reside or are present and regard with respect the customs and traditions of the people of that State. In the Declaration, non-citizens have been termed as aliens. As enumerated below, Article 5-10 talk about the rights to be enjoyed by them –

Nature of Treatment as Nationals of the Country in which they Live

The aliens will receive same treatment in respect to-

- a.** right to life and security of the person, including freedom from arbitrary arrest or detention;
- b.** Protection against arbitrary or unlawful interference with privacy, family, home or correspondence;
- c.** Equality before the courts, including the free assistance of an interpreter;
- d.** The right to retain language, culture and tradition;
- e.** The right to transfer money abroad.

Limited Rights

The following rights must be granted to aliens so long as they do not interfere with *national security, public safety, public order, public health or morals or the rights and freedoms of others*:

- a.** The right to leave the country
- b.** The right to freedom of expression
- c.** Liberty of movement and freedom to choose their place of residence within the borders of the country

https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.26_Declaration%20on%20the%20Human%20Rights%20of%20Individuals%20who%20are%20not%20nationals.pdf, accessed on 31st March, 2020 at 11.30 AM.

- d.** The right of spouse and minor or dependent children to join a lawful alien, as provided by national law

Conditional rights

Aliens lawfully residing in the country must be granted the following rights so long as they observe the country's laws and respect the customs and traditions of the people:

- a.** The right to safe and healthy working conditions, fair wages, and equal pay for equal work
- b.** The right to join trade unions
- c.** The right to social services, health care, education, and social security

Additional rights

The following additional rights of aliens are particularly enumerated in the Declaration-

- a.** Protection from torture or cruel, inhuman, or degrading punishment
- b.** Freedom from being subjected to medical or scientific experimentation without the alien's free consent
- c.** Protection against arbitrary or unlawful expulsion from the country
- d.** The right to defend oneself from expulsion, except where compelling reasons of national security require otherwise
- e.** The right to communicate at any time with the consulate or diplomatic mission of the country of which he or she is a national.
- f.** A State may not arbitrarily imprison an alien, or confiscate property without compensation, or make no effort to protect aliens from any foreseeable trouble that may face.

In *Mavrommatis Palestine Concessions, Greece vs. Britain*, [(1924) PCIJ Reports, Ser. A, No.2,], it has been held that as an elementary principle of International law, a State is entitled to protect its subjects, when injured by acts contrary to international law by another State, for whom they have been unable to obtain satisfaction through the ordinary channels.

E. The Draft International Convention for the Protection of All Persons from Enforced Disappearance

Article 16 of the draft Convention expressly prohibits any State party to “expel, return (“refouler”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance”.³⁷ The provision adds that “for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law”.³⁸ This follows the practice of the Committee against Torture.

F. UN Draft Articles on the Expulsion of Aliens, 2014

When the General Assembly of the United Nations created the ILC in 1947, it delegated its mandate under Article 13(1)(a) of the Charter of the United Nations to “*initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification.*” Accordingly, on the issue of expulsion of aliens it has drafted a Document. The most important provisions of the Draft Document are as under-

- A State has the right to expel an alien³⁹ from its territory. Expulsion shall be in accordance with the present draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights. (Article 3)
- The grounds for expulsion have been enumerated under Article 5⁴⁰, while it prohibits the expulsion of refugees save on grounds of national security or public order under Article 6⁴¹ of the Draft Document.

³⁷ General Comment no.6, 1 September 2005, para.28.

³⁸ E/CN.4/2005/WG.22/WP.1/REV.4, 23 September 2005

³⁹ “alien” means an individual who does not have the nationality of the State in whose territory that individual is present. Art 2(b), Draft Declaration, 2014.

³⁹ Art. 5(2)-

- A State may only expel an alien on a ground that is provided for by law.
- The ground for expulsion shall be assessed in good faith and reasonably, in the light of all the circumstances, taking into account in particular, where relevant,

- State shall not expel a stateless person lawfully in its territory, save on grounds of national security or public order.(Article 7)
- A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her. (Article 8)
- A State is prohibited from of both collective⁴² and disguised expulsion⁴³. Article 9&Article 10.

the gravity of the facts, the conduct of the alien in question or the current nature of the threat to which the facts give rise.

- A State shall not expel an alien on a ground that is contrary to its obligations under international law.

⁴¹ Article 6: Prohibition of the expulsion of refugees: The present draft articles are without prejudice to the rules of international law relating to refugees, as well as to any more favourable rules or practice on refugee protection, and in particular to the following rules:

(a) a State shall not expel a refugee lawfully in its territory save on grounds of national security or public order;

(b) a State shall not expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

⁴² Article 9: Prohibition of collective expulsion:

1. For the purposes of the present draft article, collective expulsion means expulsion of aliens, as a group.
2. The collective expulsion of aliens is prohibited.
3. A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of an assessment of the particular case of each individual member of the group in accordance with the present draft articles.
4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

⁴³ Article 10: Prohibition of disguised expulsion:

1. Any form of disguised expulsion of an alien is prohibited.
2. For the purposes of these draft articles, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from an action or omission

- The expulsion of an alien for the purpose of confiscating his or her assets is prohibited. (Article 11)
- A State shall not resort to the expulsion of an alien in order to circumvent an ongoing extradition procedure. (Article 12)
- All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity and the human rights of the human person at all stages of the expulsion process. (Article 13)
- The expelling State shall respect the rights of the alien subject to expulsion without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law. (Article 14)
- Children, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall be treated and protected with due regard for their vulnerabilities and respecting best interests of the child. (Article 15)
- The expelling State shall protect the right to life of an alien subject to expulsion. (Article 16). The expelling State shall not subject an alien subject to expulsion to torture or to cruel, inhuman or degrading treatment or punishment. (Article 17). The expelling State shall respect the right to family life of an alien subject to expulsion. It shall not interfere arbitrarily or unlawfully with the exercise of such right. (Article 18)
- The detention of an alien for the purpose of expulsion shall not be arbitrary nor punitive in nature. (Article 19)⁴⁴

attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons,

⁴⁴ Article 19: Detention of an alien for the purpose of expulsion: 1. (a) The detention of an alien for the purpose of expulsion shall not be arbitrary nor punitive in nature. (b) An alien detained for the purpose of expulsion shall, save in exceptional circumstances, be separated from persons sentenced to penalties involving deprivation of liberty.

2. (a) The duration of the detention shall be limited to such period of time as is reasonably necessary for the expulsion to be carried out. All detention of excessive duration is prohibited. (b) The extension of the duration of the detention may be decided upon only by a court or, subject to judicial review, by another competent authority.

- The expelling State shall take appropriate measures to protect the property of an alien subject to expulsion, and shall, in accordance with the law, allow the alien to dispose freely of his or her property, even from abroad. (Article 20)
- The expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion. (Article 21) An alien subject to expulsion shall be expelled to his or her State of nationality or any other State that has the obligation to receive the alien under international law, or to any State willing to accept him or her at the request of the expelling State or, where appropriate, of the alien in question. (Article 22)
- No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law. (Article 23. 1)
- A State that does not apply the death penalty shall not expel an alien to a State where the alien has been sentenced to the death penalty or where there is a real risk that he or she will be sentenced to death, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out. (Article 23. 2)
- A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment. (Article 24)
- An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State. (Article 29)

3. (a) The detention of an alien subject to expulsion shall be reviewed at regular intervals on the basis of specific criteria established by law. (b) Subject to paragraph 2, detention for the purpose of expulsion shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned.

- The expulsion of an alien in violation of the expelling State's obligations entails the international responsibility of that State. (Article 30).

G. UN Declarations in Indian Perspective⁴⁵

Several Indian cases have specifically referred to the Universal Declaration, which was adopted the year before the Indian constitution and is widely held to have provided the model for the latter's human rights guarantees. "The [Universal] Declaration [of Human Rights] may not be a legally binding instrument but it shows how India understood the nature of Human Rights" at the time the constitution was adopted.⁴⁶ Thus, although the Supreme Court has stated that the Declaration "cannot create a binding set of rules" and that even international treaties "may at best inform judicial institutions and inspire legislative action,"⁴⁷ constitutional interpretation in India may be strongly influenced by the Declaration.⁴⁸ At the same time, an early Indian case made clear that the Universal Declaration of Human Rights cannot be taken into account where it conflicts with clear provisions of the Indian Constitution.⁴⁹

V. Illegal Migration and Indian Law

Migrating population from one country to another is a global problem. Not only India but some developed countries like United Kingdom, the United States of America and Canada are facing the heat of migration particularly from Asian countries. In India, the situation is really grim. Ever since the birth of

⁴⁵Available at

<https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=https://www.google.co.in/&httpsredir=1&article=1396&context=gjicl>, accessed on 31st March, 2020 at 11.45 AM.

⁴⁶*Kesavananda Bharati v. State of Kerala*, 1973 A.I.R. (S.C.) 1461, 1510 (India) (holding that the constitutional power of amendment does not extend to altering the basic structure, including the guarantee of fundamental rights, of the Indian constitution). See also, e.g., *Bombay Educ. Society v. State of Bombay*, 1954 Born. 1333; *Maneka Gandhi v. Union of India*, 1978 A.I.R. (S.C.) 597.

⁴⁷*Jolly George Vargheese*, 1980 A.I.R. (S.C.) at 474 (India).

⁴⁸*Kishore Chand v. State of Himachal Pradesh*, [1991] 1 S.C.J. 68, 76.

⁴⁹*Biswambhar Singh v. State of Orissa*, [1957] A.I.R. (Orissa) 247, reprinted in 24 I.L.R. 425.

Bangladesh in 1971, there has been continuous influx of Bangladeshis into India from our Eastern Border. The illegal immigrants pose serious threat. Assam is worst hit. Quite obviously, there is no scope of illegal migrants to get the citizenship in India as far as the Citizenship Act, 1955 is concerned. Apart from 31,313 individuals-25,447 Hindus, 5,807 Sikhs, 55 Christians, two Buddhists and two Parsis-living in India on long-term visas, as far as the various reports are concerned. The illegal migrants in India are as under⁵⁰-

- More than 80,000 refugees from West Pakistan, largely Hindus, have been living in Kashmir since Independence without citizenship rights.
- Hindu Bangladeshi immigrants in West Bengal-mostly from the Matua community who entered India after 1971. As per the 2011 Census, Matuas comprise 17 per cent of the state's population of 100 million. They have voting rights, but are yet to get citizenship certificates.
- Nearly a 1.4 million Hindus and 500,000 Muslims in Assam as has been excluded from Assam's NRC.

In addition to the above documentary records a healthy number of people spreaded as migrant laborers which remains unrecorded.

A. Constitution of India

In India, the very first entry, namely, Entry 1 of List I of the Seventh Schedule speaks "Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination of effective demobilization". In fact, entries 1 to 4 of List I of Seventh Schedule mainly deal with armed forces. Article 355 of the Constitution of India reads as under- "*It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution.*" The word "aggression" is a word of very wide import. Various meanings to the word have been given in the dictionaries, like, "an assault, an inroad, the practice of setting upon anyone; an offensive action or procedure; the practice of making attacks or encroachments; the action of a

⁵⁰Available at <https://www.indiatoday.in/magazine/cover-story/story/20200120-who-is-not-a-citizen-1635189-2020-01-10>, accessed on 1st April, 2020 at 4.40 PM.

nation in violating the rights especially the territorial rights of another nation; overt destruction; covert hostile attitudes."

B. The Illegal Migrants (Determination by Tribunals) Act, 1983

The term has further been defined under the Illegal Migrants (Determination by Tribunals) Act, 1983, under Section 3(1)(c) as a person in respect of whom each of the following conditions is satisfied, namely: -

- (i) he has entered into India on or after the 25th day of March, 1971;
- (ii) he is a foreigner⁵¹;
- (iii) he has entered into India without being in possession of a valid passport or other travel document or any other lawful authority in that behalf;

The Preamble of the Act says that "the continuance of such foreigners in India is detrimental to the interests of the public of India." In *Union of India v. Ghaus Mohammed*⁵², the Chief Commissioner of Delhi served an order on Ghaus Mohammad to leave India within three days as he was a Pakistani national. He challenged the order before the High Court which set aside the order by observing that there must be prima facie material on the basis of which the authority can proceed to pass an order under Section 3(2)(c) of the Foreigners Act, 1946. In appeal the Constitution Bench reversed the judgment of the High Court holding that onus of showing that he is not a foreigner was upon the respondent. In *Sarbananda Sonowal v. Union of India (UOI) and Another*⁵³ the apex court held the Illegal Migrants (Determination by Tribunal) Act (IMDT) as unconstitutional while, with reference to the Sinha Report, maintained that the impact of the "aggression" represented by large-scale illegal migration from Bangladesh had made the life of the people of Assam specially one of seven sister which is Tripura the land of tiprasa "wholly insecure and the panic generated thereby had created fear psychosis" in other north-eastern States. In *KangshariHaldar v. State of West Bengal*,⁵⁴ the IMDT Act, was challenged in

⁵¹ Foreigner" means a person who is not a citizen of India; (Section 2 (a) of THE FOREIGNERS ACT, 1946).

⁵² MANU/SC/0072/1961.

⁵³No. 131 of 2000.

⁵⁴ MANU/SC/0047/1959

which Gajendragadkar, J. (as His Lordship then was) held as under: "In considering the validity of the impugned statute on the ground that it violates Article 14 it would first be necessary to ascertain the policy underlying the statute and the object intended to be achieved by it. In this process the preamble to the Act and its material provisions can and must be considered. Having thus ascertained the policy and the object of the Act the court should apply the dual test in examining its validity: *Is the classification rational and based on intelligible differentia*; and, *has the basis of differentiation any rational nexus with its avowed policy and object*? If both these tests are satisfied, the statute must be held to be valid; and in such a case the consideration as to whether the same result could not have been better achieved by adopting a different classification would be foreign to the scope of the judicial enquiry. *If either of the two tests is not satisfied, the statute must be struck down as violative of Article 14.*"

VI. Illegal Migrants and India

Over the years, diverse groups of refugees have made different parts of the country their primary settlement zones. From Hindu and Sikh migrants settling in Delhi, Rajasthan and J&K after Partition, to Bangladeshis forming the largest immigrant group from a particular country in West Bengal and Assam perhaps, Buddhist Chakmas and Hindu Hajongs from Bangladesh concentrating in Arunachal Pradesh, Tamil Nadu hosting Sri Lankan Tamil refugees and Buddhist Tibetan settlements in Dharamshala, Delhi and Odisha, India has welcomed them all. The home ministry has created 'standard operating procedures' for various refugee groups. The rights and facilities afforded to them remain erratic, decided on a case-to-case basis e.g.⁵⁵

- Refugees from some groups, like the Tibetans, have been given land, granted Aadhaar and PAN cards, been allowed to open bank accounts and work in the country. Their children can claim citizenship if they were born between 1950 and 1987.
- Since 2015, Pakistani and Afghan nationals belonging to the six minority communities, living here on a "long-term visa" can have

⁵⁵Available at <https://www.indiatoday.in/magazine/cover-story/story/20200120-who-is-not-a-citizen-1635189-2020-01-10>, accessed on 1st April, 2020 at 4.40 PM.

driving licences, access to education and healthcare facilities and buy "small dwelling units for self-occupation or self-employment".

A. Illegal Migration and Issues of Citizenship

Citizenship means being protected by the law rather than participating in its formulation or execution. The “political community is probably the closest we can come to a world of common meanings. To reject political communities’ right to distribute the good of membership is to undermine their capacity to preserve their integrity. It is to condemn them to become nothing more than neighbourhoods, random associations lacking any legally enforceable admissions policies. The citizenship is a subject of entry 17 of Union List of Seventh Schedule of the Constitution and the Govt. of India has amended the Citizenship Act, 1955 in a number of occasions to address the issue relaxing the norms. Acquisition of Indian Citizenship as per the Citizenship Act 1955 is possible under the following ways: (1) Citizenship at the commencement of the constitution of India (2) Citizenship by birth; (3) Citizenship by descent (4) Citizenship by registration (5) Citizenship by naturalization and Incorporation of the territory. The legislation has been amended by the Citizenship (Amendment) Act 1986, the Citizenship (Amendment) Act 1992, the Citizenship (Amendment) Act 2003, the Citizenship (Amendment) Act, 2005, and the Citizenship (Amendment) Act, 2019. At this, it may be stated that the foremost duty of the Government is to defend the borders of the country, prevent any trespass and make the life of the citizens safe and secure.

B. Citizenship by Assam Accord⁵⁶

In 1951, owing to unabated illegal immigration from Bangladesh (then East Pakistan), the NRC was prepared in Assam as a non-statutory process. Recording the particulars of all persons enumerated during the 1951 Census, the 1951 NRC identified nearly 1.5 million illegal immigrants, one-sixth of Assam's population at the time. However, there is no account of what happened to those illegal immigrants. Citizenship under the Assam Accord is as under-

- ✚ All persons of Indian origin who came before the 1st January, 1966 to Assam whose names were included in the electoral rolls used for

⁵⁶Section 6A, the Citizenship Act, 1955.

the purposes of the General Election to the House of the People held in 1967) and

- ✚ All persons who have been ordinarily resident in Assam since the dates of their entry into Assam shall be deemed to be citizens of India.
- ✚ every person of Indian origin who—
 - ✓ came to Assam on or after the 1st day of January, 1966 but before the 25th day of March, 1971 from the specified territory; and
 - ✓ has, since the date of his entry into Assam, been ordinarily resident in Assam; and
 - ✓ has been detected to be a foreigner;

shall be deemed to be a citizen of India for all purposes as from the date of expiry of a period of ten years from the date on which he has been detected to be a foreigner.

Three decades later, at the end of a six-year-long agitation against illegal immigrants from Bangladesh, the Centre and student leaders signed the Assam Accord in 1985. The accord accepted any illegal migrant entering the state before March 25, 1971, as a legal Indian. This apex court-monitored exercise in 2019, costing the exchequer to Rs 1,220 crore, excluded 1,906,657 persons on being identified as illegal immigrants in Assam (of these, 80 per cent are estimated to be Hindus). Apart from these exercises, between 1964 and 2008, for instance, 461,000 Tamils from Sri Lanka were given citizenship.⁵⁷

C. National Register of Citizens (NRC)

NRC is a roster of all those who settled in Assam up to the midnight of March 24, 1971. In 1978-79, several local leaders spotted a rapid increase in the number of Muslims in electoral rolls. A six yearlong agitation followed against illegal migrants from Bangladesh, which culminated with the signing of an agreement called the Assam Accord.

⁵⁷Kaushik Deka, Who is (not) a citizen? Available at <https://www.indiatoday.in/magazine/cover-story/story/20200120-who-is-not-a-citizen-1635189-2020-01-10>, accessed on 1st April, 2020 at 5.17 PM.

D. CITIZENSHIP AMENDMENT ACT, 2019

The Citizenship Amendment Act, 2019 has awarded the persons belonging to minority communities, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, who have been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any order made thereunder, shall not be treated as illegal migrants for the purposes of that Act and shall be eligible to apply for naturalisation under section 6.⁵⁸ Moreover the migrants from these communities were earlier given protection against legal action in the years 2015 & 2016 and long term visa provision was made for them.⁵⁸ Interestingly, the Government of India unlike any other country in the world has taken a positive stand by recognising a huge number of illegal migrants particularly belonging to the religious minorities who have been subjected to religious persecution in those neighbouring countries in neighbouring countries as citizens of India through the Amendment of 2019.

In response to the, exclusion of illegal migrants of some of the religious communities coming from different neighbouring nations under the Citizenship Amendment Act, 2019, it may be stated that the country of their origin is a country where by the Constitution the Country is Religious Country e.g. Pakistan and Bangladesh are Muslim Country recognised by the Constitution and those religious communities are religious minorities in those countries. They in those country such religious groups of people are better protected. Hence, it may be submitted that if any Muslim person illegally crossing the border of e.g. Pakistan and claiming that he/ she came to Indian since he/ she had been subjected to religious persecution over there, it is really an unfortunate state of affair involving law and order issue in that country and which is linked to the failure of constitutional machinery of that nation and it cannot be a ground for extension of rights of citizenship to such people by a neighbouring country.

Further, the CAA, 2019 doesn't negate the provision of Citizenship by Naturalisation under Section 6 of the Citizenship Act, 1957. Hence, a person

⁵⁸Available at https://www.business-standard.com/article/current-affairs/explained-citizenship-amendment-bill-vs-nrc-vs-clause-6-of-assam-accord-119010900621_1.html, accessed on 8th March, 2019 at 22.11 PM.

who is residing in India for a long time with sufficient evidence of his staying and interested to apply for citizenship, may apply for the Indian Citizenship. Thus, in none of the way the rights of any person is curtailed under the CAA, 2019 while, it has opened a new vistas to become Indian Citizen for the people belonging to religious minorities or more specifically, for the people whose religious orientation is different from that of the State Religion in our neighbouring countries.

VII. CONCLUSION

To sum up, the state is constitutionally bound to pay due importance to the protection of its citizens, the foreign nationals need permission from the destination country before they come and stay. Violation of the country's immigration laws renders them illegal migrants and there is no obligation for a state to give equal weight to the interests of non- members. The obligations towards migrants and asylum-seekers call for a policy of open borders and/or deny the state's right to decide alone who exactly, and how many people, may enter its territory. At this, through the CAA, 2019, the Government of India unlike any other country in the world has additionally recognised a huge number of illegal migrants particularly belonging to the religious minorities who have been subjected to religious persecution in those neighbouring countries in neighbouring countries as citizens of India through the Amendment of 2019 while other provisions of obtaining the status of Citizenship remains intact.

Realising the Rights of the Senior Citizens: An International Human Rights Law Perspective

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Abstract

The senior citizens throughout the world face the maximum challenges, abuse and discrimination restricting the realization of their human rights and thus, categorizing them into the vulnerable groups. Ageing is a natural phenomenon yet the aged population are traditionally concerned as burden and problems because they are non-functional, non-productive and non-active. Amongst the vulnerable groups, the United Nations has time to time recognized and revised the human rights pertaining to women, children, migrant workers and persons with disabilities but negligible focus has been given on the rights of the senior citizens as a distinct category concerning their deserving rights, extraordinary care and protection under the ambit of human rights law. Even though the rights of the senior citizens have been neglected but over few years they have become a popular agenda of professional media, NGOs and certain States which have pushed United Nations to identify the special rights, care and protection of the senior citizens in the international scenario. However, they are not adequate; reforms and revisions are yet to follow. Due to decline in mortality rate and longer life expectancy there has been an unprecedented growth in the world's senior citizen's population thereby making their group a more prominent one wherein realization of their human rights becomes inevitable. This paper intends to focus on the plight of the senior citizens from their jeopardized rights so that they get the spotlight and priority both from the national and international scenario in their generic framework. This paper would mainly focus on the contributions of the senior citizens and their rights by the virtue of being a human. It will examine the key features of the United Nations Convention on the Rights of Older Persons and other instruments that compromises the care and protection and the rights of the senior citizens both in the international as well as national scenario. And finally, it will evaluate the gaps and discuss the optimistic contemporary attitude to describe old age as a productive category, rather than being a burden, with a new social meaning and positive attitude.

Keywords: Senior Citizens, Old Age, Vulnerable Group, Human Rights, United Nations

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I. Introduction

“After a lifetime of working, raising families and contributing to the success of this nation in countless other ways, senior citizens deserve to retire with dignity.”

- Charlie Gonzalez

The aged people throughout the world face the maximum challenges, abuse and discrimination restricting the realization of their human rights and thus, categorizing them into the vulnerable groups. It is very disappointing to note that once these men and women who had been the very subject of human rights law and who themselves had voiced for their human rights, now stand amongst the vulnerable group. And it is yet more disappointing to note that even the political will of the country does not express prioritizing the special rights of the senior citizens, who had once been the main contributor to the nation's progress, over the other categories of vulnerable groups. Ageing is a natural phenomenon yet the aged population is traditionally concerned as burden and problems because they are non-functional, non-productive and non-active. Amongst the vulnerable groups, the United Nations has time to time recognized and revised the human rights pertaining to the women, the children, the migrant workers and the persons with disabilities but negligible focus has been given on the rights of the senior citizens as a distinct group concerning their rightful and deserving rights, exceptional care and protection underneath the ambit of human rights law. Even though the rights of the senior citizens have been neglected but over few years they have become a popular agenda of professional media, NGOs and certain States which have pushed United Nations to identify the special rights, care and protection of the senior citizens in the international scenario. However, there are not adequate, reforms and revisions are yet to follow. Due to decline in mortality rate and longer life expectancy there has been an unprecedented growth in the world's senior citizen's population thereby making their group a more prominent one wherein realization of their human rights becomes inevitable.³

³PROJECT REPORT ON HUMAN RIGHTS OF THE ELDERLY PERSONS: LAW, POLICIES AND IMPLEMENTATION: A STUDY WITH SPECIAL REFERENCE TO KERALA Nhrc.nic.in, (last visited Apr 7, 2021), https://nhrc.nic.in/sites/default/files/Project%20Report%20on%20the%20Rights%20of%20the%20Elderly_NUALS.pdf.

II. International Human Rights Instruments

Amongst the foundational International Human Rights Law instruments, none of them expressly provide for the protection and upliftment of the rights of the senior citizens and prohibition of age discrimination. Article 2 of UDHR lays down the categories of discrimination such as race, sex, colour, language, religion, political or other opinion, property, birth, social or national origin. Again ICCPR and ICESCR provide similar grounds too. Age-based discriminations and the empowerment of the senior citizens failed to receive the focus. Out of the nine International Human Rights instruments only one speaks of prohibition of discrimination on the basis of age and two speaks of senior citizens.⁴

1. International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families, 1990, prohibits age based discrimination.
2. The Elimination of All Forms of Discrimination Against Women, 1979, seeks to achieve equal rights to social security to women including old age.
3. The Convention on the Rights of Persons with Disabilities, 2008, directs the member States to render such services that would minimize and prevent further disabilities amongst the senior citizens and ensure that they get retirement benefits and other necessary programmes. It also emphasised that the senior citizens with disability must have information on their productive rights, easy access to justice and prevention of their abuse. This is the sole treaty that addresses the age-based discrimination on the grounds of access to justice, health, abuse and social protection.

However, these available rights of the senior citizens are accessible by the virtue of being either a migrant or any member of the migrant's family or being a women or a person having a disability.

III. International Documents on Senior Citizens

⁴ International Conference on Human Rights of older persons & non-discrimination Ohchr.org, (last visited Apr 7, 2021), <https://www.ohchr.org/Documents/Issues/OlderPersons/ConferenceSantiagoReport.pdf>

A. Vienna International Plan of Action on Ageing, 1982

This international document is the foremost one that was endorsed by the General Assembly by 37/51 resolution addressing the guidelines on the income, social welfare, family, health and securities of the senior citizens.⁵

B. The UN Principles for Older Persons, 1991

These principles were adopted by the General Assembly by 46/91 resolution reaffirming the faith in fundamental human rights and right to equality. It enshrines 5 major principles recognising the rights of the senior citizens which includes firstly, right to independence having access to adequate food, clothing, shelter and health care, secondly, right to participation, thirdly, right to care and protection including mental, physical and emotional wellbeing, fourthly, right to self-fulfilment and having access to cultural, educational, spiritual and recreational right and fifthly, right to dignity and right against any sort of exploitation and abuse. However, these principles lacked the binding nature.⁶

C. Madrid International Plan Action on Ageing, 2002

This plan accompanied a political declaration containing three major priority objects. They are health and well-being, development and enabling environments. This plan laid its concentration on the preferment and upliftment of human rights of the senior citizens and elimination of age-based discrimination. However, it was witnessed by the General Assembly in 2011 that only 42 States out of 192 States had responded in favour of its implementation.⁷

D. Soft Laws Recognising Rights of Senior Citizens

⁵ Vienna International Plan of Action | *United Nations For Ageing United Nations For Ageing* | Ageing, (last visited Apr 7, 2021), <https://www.un.org/development/desa/ageing/resources/vienna-international-plan-of-action.html>.

⁶ OHCHR | *United Nations Principles for Older Persons* Ohchr.org, (last visited Apr 7, 2021), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx>.

⁷ Madrid International Plan of Action on Ageing | *United Nations For Ageing United Nations For Ageing* | Ageing, (last visited Apr 7, 2021) <https://www.un.org/development/desa/ageing/madrid-plan-of-action-and-its-implementation.html>.

Soft law refers to non- enforceable or non-binding expressions or views in issuing any Treaties Body and Special Procedure. The treaty bodies which supervises the implementations of the Treaties have been seen to make general comments and recommendations on particular issues that affects the rights of the senior citizens.⁸

General Comments and Recommendations

The Committee on Economic, Social and Cultural Rights in 1995 in its general comment no. 6 emphasized the economic, cultural and social rights of the senior citizens. In reference to that comment the CESCR made it obligatory for the States to ensure and recognize different rights pertaining to the senior citizens. Later on, this general comment no. 6 was reported as the most appropriate guidance for recognising the rights of the senior citizens as right to adequate standard of living, right to health, right to food and housing, right to social security and right to work by the High Commissioner for Human Rights in its April, 2012 Report.

The Committee Against Torture in 2008 in its general comment no. 2 instructed all the places or institutions wherein older people are kept under control or custody that it will be obligatory on their part to forbid torture or any other cruel or undignified or inhumane treatment or penance of the senior citizens and redress it.

The Committee on Elimination of Discrimination against Women in 2010, in its general recommendations no. 27 pointed out the impact of discrimination and nature of ageing against older women which showed the high risk of vulnerability among the aged women.

Special Procedure

The Independent Expert in 2010 presented a report on the problematic enjoyment of human rights of the senior citizens in regard to their social security to the Human Rights Council in its 14th Session.

⁸ SARA TONOLO, <https://medwinpublishers.com/NNOA/NNOA16000183.pdf>, 5 Nanomedicine & Nanotechnology Open Access (2020), (last visited Apr 7, 2021), <https://core.ac.uk/download/pdf/162438126.pdf>.

The Special Rapporteur in 2011 drafted a thematic study and submitted to the Human Rights Council in its 18th Session outlining the attainments of the standard and the highest enjoyment of mental as well as physical health rights of the senior citizens.

E. Regional Human Rights Documents

The American Convention on Human Rights, 1069

The Convention prohibits capital punishment for the persons above 70 years of age and the additional Protocol provides for special privileges such as food and medical care and social security rights for the senior citizens.

The African Charter on Human and Peoples' Rights, 1981

The Charter and along with its Protocol on Rights of Women in Africa, 2003 provides for the protection and promotion of the senior citizens' basic human rights as well as the rights of the aged women against violence and abuse.

The Arab Charter on Human Rights, 1997

The Charter speaks of the responsibility of the State to provide outstanding and special care and protection to the senior citizens.

The Charter of Fundamental Rights of the European Union, 2000

This Charter speaks of the prohibition of discrimination on the basis of age, identifies the right to dignity and independence of the senior citizens and right to social security and right to participation in social and cultural life.⁹

F. Fourth Coming other Regional Human Rights Instruments

- a. A Protocol is currently being drafted to the African Commission on Human and People's Right by the Working Group on Older Persons and People with Disabilities in Africa.
- b. A draft Convention recognising the human rights of the senior citizens is under process by the Organization of American States.¹⁰

⁹ SARA TONOLO, <https://medwinpublishers.com/NNOA/NNOA16000183.pdf>, 5 Nanomedicine & Nanotechnology Open Access (2020), (last visited Apr 7, 2021), <https://core.ac.uk/download/pdf/162438126.pdf>.

¹⁰ THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC, *The Status of the Human Rights of Older Persons*, 183–190 (Tiina Pajuste).

G. The UN Open-Ended Working Group on Ageing

On December, 2010, the United Nations General Assembly set up the UN Open-Ended Working Group on Ageing with a resolution of 65/182 to strengthen, identify and ensure the protection and promotion of the basic human rights of the senior citizens. The agenda of this Group is to identify and evaluate the present international framework for the rights of the senior citizens, critically analyse the gaps and finally find the best way to address them so as to achieve their agenda of realizing and guaranteeing the senior citizens of their basic and essential human rights. In this course, they are also privileged to recommend for additional instruments or other appropriate measures which might prove to be fruitful. In its first two working sessions, the Group had allowed the member States as well as the NGOs to participate, wherein the reports from them and the follow up to Second World Assembly on Ageing: Report of the Secretary General to the Second Session, 2011 revealed that there lies significant normative gaps along with implementation gaps in the framework of the international instruments which are addressed to the senior citizens. Eventually, there was a recommendation for a new specific convention dedicated to the rights of the senior citizens as Convention on the Rights of Older Persons. Most of the South American States have favoured for the creation of a legally binding instrument, while most of the European States have favoured for the rectification and stronger implementation of the existing instruments by the way of amendments or protocols.¹¹

IV. Key Issues Faced by the Senior Citizens

A. Facing Age Based Discrimination

Violation of human rights has been witnessed among different categories of human beings, however, age based discrimination has been given the least importance in any International documents. Negative and stereotypes attitudes manifest isolation, exclusion, marginalization and abuse of the senior citizens in various forms. It can be aptly said that along with other discriminations that a person had faced throughout his or her life based on sex, race, marital status,

¹¹ INTERNATIONAL CONFERENCE Human Rights of older persons & non-discrimination Ohchr.org, *The Status of the Human Rights of Older Persons*, <https://www.ohchr.org/Documents/Issues/OlderPersons/ConferenceSantiagoReport.pdf>.

disability or origin, one more basis gets added to it that is age, now, the person has to fight this age-based discrimination in the last few years of his life. Say, older women, most of them have worked in informal sector having no access to institutional benefits like proper wage, pension schemes, health insurance, provident fund and others. They had spent their life supporting their family without paying any heed to their financial condition, thereby, making the poorest of poor. Even if they were working women, they have been subjected to various discrimination such as disproportionate income, gender discrimination, forced household work and rearing of children, obstacles in pursuing higher education and other forms of abuses. So, there is an add-on factor in their list that is age-based discrimination wherein they stand in a very vulnerable position having no access to social and financial security. Due to these legal and structural barriers often the senior citizens fails to enjoy their lawful human rights. Above that the mistreatment faced by them is not only a clear hindrance to the fullest realization of their basic human rights but also an insult to their dignity, thereby, it requires clear demarcation and focus by the international human rights instruments. To cite an example, the Human Rights Committee was of the opinion that 'right to work' can only be permitted if it is found objective as well as reasonable. Thus, under this veil of objective and reasonable the employers continue rejecting the profiles of the senior citizens even if they are able and most suitable for that work solely on the basis of just a number. Apart of these, even the discrepancies in the different legislations of the nation based on eradicating discrimination fails to focus on the key discrimination based on age which ultimately affects the senior citizens in realizing their lawful rights. The older people have to pay high and indiscriminate premium rate for any health and life insurance policies especially when it is them who need them the most being more prone to sickness and injuries. Without any clear International Human Rights Standards, these unjust and unreasonable premiums on insurance policies are bound to marginalize them. The inheritance of pension schemes is also denied to the same-sex survivors in a LGBT couple. Moreover, they are subjected to financial abuse or ignored financial crisis based on extortion and undue influence that threatens their very existence. They are also denied housing facilities and are forced to institutionalize themselves against their wills. They are also denied the right to information. To cite an example in South Africa and Tanzania the senior citizens have been denied to have access

to information and testing services on HIV. This gap continues and eventually makes them the marginalized group.¹²

B. Exposure to Violence and Abuse

The lack of effective remedy as well as security in both international and national legal system for senior citizens results to an open exposure to physical, financial, emotional as well as sexual abuse of the aged people. Although the Universal Declaration of Human Rights and ICCPR have emphasised on right to life and social security, they have not provided protection from all forms of violence and abuse to which the senior citizens are subjected to very often. The senior citizens are neglected and physically abused at different institutions such as hospitals, psychiatric institutions and also at detentions since their family members too are least bothered about their well-being and there is no one who can speak for their rights. Back at home their conditions are worse. If they have sound bank balance they are extorted and if not then they are ill-treated and considered as burden upon the family or as a non-performing asset. They are not even given access to any information and connection with the outer world so that they do not get any external support. Furthermore, the fear of abuse and loss of habitation and food is so strong in them that even they get habituated with the situation and do not report about their abuse. A critical gap exists whenever a person undergoes a survey on the abuse of the senior citizen between the data collected and the information or data recorded because the reporting system for the senior citizens are often challenging. But no one cares to monitor them and listen to their grievances. They are constantly denied the palliative care which is torture in actual sense.¹³

C. Denial to Social Rights and Security

It is astonishing to note while we speak about right to and free access to education on one hand, we put age limits on the other hand. Paradoxically, right to education is open only for the younger generation indiscriminate to sex but

¹² OHCHR | Human rights of older persons Ohchr.org, (last visited Apr 7, 2021), <https://www.ohchr.org/en/issues/olderpersons/pages/olderpersonsindex.aspx>.

¹³HUMAN RIGHTS OF OLDER PEOPLE IN INDIA A REALITY CHECK Agewellfoundation.org, (last visited Apr 7, 2021), <https://www.agewellfoundation.org/pdf/Human%20Rights%20of%20Older%20People%20in%20India%20-%20A%20Reality%20Check%20-%20July%202014.pdf>.

discriminate to age. The aged people are highly discriminated and even marginalized when step in the field of education. There are many who could not complete their studies or pursue higher studies due to family work load in spite of having great interest but the society as well as our education system leaves negligible scope for them. The same goes with their scope for work. The advancement of technologies and the stereotype mentality of the society insults their experience and dedication towards works. This situation can only be rectified once we have a dedicated legislation for their sincerity. The right to social security has been enshrined both in UDHR and ICESCR under Article 22 and Article 11 respectively. But in most of the cases the States have failed to implement it due to their economic constraints and further push their responsibilities on the shoulders of their children. Even then the senior citizens fail to avail that benefit because their children might have migrated to some other place or they might have failed owing to their own monetary crisis. The senior citizens are often denied access to loans, rents, insurance, land and grants. Not only that during any kind of relief of any natural disaster the senior citizens are served the least as they are not prompt enough to voice their needs or present themselves at the queues or get themselves registered. If they send their representative to avail the benefits designed especially for them, they often get cheated by their representative.¹⁴

D. Limitations to Access to Justice

Under Article 7, UDHR guarantees right to equality before law and most of the States have incorporated this concept. However, the lacunae lie to access the justice. Most of senior citizens are ignorant about their rights due to lack of awareness or obstacles to access the information due to technological advancements. Negligible steps have been taken by the State to educate the senior citizens to realize their rights and have proper recourse to justice. Since without knowing these a senior citizen cannot avail his right to justice, it comes down to the conclusion that justice has been denied to him. Not only that, they must be relieved from the complex and lengthy proceedings for their speedy remedy because they are not in a physical as well as mental capacity to continue and bear the rigours of an ordinary court proceedings. And eventually, when

¹⁴ THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC , *The Status of the Human Rights of Older Persons*, 183–190 (Tiina Pajuste).

justice is delayed it stands as justice denied. Surprisingly, the prison rights of senior citizens have also gone unnoticed. Even in UN Standard Minimum Rules on the Treatment of Prisoners, their rights went unaddressed whilst they need particular care in prison such as medicines, proper food, mobility, protection from both mental and physical violence, counselling. On another note, since the senior citizens who longer pose a threat a to the society due to physical infirmity and have already spent a considerable time in incarceration, they must be released with or without bail so that even they can get a chance to live the remaining few years with dignity. However, no international instrument has yet recognised the re-entry of the senior citizens into the society. Moreover, the people who get released at their old age have to face lots of struggle to rehabilitate in the society. They do not get any support from the State to earn their living, no access to employment, no pension, no medical facilities or other social security making their condition worse.¹⁵

E. Restriction in Autonomy and Independence

There are varying degrees of dependence of senior citizens which has always been seen as welfare and benefits. Apart from these, they should be provided their independence and autonomy for the fullest enjoyment of their rights, their liberty must not be deprived of them due to their old age. Due to the lack of proper legislation the senior citizens are denied to their right to choose residence, to take their independent decisions, to participate in public and family occasions, their daily activities, create and maintain family and personal relations with others, food habits, visit to places and many more. They and their decisions are always disrespected and they have no room for their privacy. They are mostly detained and are forced to act like security guards or keeper of the children. The condition of the widowed aged women is extremely deplorable. They are treated no less than a bonded housemaid or beggar.¹⁶

¹⁵OHCHR | Human rights of older persons Ohchr.org, (last visited Apr 7, 2021), <https://www.ohchr.org/en/issues/olderpersons/pages/olderpersonsindex.aspx>.

¹⁶HUMAN RIGHTS OF OLDER PEOPLE IN INDIA A REALITY CHECK, Agewellfoundation.org, (last visited Apr 7, 2021), <https://www.agewellfoundation.org/pdf/Human%20Rights%20of%20Older%20People%20in%20India%20-%20A%20Reality%20Check%20-%20July%202014.pdf>.

V. Conclusion and Recommendations

The overview is not an exhaustive summary of international instruments that failed to protect the rights of the senior citizens around the world. Nevertheless, it can be evidently made out that the United Nations have prepared a porous shield to safeguard and uplift the rights of the senior citizens. The current international instruments have failed to define the protections of the senior citizens and their dignity. There is range of options available to address the rights of the senior citizens and thereby create a dedicated and comprehensive framework realizing the rights of the senior citizens. Thus, the most effective way is to recognize the plights of the senior citizens which they face every day and address those by a systematic articulation of binding standards to meet the gap between the newly formulated or available laws and adequate implementation of those laws as they the senior citizens have already waited very long to realize their rights and this is the very hour of their need when their rights must be immediately addressed to.

Few recommendations keeping in mind the position of the senior citizens would be –

1. The Open-Ended Working Group must be given enough support technically as well as financially so that they can carry on identifying the key issues being faced by the senior citizens and the gaps in the implementation for the realization of those rights and undertake further measures to address them in a dedicated legislation for bringing a binding effect for the upliftment of the rights of the senior citizens.
2. An UN Special Rapporteur for the Rights of the Senior Citizens ought to be appointed for examining as well as reporting the status of human rights of the senior citizens all over the world to draw attention over the violation of their rights.
3. The rights of the senior citizens must find a place in regional, national as well as international stages of discussions as one of the central key issue and only then their rights would be addressed soon.
4. Even though a lenient approach have been noticed from the side of most of the Western countries in creating a new instrument dedicated to the rights of the senior citizens, the other UN member States, the interest groups, recognized NGOs as well as media must continue to voice the rights of the senior citizens and continue to favour it so that sooner or

later they can leave a positive impact on the other Western UN member States.

5. The advocacy groups must try to educate the mass about the rights of the senior citizens and must stretch out their hands to help them realizing their rights. They must try to point out to the current government the prevailing gaps and shortcomings in the present legal system wherein the rights of the senior citizens have been omitted which needs to be mitigated as early as possible. Any significant change in the domestic laws can prove to be useful as they will not only recognise the rights of the senior citizens in their own country but also will set an example for the rest of the countries in the world.
6. The soonest adoption of Convention on the Rights of Older People will a historical move in identifying the rights of the senior citizens which would significantly address the rights of the senior citizens and their needs by creating a binding effect on the government of the signatories for the better realization and upliftment of their rights.

Executive Power to Undo Punishment vis-à-vis Doctrine of Precedent

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Abstract

One of the powers which have been conferred on the President and Governor of India is the Power of Pardon. Article 72 and Article 161 of the Indian Constitution confers this power on the President and Governor respectively which is to be exercised with a sense of responsibility. A kind of check over misuse of this extraordinary power by the hands of the executive organ of the State is provided through the power of judicial review. The main purpose of the pardoning power of the Executive is to provide a human touch to the judicial process. The very purpose of mercy provisions will be defeated if this human touch is not exercised in a proper way. This paper made an effort to discuss factors influencing the commutation of sentencing and the issues to get a complete understanding of the pardoning power under the Constitution of India.

Keywords- *Pardoning power, President of India, Governor, Commutation, Judicial Review*

I. Introduction

The Constitution of India confers power to the President of India to grant pardons and to suspend, remit or commute sentences in certain cases which read as under²:

- (1). The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence-(a). in all cases where the punishment or sentence is by a Court Martial; (b). in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends; (c). in all cases where the sentence is a sentence of death; (2). Nothing in sub-clause (a)

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² Article 72, Constitution of India.

of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial; (3). Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

In the same way, Constitution of India confers power to the Governor of each of the States to grant pardons and to suspend, remit or commute sentences in certain cases which read as under³: “The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter of which the executive power of the State extends.”

The pardoning power of the President of India or the Governor of each of the States, leave a field open for the executives to depart from the strict adherence to the “Doctrine of Precedent”. As far as finality is concerned, ‘Doctrine of Precedent’ gets a jolt when President of India under Article 72 and the Governor of a State under Article 161 of Constitution of India grants pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence under any of the penal laws. It implies that the Ratio-Decidendi of a judgment pronounced either by Supreme Court of India or the respective High of a province to penalise a person either by honouring a pre-existing Ratio-Decidendi or newly declared Ratio-Decidendi by interpreting the law is departed. Then where lies the finality of “Doctrine of Precedent”, one of the purposes for which it was developed when the executives of a country by exercising quasi-judicial power (even though separation of powers between judiciary, executive and the legislatures is one of the basic structures of the Constitution of India which cannot be damaged or destroyed), can nullify it? As judiciary can depart from the strict adherence of “Doctrine of Precedent” due to the presence of its own inherent power under certain situations, similarly executives of a country also by exercising pardoning power can stop the honouring of it, though in a very limited way.

³ Article 161, Constitution of India.

II. Analysis of the Nature of Pardoning Power of the Executives vis-a-vis Judicial Review

MARU RAM V. UNION OF INDIA: The first question which is emerging: is the pardoning power of President under Article 72 (including Article 161) a discretionary power of the President himself or does he need to act must on the advice of the Council of Ministers? Next important question: is the pardoning power judicially reviewable by the Supreme Court or respective High Court? The following observations of the Supreme Court in the above-mentioned Maru Ram v Union of India give answers to these pertinent questions⁴:

It is not open either to the President or the Governor to take independent decision or direct release or refuse release of any one of their own choice. It is fundamental to the Westminster system that the Cabinet rules and the Queen reigns. Being too deeply rooted as foundational to our system no serious encounter was met from the learned Solicitor General whose sure grasp of fundamentals did not permit him to controvert the proposition, that the President and the Governor, be they ever so high in textual terminology, are but functional euphemisms promptly acting on and only on the advice of the Council of Ministers save in a narrow area of power. The subject is now beyond controversy, this court having authoritatively laid down the law in Shamsher Singh's case. So, we agree, even without reference to Art, 367 and ss. 3(8)(b) and 3(60)(b) of the General Clauses Act, 1897, that, **in the matter of exercise of the powers under Articles 72 and 161, the two highest dignitaries in our constitutional scheme act and must act not on their own judgment but in accordance with the aid and advice of the ministers.** Article 74, after the 42nd Amendment silences speculation and obligates compliance. The Governor vis a vis his Cabinet is no higher than the President save in a narrow area which does not include Art. 161. The Constitutional conclusion is that the Governor is but a shorthand expression for the State Government and the President is an abbreviation for the Central Government.

An issue of deeper import demands our consideration at this stage of the discussion. **Wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot;** for no legal power can run

⁴ AIR 1980 SC 2147

unruly like John Gilpin on the horse but must keep sensibly to a steady course. Here, we come upon the second constitutional fundamental which underlies the submissions of counsel. **It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power.** We proceed on the basis that these axioms are valid in our constitutional order.

Article 14 is an expression of the egalitarian spirit of the Constitution and is a clear pointer that arbitrariness is anathema under our system. It necessarily follows that the power to pardon, grant remission and commutation, being of the greatest moment for the liberty of the citizen, cannot be a law unto itself but must be informed by the finer canons of constitutionalism.

It is the pride of our constitutional order that all power, whatever its source, must, in its exercise, anathematise arbitrariness and obey standards and guidelines intelligible and intelligent and integrated with the manifest purpose of the power. From this angle even the power to pardon, commute or remit is subject to the wholesome creed that guidelines should govern the exercise even of presidential power.

Speaking generally, Lord Acton's dictum deserves attention I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way, against the holders of power, increasing as the power increases. Likewise, Edmund Burke, the great British statesman gave correct counsel when he said: "All persons possessing a portion of power ought to be strongly and awfully impressed with an idea that they act in trust, and that they are to account for their conduct in that trust to the one great Master, Author, and Founder of society."

Pardon, using this expression in the amplest connotation, ordains fair exercise, as we have indicated above. **Political vendetta or party favouritism cannot but be interlopers in this area. The order which is the product of extraneous or mala fide factors will vitiate the exercise. While constitutional power is beyond challenge, its actual**

exercise may still be vulnerable. Likewise, capricious criteria will void the exercise.

Push this logic a little further and the absurdity will be obvious. No Constitutional power can be vulgarised by personal vanity of men in authority. **Likewise, if an opposition leader is sentenced, but the circumstances cry for remission such as that he is suffering from cancer or that his wife is terminally ill or that he has completely reformed himself, the power of remission under Articlcs 72/161 may ordinarily be exercised and a refusal may be wrong- headed. If, on the other hand, a brutal murderer, blood- thirsty in his massacre, has been sentenced by a court with strong observations about his bestiality, it may be arrogant and irrelevant abuse of power to remit his entire life sentence the very next day after the conviction merely because he has joined the party in power or is a close relation of a political high-up.** The court, if it finds frequent misuse of this power may have to investigate the discrimination. The proper thing to do, if Government is to keep faith with the founding fathers, is to make rules for its own guidance in the exercise of the pardon power keeping, of course, a large residuary power to meet special situations or sudden developments. This will exclude the vice of discrimination such as may arise where two persons have been convicted and sentenced in the same case for the same degree of guilt but one is released and the other refused, for such irrelevant reasons as religion, caste, colour or political loyalty. **Once we accept the basic thesis that the public power vested on a high pedestal has to be exercised justly the situation becomes simpler. The principal considerations will turn upon social good by remission or release.**

The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on their own. **The advice of the appropriate Government binds the Head of the State.** No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group. (9). Considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean, and are left to the appropriate

Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. **Only in these rare cases will the court examine the exercise.**

KEHAR SINGH VS UNION OF INDIA: In the same way, in this judgment, Supreme Court followed the Ratio-Decidendi of Maru Ram v Union of India judgment by reiterating briefly the mandatory acceptance of the decision of Council of Ministers by the President or respective Governor and elaborately the judicial review-ability of the Presidential pardon or Governor's pardon which was not done in the former case. While exercising the power, the President or the Governor, to justify the pardon, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence, without altering or ignoring the records/evidence of the case, the cabinet can come to a different conclusion by going into the merits of the case with a different interpretations of the facts⁵:

The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. **We may point out that the Constitution Bench of this Court held in Maru Ram v. Union of India that the power under Article 72 is to be exercised on the advice of the Central Government and not by the President on his own, and that the advice of the Government binds the Head of the State.**

We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. **In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed.** The president acts in a wholly different plane from that in which the Court acted. He acts under a

⁵ AIR 1989 SC 653

constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him.

The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. It is the nature of the power which is determinative. In *Sarat Chandra Rabha v. Khagendranath Nath* (AIR 1961SC 334), Wanchoo J said: “Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched. In this view of the matter the order of remission passed in this case though it had the effect that the appellant was released from jail before he had served the full sentence of three years’ imprisonment and had actually served only about sixteen months’ imprisonment, did not in any way affect the order of conviction and sentence passed by the Court which remained as it was.”

It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court.

The further question raised was whether judicial review extends to an examination of the order passed by the President under Article 72 of the Constitution. At the outset we think it should be clearly understood that we are confined to the question as to the area and scope of the President’s power and not with the question whether it has been truly exercised on the merits. **Indeed, we think that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram v. Union of India*. The function of determining whether the act of a constitutional or statutory**

functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the court.

This Court proceeded in *State of Rajasthan v. Union of India*, [1978] I S.C. R. 1 80, to hold: “So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its Constitutional obligation to do so this Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the Constitutional values and to enforce the Constitutional limitations. That is the essence of the Rule of Law”. In *Minerva Mills Ltd. v. Union of India*. [1981] 1 S. C. R. 206, Bhagwati, J. said: “the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. The Constitution has, therefore, created independent machinery for resolving these disputes and this independent Machinery is the judiciary which is vested with the power of judicial review.”

We are concerned here with the question whether the President is precluded from examining the merits of the criminal case concluded by the dismissal of the appeal by this Court or it is open to him to consider the merits and decide whether he should grant relief under Article 72. We are not concerned with the merits of the decision taken by the President, nor do we see any conflict between the powers of the President and the finality attaching to the judicial record, a matter to which we have adverted earlier. Nor do we dispute that the power to pardon belongs exclusively to the President and the Governor under the Constitution. There is also no question involved in this case of asking for the reasons for the President’s order. And none of the cases cited for the respondents beginning with *Mohinder Singh v. State of Punjab* (AIR 1976 SC 2299), advance the case of the respondents any further. The point is a simple one, and needs no elaborate exposition. We have already pointed out that

the Courts are the constitutional instrumentalities to go into the scope of Article 72 and no attempt is being made to analyse the exercise of the power under Article 72 on the merits. As regards Michael De Feritas v. George Ramoutar, [1975] 3 W.I.R. 388, that was, case from the Court of Appeal of Trinidad and Tobago, and in disposing it of the Privy Council observed that the prerogative of mercy lay solely in the discretion of the Sovereign and it was not open to the condemned person or his legal representatives to ascertain the information desired by them from the Home Secretary dealing with the case. None of these observations deals with the point before us, and therefore they need not detain us. Upon the considerations to which we have adverted, it appears to us clear that the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review.

The facts which are emerging from the above-mentioned two leading judgments of Supreme Court, are; **firstly**, the pardoning power of the President or the Governor under articles 72 or 161, cannot be exercised arbitrarily or by whims and caprice, rather there should be a sound logic and fair principle behind the exercise of this discretionary power; **secondly**, the decision of pardoning the convicted person by the constitutional Head of the country or the state is actually the decision of the cabinet- union and state as the case may be, which they have to accept and abide by; **thirdly**, if the President or the Governor grants the pardon, reprieves, respites or remission of punishment or suspends, remits or commutes the sentence pronounced by Supreme Court or High Court, then as pre-requisite, they can come to different conclusion or findings of facts with an opposite interpretation by going into the merits of the case, as finally pronounced by the judiciary; **fourthly**, though the pardoning power cannot be judicially reviewable, but its malafide exercise or if the exercise of power under articles 72 and 161 is irrelevant, irrational, discriminatory, then judiciary can venture into. Over and above these legal and constitutional standings of Articles 72 and 161, the crux of the issue is the dilution of the application of Doctrine of Precedent in India. In leading cases of Maru Ram v. Union of India and Kehar Singh v. Union of India, the Supreme Court declared that the pardoning power of the President and the Governor is subject to judicial scrutiny. In the later cases, though the Supreme Court enumerated some specific grounds on which

the judiciary could scrutinise the constitutionality of the decision of the Constitutional pardoners, but it did not lay down specific guidelines within the trajectory of which the *de jure* Constitutional pardoners could exercise that discretionary power on the advice of *de facto* Constitutional executives. Therefore, the fact remains that the application of Doctrine of Precedent has to a great extent been diluted because of pardoning power of President and Governor as they can just stop the implementation of the sentence of the convict, based on the Ratio-Decidendi of a final judgment, either on the basis of strict compliance with a previous Ratio-Decidendi or a newly developed Ratio-Decidendi-it is last instance of departing from the applicability of Doctrine of Precedent. But this dilution has also been diluted due to the Ratio-Decidendi of the above referred leading cases through which the judiciary brings the exercise of pardoning power under judicial scrutiny-the judicial review-ability of any pardon, reprieves, respites or remission of punishment or suspension, remission or commutation of the sentence by the President of India or the Governor of any of the States which they have done on the advice of the respective Council of Ministers.

III. Specific Instances of Pardoning by the President and the Governor

Nirbhaya rape case⁶ and Parliament attack case are instances where the President did not grant pardons to the convicted person/s. You have to find out some cases where the president granted pardons but those were not declared unconstitutional. It is better if each of the pardons is tagged with the Ratio-Decidendi of the actual judgment which convicted and sentenced the person either by following a previous Ratio-Decidendi or by making a new Ratio-Decidendi.

On the other hand, there are instances like in like K M Nanavati v State of Bombay, Swaran Singh v State of U.P, Satpal v State of Haryana, Epuru Sekhar v Govt of Andhra Pradesh where pardoning by the Governor was declared to be unconstitutional.

IV. Findings and Conclusions

The power of pardon has been made subject to judicial review. It is a good development in so far as it will prevent a misuse of this important constitutional

⁶ Mukesh and Anrs. V NCT Delhi (Nirbhaya Case) (2017)6 SCC1.

power by unscrupulous politicians in favour of people with power and influence. However, it may serve to further increase the burden of cases on the courts and altogether prolong the judicial process. It may also prevent the executive from utilizing this power for reasons that although may not strictly be in conformity with constitutional principles, may nevertheless be in the interest of the State. Given the bizarre twist that our polity has taken in recent times, it seems to be self-evident that the only protection we have from complete insanity is judicial review. Thus, while the trend towards greater judicial scrutiny of the power of pardon is undoubtedly a welcome one, the judiciary must leave the executive with a window of discretion in the exercise of the same. If we do not combine democratic governance with firm governance, we shall have no one except ourselves to blame for lawlessness resulting from the abuse of the provisions relating to pardon by criminals guilty of heinous crime.

Given that the Supreme Court itself has also recently argued for whole life sentences as an effective replacement for the death penalty, this may well be the common ground between the executive-judiciary that will avoid confrontation and deal with the delay question. It will however replace the controversial death penalty with the equally controversial 'whole life' sentence.

Women and Land-holding Rights in India: Gender Discrimination Riddled with Agony

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Dr. Pardeep Singh²

Abstract

Globally women are deprived of access to land-holding rights and means of production. The discrimination seems pervasive trickling down from top to the bottom of our social fabric of society in India. It goes to an extent, that a family—an agency of the socialization, itself, neglects their daughter/s by keeping her/them away from possession, ownership, succession, inheritance of family property, and by denying equal opportunities for education or employment. There exist many pieces of research in the world pressing upon the need and relevance of securing property and landholding rights for women for empowering them in a real sense. As has been claimed, access to the property and arable land can contribute not only to raising the situation of women rather in education and overall development of the society too. The present study is an attempt to explore various nuances relating to the issue of access to the property by women in India. Existing literature on the topic has been rigorously gone through and highlighted for building a discourse deliberating the need for recognizing property rights for women in India. The paper emphasis how without taking any sympathetic approach towards women empowerment, it is high time to make a call for a right-based approach for women to their landholding rights.

Keywords: *Discrimination, doubly suppressed, ownership inequalities, stridhan, vulnerability, landholding rights, sympathetic approach, right-based approach.*

I. Introduction

“Women constitute half the world’s population, perform nearly two-third of its work hours, receive one-tenth of the

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world's income, and less than one-hundredth of the world's property.”³

In the backdrop of this contextual ‘locating’ of women at the global level, it would be relevant to build a discourse on the importance of women having equitable access to their rights. Unfortunately, if we see the journey travelled so far by India, particularly post-independence, then we found ourselves struggling toward reaching any conclusion about the position of women in India. The journey of women in India seems to be full of fascination as well as frustrations.

Some of the religious beliefs, particularly in Hinduism, have given respectable status and position to women. In Hindu religious texts, a woman is considered to be the manifestation of Goddess/Shakti, and the male is considered to be incomplete without the female (Shakti). Each male deity of the divine trinity has his female counterpart; *Saraswati*(learning), *Lakshmi* (wealth) and *Parvati* (power).⁴ Also, there is no denial in admitting the frustrating part of women’s story in India wherein women seem to be treated as second-rate citizens and a widow as the third-rate citizen. On the front of their property rights, in India, women have always been doubly suppressed and condemned socially, politically, legally, and economically. The existing dichotomy and conundrums of women’ stories in India need to be debated and deliberated rigorously for the sake of desired transformations.

It is being said by many that the reason behind this dichotomy is the existing gap between aspirations of our founding mothers & fathers and achievements thereof. The rigidity of the caste system in India is also one such contributory factor that led Hindu women to lose their independence and to depend on their male counterparts for protection. Indian women have either nil or trifling access over property and other things. Women are deprived of access to land-holding rights and means of production, be it a question of ownership, possession, control, succession, and inheritance. To a greater extent, the family—an agency of the socialization, itself, neglects their daughter/s by keeping her/them away

³United Nations Report, *Program of Action for the Second Half of the UN Decade for Women*, 1980.

⁴ Richa Sharma, *Status of Women in Hindu Society* (10-08-2015) (Sept. 29, 2020, 9:00 PM) <https://www.speakingtree.in/blog/status-of-women-in-hindu-society>. (Last visited on 20-09-2019).

from possession, ownership, succession, inheritance of family property, and by denying equal opportunities for education or employment. Nobel laureate, Amartya Sen once said that: “the absence of claims to property can not only reduce the voice of women, it can also make it harder for women to enter and flourish in commercial, economic and social activities.”⁵ Sen has highlighted survival inequalities, unequal facilities (obstacles to education), ownership inequalities, and unequal sharing of household benefits in India. In India, there is a difference in basic facilities including schooling, the opportunities of special facilities, such as higher education or technical training, which happens to be far fewer for young women than for young men.

II. Existing Literature Making a Call for Securing Women’s Right to Property

Sonia Bhalotra ⁶ sums up that legislation that gives women equal rights to inheritance of ancestral property intensifies preference of son over daughter in fertility and has added to the increased female infant mortality rate. The reports suggest significant increase in parents’ proclivity to commit sex-selective abortion in order to manipulate the sex composition of the births in favour of sons.

Showing the importance of ensuring property rights for women, Pradeep Panda & Bina Agarwal⁷ made a valid conclusion that, unlike employment, if a woman owns a property, it is seen to make an unambiguous difference to the incidents of violence.

Similarly, highlighting the status of the right of women to property in India, Pakistan, Bangladesh, Nepal, and Sri Lanka, Bina Agarwal,⁸ argues that the single most important economic factor affecting woman's condition is the gender gap in command over property. Bina builds a dialogue that women's

⁵ AMARTYA SEN, *THE ARGUMENTATIVE INDIANS* 235 (Oxford University Press: New Delhi, 2005)

⁶SONIA BHALOTRA *et. al.*, *WOMEN’S INHERITANCE RIGHTS: REFORMS AND THE PREFERENCE FOR SONS IN INDIA*,(Institute of Labor Economics, Germany, December, 2017).

⁷ Pradeep Panda &Bina Agarwal, *Marital Violence, Human Development and Women’s Property Status in India*,33 *WORLD DEV.R* No. 5, 823-50 (2005)

⁸BINA AGARWAL, *A FIELD OF ONE’S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA*,(Cambridge University Press 1994).

direct ownership and control of land can be crucial for enhancing their well-being, their bargaining power within and outside the household, and their overall empowerment. It can have wide-ranging implications for poverty alleviation and production efficiency. In particular, the book outlines the effects of lack of control over land and property on the lives and livelihoods of women across South Asia.

Pradeep Panda⁹, in his research study on social protection, explores the links of women's ownership of property and inheritance rights and their experience of domestic violence, and found that women who owned property and did not face violence mentioned the role of owning property in protecting them from potential violence.

Jayoti Gupta¹⁰ explored the linkage of women's ownership of property and inheritance rights and their experience of domestic violence, and concluded that women who faced violence did report a change in their situation after claiming the property. Jayoti Gupta also pinpointed that the role of the fathers in ensuring their daughters' right to property seems to be significant.

Reena Patel,¹¹ with the aim to critically evaluates the potential for such a 'rights regime' to enable Hindu women's greater access to the property, argued that women should be entitled to a share in their husbands' property not only as widows upon the husband's death but also during the entire period while the marriage subsists. Reena Patel is building a discourse that although the existing legal and religious normative frameworks do not accord such a right; it is nevertheless possible to argue for the legitimacy of such a claim. Indeed, there is a growing recognition of the need for a regime of marital property in India. The same principle could also be extended to the daughter's share in parental property.

⁹PRADEEP PANDA, DOMESTIC VIOLENCE AND WOMEN'S PROPERTY OWNERSHIP: DELVING DEEPER INTO THE LINKAGES IN KERALA,(Population Council New Delhi India 2006)

¹⁰JAYOTI GUPTA, PROPERTY OWNERSHIP OF WOMEN AS PROTECTION FOR DOMESTIC VIOLENCE: THE WEST BENGAL EXPERIENCE, (Centre for Studies in Social Sciences Kolkata India2006).

¹¹ Reena Patel, *Hindu women's property rights in India: a critical appraisal*, THIRD WORLD QUART., 1255-1268(2006)<https://doi.org/10.1080/01436590600933453>

Debarati Halder and K. Jaishankar¹² feel that succession rights and right to own property of the Hindu women would be stronger if the Hindu Succession Act includes a separate provision for prevention of dowry-based harassment. It should be mentioned that the *stridhan* or the property of women would be solely her own property and any kind of forceful recapture of the property which belongs to the bride would make such ownership null and void, and it would be considered a penal act.

Bina Agarwal¹³ highlighted the status of the right of women to property in South Asia to conclude that the gender gap in the ownership and control of the property is the single most critical contributor to the gender gap in economic well-being, social status, and empowerment. She made a call that better employment opportunities can complement but not substitute the land ownership.

Moser¹⁴, in his study, highlighted a negative co-relation that has been found between ownership, assets and vulnerability of people. More ownership of assets leads to less vulnerability, while the reduction in ownership right increases the chances of vulnerability.

Hema Swaminathan,¹⁵ aiming to locate women's experiences of property conflicts within the larger context of being HIV affected argued that women's limited ability to access, own, and control property such as land and housing is one manifestation of gender inequity that has serious implications for women and their families. According to Hema, property grabbing, dispossession, or eviction of women after their husbands' death or due to their HIV positive status is slowly emerging as a problem in India.

¹²Debarati Halder and K. Jaishankar, *Property Rights of Hindu Women: A Feminist Review of Succession Laws of Ancient, Medieval, and Modern India*, 24 JOUR. LAW RELIGION No. 2, 663-687. (2008) <http://www.jstor.org/stable/25654333>. Last visited on 15-7-2019.

¹³ Bina Agarwal, *Gender and Command over Property: A Critical Gap in Economic Analysis and Policy in South Asia*, 22 WORLD DEV. 1455-1478 (1994).

¹⁴ Caroline Moser, *The Assets Vulnerability Framework: Re-assessing Urban Poverty Reduction Strategies*, 26 WORLD DEV., 1-19 (1998).

¹⁵Hema Swaminathan, *Women's Property Rights and HIV/AIDS in India*, 34 EPW 17, April 25, 2009.

Srimati Basu,¹⁶ while identifying the fundamental barriers that impede the ability of legal reforms to improve the status of Hindu women in India found that ideological myths perpetuated male-biased property inheritance. As per Basu, myths which hold that dowry at the time of marriage constitutes women's share of inheritance, that a woman's right to family property is transferred to the affinal household at the time of marriage, that sons deserve greater inheritance because of their care for parents, and that daughter can rely on the lifelong financial support of their natal families are used by women to explain women's disinheritance from the natal property. Basu argues, then, that women do not "internalize the ideological construction of their needs" but negotiate the meanings of those ideologies.

III. Legislative Attempt for Securing Land-holding Rights

Post-independence, a number of statutory provisions have been made in order to safeguard the interest of women. Right from our Constitutional objectives as inserted in the very Preamble of our Constitution i.e. to secure Equality of status and opportunity and to promote fraternity; assuring the dignity of each individual, a number of other constitutional protections have also been given for protecting the interest of women like Article 15(3); providing for the special provisions for the protection of women. Likewise, various other provisions as inserted in Part-IV, Part-IV-A of the Constitution of India.¹⁷ 33 per cent

¹⁶ SRIMATI BASU, SHE COMES TO TAKE HER RIGHTS: INDIAN WOMEN, PROPERTY, AND PROPRIETY, (State University of New York Press, 305 1999).

¹⁷INDIA CONST. Part-IV:

INDIA CONST. art. 39(a), Constitution of India, which provides for an obligation for State to direct its policy towards securing for men and women equally the right to an adequate means of livelihood); Article 39(d), providing for equal pay for equal work for both men and women,

INDIA CONST. art. 39 A provides for promoting justice, on a basis of equal opportunity and to provide free legal aid by suitable legislation or scheme or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities,

INDIA CONST. art. 42 provides for securing just and humane conditions of work and for maternity relief,

INDIA CONST. art.46 provides for promoting with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation,

reservation for women in village panchayats and local bodies vide 73rd and 74th Amendments of Constitution of India also safeguarded and aspired for uplifting the status of women in India.

In spite of all these statutory assurances, we observed numerous instances of inequalities wherein women were being doubly suppressed. Amongst Hindus, inequalities in inheritance were brought to the notice of the Supreme Court of India in case of *Madhu Kishwar versus State of Bihar*,¹⁸ wherein the Supreme Court directed the Government of India to comprehensively examine the question on the premise of our constitutional ethos and amend the law accordingly. The 174th Report of the Law Commission of India (May, 2000) on “Property Rights of Women” also pressed for a need to make some reforms in the Hindu Succession Act, 1956. Consequently, in 2005, the Hindu Succession Act, 1956 got amended so as to ensure the wellbeing of Hindu women by making a daughter of coparcener as coparcener herself.¹⁹

INDIA CONST. art. 47 providing for State to raise the level of nutrition and the standard of living of its people and in Part-IV-A including:

INDIA CONST. art. 51(A) (e), Constitution of India, providing to promote harmony and the spirit of common brotherhood amongst all the people of India and to renounce practices derogatory to the dignity of women, are such golden knitted assurances of our Constitution for empowering women in India.

¹⁸ (1996) 5 SCC 102.

¹⁹ Hindu Succession Act, 2005, sec. 6 read as:

Devolution of interest in coparcenary property.

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005 (w.e.f. 09-09-2005), in a Joint Hindu family governed by the *Mitakshara* law, the daughter of a coparcener shall,—

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,

and any reference to a Hindu *Mitakshara* coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this subsection shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

Amendment in Hindu Succession Act in 2005 projected to be of great worth; whereby a daughter of a coparcener for the first time has been declared as a coparcener herself and all the rights related to coparcenary property were granted to Hindu daughter at par with her brothers. The State of Kerala also passed a slightly different amendment in the form of the Kerala Joint Hindu Family System (Abolition) Act that recognized all family members with an interest in the undivided family estate as being independent full owners of their shares from then onwards, i.e. abolished joint family property altogether. Furthermore, in the same year the enactment of Protection of Women from Domestic Violence Act, 2005 was also projected as a welcome step in order to protect the interest of women in India. These two socio-welfare legislations

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in

the property of a Joint Hindu family governed by the *Mitakshara* law, shall devolve by testamentary or intestate

succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and, —

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation. —For the purposes of this sub-section, the interest of a Hindu *Mitakshara* coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not...

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004. Explanation. —For the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.

were seen as a light of hope at the end of the dark black tunnel of sufferings of women in India, particularly on the front of their exclusion in landholding rights and for protecting them from domestic violence.

India is one of the signatories to the Convention on Elimination of all Forms of Discrimination against women (CEDAW) as adopted in 1979 by the United Nations and is under an obligation to modify gender-biased laws. To meet this end, India has also taken several measures for improving the conditions of women in India. One such initiative was the ninth five-year plan (1997-2002) of the government of India, wherein department of land resources, for ensuring accessibility and grant ownership of land rights to women, instructed all the States that 40% of agricultural land settled under land reform programmes should be exclusively in the name of women. In the remaining cases, the allotment may jointly be in the name of husband and wife. These initiatives intended to benefit a large number of women in India. During the 10th Five-year plan also, various states introduced a scheme of providing concession in registration and stamp duty to women property buyers.²⁰ Eleventh (2007-12) and twelfth (2012-17) five-year plans also made a call for more ownership rights to women in India.

IV. Land-Holding Rights and Women's Condition: A Far Cry

Given the unawareness, meta-son preference, mounting instances of forlorn women/widows in places like *Vrindavan*, it can be rightly inferred that on the front of land-holding/property rights, no substantial change has been observed in the status of women in India. Hindu women have equal legal rights on papers but, still pervasive social constructions prevent them from making use of these rights. Amongst Hindus, very often a daughter is persuaded, by her family and by her mother herself, to relinquish her legal share in favour of her brothers so that she can continue her relationship with the natal home. Ironically, legal rights in ownership of property as provided by the Hindu Succession Act, 2005 is not being realized due to existing social constructions and prevailing customary practices which, in fact, have hijacked these rights and left this segment of the society in a situation of helplessness. Hindu widows happen to

²⁰ C. SRIDHAR, A NOTE FROM THE CENTRE DIRECTOR, IN PREM CHOWDHARY (ED.) UNDERSTANDING WOMEN'S LAND RIGHTS: GENDER DISCRIMINATION IN OWNERSHIP, (Sage Publications India Pvt. Ltd., 2017).

be more prone to discrimination due to denial of land-holding rights in the true sense of the word. While citing the data of the Ministry of Rural Development for the year 2011, Indu Pathak, in one of her papers, highlighted that:

“It is recognised as a significant determinant of economic well-being, social status and political power. But rural women in India have only marginal rights to agricultural land and to other productive assets. It is an irony that in India, while 83 per cent of rural women provide agricultural labours, only 10 per cent of rural land is actually titled to them.”²¹

Overall, at the world level also, India lags behind in addressing the socio-legal problems in form of pervasive discrimination against women. It is quite frustrating to note that India ranks 95th out of 129 Nations on the gender inequality index (GII) of 2019.²² Undoubtedly, objectives for ensuring undeniable accessibility of women to land rights still remain a far cry. A Study has shown that the Hindu Succession Act, 1956, as amended in 2005, has been largely unsuccessful in improving inheritance of women.²³ Parents may have been reluctant to give daughters any property due to patrilocality and the risk that the property ends up being controlled by the in-laws of the daughters.

The Protection of Women from Domestic Violence Act, 2005 also seems to be a paper tiger in reality. As per the 5th monitoring report brought out by the Lawyer’s Collective and International Centre for Research on Women, the Protection officers are discouraging women from seeking justice and are pushing them into “settlement”. On the question raised by this body during the survey “Is Domestic Violence a family affair?”, 57.1 % of Delhi’s Protection

²¹Indu Pathak, *Gender Justice and Law: A Gender Specific Study of Land ownership in Uttarakhand*, 376-377 in PREM CHOWDHARY (ED.) UNDERSTANDING WOMEN’S LAND RIGHTS: GENDER DISCRIMINATION IN OWNERSHIP,(Sage Publications India Pvt. Ltd., 2017).

²²The Gender Inequality Index (GII) is an index for measurement of gender disparity that was introduced in the 2010 Human Development Report 20th anniversary edition by the United Nations Development Programme (UNDP).

²³*Supra* note 4. See, cited work of Roy (2015)

Officers said ‘yes’, which indicates that they still don’t see it as a social problem.²⁴

As rightly highlighted by Prem Chowdhary that:²⁵

“Despite all this recognition, good intentions, and willingness of the government, women continue to encounter tremendous barriers to arrogate what should be rightfully theirs. It is undeniable that there is a difference between the legal recognition of a claim and its social recognition and between recognition and enforcement. There is also a distinction between ownership and effective control. For women’s empowerment, it is essential to enhance their ability to claim and retain control over their rightful inheritance shares.”

A. A Study Depicting Women’s Confounding Existence

“...[T]he bodies of widows who die in government-run shelter homes in Vrindavan are taken away by sweepers at night, cut into pieces, put into jute bags and disposed of as the institutions do not have any provision for a decent funeral. This, too, is done only after the inmates give money to the sweeper!”

Long back in 2012, the Hindu Newspaper published the above mentioned shocking facts, that had come to light in a survey conducted by the Mathura District Legal Services Authority (DLSA) on the “Plight of Forsaken/Forlorn Women— Old and Widows Living in the religious place like *Vrindavan* in the State of UP.”²⁶

This kind of sorry state of affairs makes us realize about the pathetic conditions of women in India, particularly after the death of her husband, wherein they are subjected to perpetual sufferings. An apparent objection to this published news, which made many feel snubbed, was also the cruel behaviour of sweepers towards dead bodies of widows. Sweepers working in government-run shelter

²⁴THE TRIBUNE, *Protection officers hardly of any help to victims: survey*, Jan., 31, 2012.

²⁵PREM CHOWDHARY, *supra* note 19.

²⁶THE HINDU, *Dignity denied even in death for Vrindavan widows*, Jan. 8, 2012.

homes had been projected by many as responsible for the sufferings of dead bodies of those women. However, to the contrary, in fact, sweepers were seen with all respect by these women inmates as revealed by Dr. Laxmi Gautam. Dr. Laxmi is known as ‘angel of Vrindavan’ for her tireless commitment towards addressing the sufferings of forlorn women during and after their lives. It was Dr. Laxmi only who carried out the painstaking survey of the forlorn women/widows in the city of Vrindavan with others for the Mathura District Legal Services Authority (DLSA). During the field visit, Dr. Gautam shared her experience as to how national media haunted her for media bite over these findings of their survey report which she was not supposed to comment on, being a *sub-judice* matter before the Supreme Court of India.²⁷ Dr. Gautam shared as to how ‘a wrong translation from Hindi to English language’ changed the entire focus of the sufferings of widows as captured by her in her survey report written in Hindi. The media was prompt enough to pick the word “cut into pieces” and generated a debate on the role of sweepers who, according to Dr. Gautam, happened to be rather helping hands (only male accessible to them at the shelter) for those poor women inmates living in the Ashrams. While narrating the whole episodic story of sufferings, Dr. Laxmi said that:

“During my visit to one such government-run shelter home, in my interaction with a forlorn widow hailing from the State of West Bengal, I came to know about this pathetic treatment is given to the dead body. Cremation was in itself a burden on the inmates. An average height of Hindu woman being about 5 feet and if one died in the late evening; since by that time the sweeper would have already left, the body would be placed in the same room for the whole night. The next day also, the sweeper would attend that dead body after

²⁷The Co-author is pursuing her Ph.D research as an ICSSR fellow at Department of Law, CU, Haryana on Hindu Women’s Property and Educational Rights with special reference to ethnographic study of destitute Women living in Vrindavan town of U. P. State. Mentioned herewith are some initial findings of this qualitative research. Excerpt showing above are the initial findings of the interaction of Co-author Ms. Narinder (ICSSR fellow) with one of the key-informants (Dr. Laxmi Gautam) of her qualitative research. Co-author would like to acknowledge the support she received from her supervisor in this study

completing his routine work in these Ashrams at around 2:00-3:00 pm. Since the bodies of these women were not generally found in healthy condition and were not put in ice, so by that time their bodies would become stiff enough to make it difficult for that sweeper to put the dead body into the jute bag which is hardly of 2.5 feet to 3.0 feet in length. The only option left with the sweeper would be to forcefully stroke the stiff parts of the body so as to enable him to pack it properly into that jute bag and to cremate thereafter outside the crematorium—a place where Hindu women are not allowed to enter as per customary practice.”²⁸

Since Dr. Laxmi had submitted her report in Hindi and the Newspaper had reported it in English so mistakenly it got written ‘...*cut into pieces*’ instead of hitting forcefully (resultant in breaking of bones) for enabling him to put the body into a jute bag.²⁹

Fortunately, taking cognizance of the report, the Apex Court had made certain guidelines including making it imperative for the administration to record the last rites/cremation of women dying in these government-run shelter homes at *Vrindavan*. It was a much-needed step taken by the honourable Court as dignified and graceful cremation falls under the ambit of basic rights of an individual. Equally important was the need to go behind the veil for finding out the root causes behind such inhuman treatment meted to these women. Women’s sufferings need to be taken seriously. In the present case, Justice Altamash Kabir, the then Executive Chairperson of the National Legal Services Authority (NALSA), had been kind enough to ask the U.P. State Legal Services Authority to survey the causes behind the miserable condition of the women. In that survey, it was found that in most cases widows are denied remarriage even after the death of their husband in childhood or young age. While some are

²⁸*Ibid.*

²⁹ Touched with the sorry state of women at *Vrindavan*, eventually Dr. Laxmi started doing dignified cremation, at her own, of unclaimed dead bodies of women in the town of *Vrindavan*. As per Dr. Laxmi, fear in life come from living souls and not from dead bodies. For her commitment and dedication, Dr. Laxmi also got conferred with the prestigious award of ‘*Nari Shakti Puruskar*’ in the hands of Sh. Narendra Modi, the Prime Minister of India in year 2014.

forced to leave the marital home and native place by the family members just to avoid division of share in the family property or to avoid maintenance in old age and bearing the burden of a non-productive family member, many others leave their homes due to physical and mental torture.³⁰ While citing the main reason behind these sufferings of women in *Vrindavan*, Dr. Laxmi said that: “the lack of access of women over their rights particularly their land-holding or property rights happen to be one big reason behind these women leaving their houses or being forced to leave their houses.” To the utmost surprise, one of the reasons accountable for forcing women; mostly widows, to leave their house is their assured claim over family property/land-holdings.³¹ A large number of these forlorn widows are from the State of West Bengal. To some extent, the applicable liberal *Dayabhaga* School in West Bengal secured women’s rights over family property. So, maybe in order to get rid of their claims, the family members; very often on the death of her husband forced them to leave the house. The kind of hardship being faced by these widows is something which cannot be portrayed in words.

Ownership of Property has largely been the domain of men worldwide and there is great resistance to granting land rights to women. Daughters; who earlier could not claim rights on their father’s property can now demand an equal share in their father’s ancestral property. But, it is observed that in states like Punjab and Haryana, people do not seem to accept the change.

For example, on the idea of a woman owning land in the Jat community of fertile northern plains of Punjab, “if she should insist on her right to inherit land equally under civil law, she would stand a good chance of being murdered.”³²

³⁰ Tempted over this sensitive and unexplored socio-legal issue, on being carried out a qualitative research on these forlorn widows, the Co-author in her initial findings, has found that the devil resides in the societal attitude towards women and in particular reluctant behavior of patriarchal society towards acknowledging women’s right over property. The research found that most of the women living in the vicinity of Vrindavan are hailing from West Bengal. Surprisingly, the Bengal followed the more liberal *Dayabhaga* School which differ considerably from *Mitakhshara* School on the question of women’s standing as property owner.

³¹ *Ibid.*

³² M. Das Gupta, *Selective Discrimination against Female children in Rural Punjab*, 13 *POPULATION AND DEV. REV.* No. 2).

V. Bridging the Gap by the Supreme Court of India

As a follow-up monitoring over the pathetic conditions of forlorn women living at *Vrindavan*, the Apex Court of India again noted that there was "no" improvement in "pitiable" living conditions of widows in shelter homes at *Vrindavan* in Uttar Pradesh, the social justice bench comprising Justice Madan B. Lokur and Justice U. U. Lalit of Supreme Court of India in February 2015 remarked that: "It appears that no substantial progress has been made despite our orders. Civic facilities are poor and something has to be done. The condition of widows is very bad."

The bench referred to various reports filed by the NALSA, Mathura District Legal Services Authority and National Commission for Women (NCW) on "pitiable" condition of four shelter homes meant for widows in the temple town of Uttar Pradesh.

While adjudicating the long-pending issue relating to the retrospective implementation of amendments of section-6 of the Hindu Succession Act as carried out in the year in 2005, a three-judge bench headed by Justice A.K. Sikri had taken note of existing conflicting judgments in November, 2018 and referred the matter to a three-judge bench to settle the law.³³ These conflicting judgments include the case of 2015 in the matter of [*Prakash v. Phulavati*](#), wherein a two-judge bench of the Supreme Court of India had held that if the coparcener (father) had passed away prior to 9 September 2005 (i.e. the date on which the amended section 6 of Hindu Succession Act came into effect), his daughter would have no right to the coparcenary property.

However, contrary to this, there exists another authority of the Supreme Court in the matter of *Danammav. Amar*, wherein in the year 2018, a two-judge bench had held that the two daughters in this matter would get a share in the property, even if their father had passed away in 2001. Eventually, this existing legal complication as caused by these two contradictory cases was referred to a three-judge bench of the Supreme Court in the case of *Vineeta*

³³See, <https://theprint.in/judiciary/daughters-equal-right-to-ancestral-property-heres-what-landmark-sc-judgment-says/479728/>. Last visited on 14-8-2019.

*Sharma v. Rakesh Sharma & others*³⁴ wherein, the Supreme Court ordered in favour of the retrospective implementation of the amendments irrespective of the death of father prior to the date of its implementation. Court also noticed that since matters have already been delayed due to legal imbroglio caused by conflicting decisions, the daughters cannot be deprived of their right of equality conferred upon them by Section 6 of Hindu Succession Act, 2005. In this case, the Supreme Court also held that all the pending matters relating to this concern be decided, as far as possible, within six months. Justice Arun Mishra, one amongst the three-judge bench said that: “a daughter always remains a loving daughter. A son is a son until he gets a wife. A daughter is a daughter throughout her life.”³⁵

VI. Conclusion

With one half of the population in India constantly deprived of the ownership of the land/property and inheritance rights over property, there is no denial in saying that women have miles to travel for securing their equitable access to land-holding rights. Gender discrimination in the ownership of productive assets and immovable property like land can be seen all over the world. The patriarchal mind-set of society is one of the main reasons behind the pitiable condition of women in India.

Empowering women is perhaps the most preferable objective to be achieved by any nation for ameliorating the persisting gender discrimination. Unless and until the historically discriminated women population is not secured with their basic rights, the aspirations of our founding mothers and fathers would remain unmet. When we try to put ‘empowerment’ in words, then at a very fundamental level, it means gaining control over sources of power, self-assertion, and ability to take part in decision-making that affects their lives which *inter alia* demands for equal opportunities, equal capabilities and equal access to resources.³⁶ Without taking any sympathetic approach towards women empowerment, it is

³⁴

See, https://main.sci.gov.in/supremecourt/2018/32601/32601_2018_33_1501_23387_Judgement_11-Aug-2020.pdf. Last visited on 13-08-2020.

³⁵*Ibid.*

³⁶PREM CHOWDHARY, *supra* note 19 at 1.

high time to make a call for a right-based approach for women. Land-holding rights are on the highest pedestal to build a discourse on it. The land has always been considered the most important form of property. It is seen as the single most important source of security against poverty as highlighted by Bina Agarwal.³⁷

Given the persisting gender discrimination and doubly-suppressed status of women, challenge before the contemporary Indian society is not only to create a congenial environment for women with security for their equitable access to their property rights but also to foster such mechanism that brings an attitudinal change in society which *inter alia* happens to be a challenging task. As very aptly said by Swami Vivekananda that: “country and that nation that does not respect women have never become great, nor ever be in future.” Though it sounds a bit annoying because of delay, certainly, it needs to be internalized that the modern human society can’t afford to postpone the desired changes any further. It is high time that the nation should respond to the situation by safeguarding the land-holding rights of women in letter and spirit. Policy-makers and civil society may bring the desired transformation by launching a civil movement in sync with *Beti Bachao Beti Padhao*.³⁸ The whiff of emancipation has already been seen by various path-breaking legislative and judicial steps, now it needs to be accelerated by civil society for treating women at par with men in a real sense as far as their accessibility to land-holding rights is concerned. A statute may also be enacted for Indian women of all religious beliefs, ensuring their equitable access to land-holding rights so as to uplift their status. These kinds of statutes may easily be a ground reality if we may succeed in re-thinking and passing of long-pending bills *viz.* the Constitution (108th Amendment) Bill, 2009 providing for 33 percent women reservation in the *Lok Sabha* & State Assemblies and two other Bills—Constitution (110th, 112th Amendment) Bills, 2009, respectively seeking for increasing representation of women in rural panchayats and urban local bodies from existing one-third to

³⁷Bina Agarwal, *Are we not peasants too? Land Rights and Women’s claims in India?* 21 SEEDS NEW YORK: POPULATION COUNCIL 2002)

³⁸*Beti Bachao Beti Padhao*, an initiative taken by Government of India in 2015, has witnessed tremendous results with a higher Gross Enrolment Ratio (GER) of girls than boys at elementary level. (Girls-94.32 & Boys 89.28). Data as has been shared by Finance Minister Nirmala Sitharaman during her budget speech in February, 2020.

half of the total number of seats. Given the proven fact that women across the world have upper hand in handling the household affairs, it is imperative to have an inclusive approach for ensuring equitable rights for women.

Challenging Livelihood of the Child Labour: A Micro Level Study at Asansol in West Bengal, India

Vijoy Kumar Sinha¹

Dr. Santanu Panda²

Abstract

In this study we have made an attempt to find out the reason behind the child labour in town. Children are the future of this Nation. They are considered as the most important asset of the society. Any future of the nation is depending on how children grow and develop themselves. The issue of child labour is continuously grabbing the attention of the world. Child labour deprives children of their childhood, interferes with their ability to attend regular school and which is mentally, physically, socially, or morally dangerous and harmful. These children work in extremely inhuman conditions, which constitutes a violation of their fundamental rights guaranteed to them under the Constitution of India and other international conventions. The objective of the study is to find out the real scenario of the child labour and why they are getting deprived of childhood and primary education. So, the study has been conducted at Asansol Town with the help of structured questionnaire. A total of hundred sample respondents were taken based on a random sampling technique for the study and those are available during the survey. The study will also reveal the relation between the root cause and socio-economic conditions of child labour. Finally, some suggestions would be made to stop child labour and improve the socio-economic condition in the selected area of Asansol Town.

Keywords: *Child Labour, Poverty, Asansol, Childhood, Rights, primary education*

I. Introduction

Children are the future of this world. They are considered as the most important asset of our society. Any future of the nation is depending on how children grow and develop themselves. The issue of child labour is continuously grabbing the attention of the world. Child labour

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*“deprives children of their childhood, interferes with their ability to attend regular school and which is mentally, physically, socially, or morally dangerous and harmful.”*³

These children work in extremely inhuman conditions, which constitutes a violation of their fundamental rights guaranteed to them under the Constitution of India and other international conventions. There are numerous factors which led to the child labour i.e. poverty, unemployment of their parents, low health, large families, migrating to other cities to work, illiteracy, non-awareness of child rights.⁴ These types of factors show that there is a lack of proper implementation of legislation, ineffective administration, etc. Children from very younger age seek employment to support their families or to gain some knowledge of occupation due to the absence of school facilities in their places. In today's date, child labour is no longer economic exploitation, it has become a necessity for them to meet the needs of their parents and also for them. The authors with the help of the doctrinal and empirical method has been applied to find out the root cause and socio-economic conditions of child labour in Asansol Town and why they are getting deprived of childhood and primary education.

II. Literature Review

Dr. Satyanarayana and Dr. Srinivasa Rao, in their work titled *“An empirical study on root causes of child labour in Krishna District of Andhra Pradesh”*⁵ stated about the root causes of child labour. They researched the Krishna District of Andhra Pradesh by collecting a sample of 300 respondents. In their research, it showed that poverty is the primary cause of child labour. They also

³Niti Nagar and Bindu Roy, “A Critical Analysis of Child Labour in India”1(5) International Journal of Current Research in Multidisciplinary<http://www.ijcrm.com/publish_article/edition_5/B0150717.pdf> (Last visited : May 29 , 2020).

⁴Dr. Mariamma, “Child Labour: Denial of Right to Education” Special Issue (June 2015), Research Front<<https://imlcl.files.wordpress.com/2019/01/child-labour.pdf>> (Last visited : May 29 , 2020).

⁵ Dr. M. Rama Satyanarayana and Dr. P. SrinivasaRao, “An empirical study on root causes of child labour in Krishna District of Andhra Pradesh” (2017) 4(5) International Journal of Economics and Management Studies, <<https://pdfs.semanticscholar.org/94ad/0f23afe0edbd8c724dfe951ef9177a0ecbb2.pdf>> (Last visited : May 29 , 2020).

established the relation between the root cause and socio-economic conditions of child labour. They also gave a few suggestions to eradicate child labour.

Sudha Karan and Dr Singh, in their research titled “*Legislative Regime on Child Labour in India: A critical analysis*”,⁶ highlighted some points about the different enactments of child labour. In their paper, they pointed out that there is an ineffective implementation of child labour laws in our country. The inspectors of the inspecting department are not performing their work sincerely and act in an irresponsible manner. Due to poverty and ignorance, parents of child labour are making fake medical certificates and birth certificates to make their children engaged in the work. The Act does not talk about the unorganized sectors like agriculture, glass industry, family undertakings, etc. They also mentioned about the education being getting costly which is not affordable for the poor masses. They also highlighted that due to overpopulation is also one of the root causes of child labour. The author has made some suggestions like creating awareness among the parents about family planning, vocational training for children so that they can do some productive work.

Nagar and Roy, in their study titled “*A Critical Analysis of Child Labour in India*”,⁷ have talked about the meaning and the various definitions of child labour given by different organizations and scholars. The author's study was to analyse the various responsible factors for child labour and to find out the areas where there is gender discrimination of child labour.

III. Objective of the Study

The objective of any research is the root of any scientific research. The objective of this study is:

1. to find out the reason behind child labour,
2. to find out socio-economic conditions of them and their families, and

⁶Sudha Karan and Dr. Chitra Singh, “Legislative Regime on Child Labour in India: A critical analysis” (2016) 1(10) International Journal of Multidisciplinary Education and Research <<http://www.educationjournal.in/download/131/2-1-17-939.pdf>> (Last visited : May 29 , 2020).

⁷Niti Nagar and Bindu Roy, “A Critical Analysis of Child Labour in India” 1(5) International Journal of Current Research in Multidisciplinary <http://www.ijcrm.com/publish_article/edition_5/B0150717.pdf> (Last visited : May 29 , 2020).

3. To recommend some suggestions to stop this social evil in this area.

IV. Methodology

A. Primary Data

In keeping with the objective of the study, and the light of experience gathered from the survey of literature a question was being prepared for interviewing: a) Scrap collector children, b) Maidservant, c) children working in stalls, d) Children working under Mason and Carpenter. As child labour is a very sensitive issue and there are some legal restrictions in employing them. My questions were direct and indirect too. The data has been collected through structured sample questionnaire method among the one hundred children. The study has been conducted in the urban area, where the child labour grows day by day.

B. Secondary Data

The secondary data has been collected from previous studies, books, articles research reports and web-based materials for validating and authenticating the information. It is very valuable supporting information to continue the present study. It is also very much helpful to find out the gap of the previous study.

V. Universe of the Study

The data has been collected based on random cluster sampling. The universe of the study of this topic is different areas of Asansol Town (Kalyanpur Housing Estate, Chandmari, Railpar, Asansol Market, Burnpur, Murgasol, Ushagram) which is given below in the figure.

Asansol is the second largest city in the state of West Bengal after the state capital, Kolkata. Asansol is geographically part of the Chota Nagpur plateau and lies on the banks of the Damodar river. The Damodar valley is a major coal mining area (the cities of Durgapur and Dhanbad rely on coal industry and are part of the same valley). The economy is thus driven by the steel and coal sector.

In this area of Asansol Town, there are a lot of shops, stalls and scrap dealers are found where there are huge numbers of child labour has been found, seen and reported also.



Figure 1: map showing selected area for study

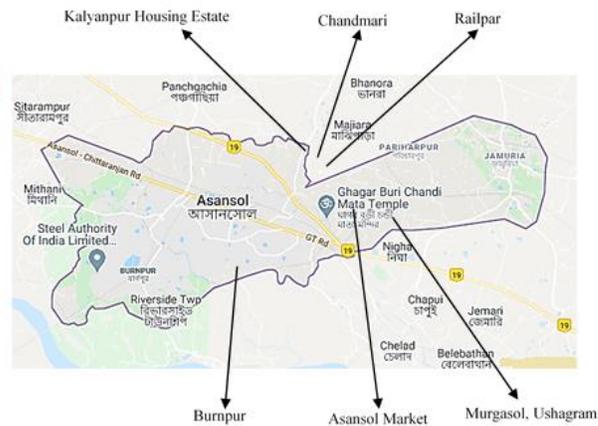


Figure 2: map showing selected areas for study

VI. Concept of Child Labour

It is very difficult to define child labour. Child labour has been defined in different ways by different organizations and scholars. But for understanding the meaning of child labour, let us examine the important definitions:

Encyclopedia of Social Sciences defines child labour as “*when the business of wage-earning or of participation in itself or family support conflicts directly or indirectly with the business of growth and education, the result is child labour.*”⁸

Census of India defines child labour as “*any child engaged in productive work, with or without compensation, wages or profit is child labour.*”⁹

According to ILO, “*child labour is a work that deprives children of their childhood, their potential and their dignity, and one that is harmful to their physical and mental development. It refers to work that is mentally, physically, socially or morally dangerous and harmful to children, or work whose schedule interferes with their ability to attend regular school; or work that affects in any manner their ability to focus during school or experience healthy childhood.*”¹⁰

⁸Dr. Krishna Pal Malik &Dr. Kaushiki C. Raval, *Law and Social Transformation*(4th edition, Allahabad Law Agency, 2016) 215.

⁹ibid.

¹⁰ibid.

The child labour work under various circumstances. Child labours are involved in various forms of work like child labour¹¹, street children¹², bonded children¹³, working children¹⁴, children used for sexual exploitation¹⁵, migrant children¹⁶, children engaged in domestic works¹⁷.

A. Constitutional Provisions

Indian Constitution guarantees some fundamental rights to the citizens of India and the other rights to any persons. These rights¹⁸ also implied to the children as they are citizens of India. There are some fundamental rights which are expressly for children and other rights which are applicable for children.

Article 15¹⁹ gives special treatment to the children where the state can make laws for the benefit for them. Article 15(3) empowers the state to make provision for women and children but no ground is mentioned, preferential treatment is permitted on consideration of inherent weakness of children as they are much exposed for the exploitation at a very early age. Article 21²⁰ protects the life and liberty of the people including children. Article 21A²¹ states about the compulsory education of the children from the age of 6 to 14 years. Article 23²² prohibits traffic in human beings, beggar and other similar forms of forced labour and it also declares that if there is any contravention of this

¹¹ Those children who are doing paid or unpaid work in factories, workshops, establishments, mines and in the service sector such as domestic labour.

¹² Children living on and off the streets, such as shoeshine boys, rag pickers, newspaper vendor, beggars, etc.

¹³ Children who have either been pledged by their parents for paltry sums of money or those working to payoff their inherited debts of their labourers.

¹⁴ Children who are working as part of family labour in agriculture and in home-based work.

¹⁵ Thousands of young girls and boys serve the sexual appetites of men from all social and economic backgrounds.

¹⁶ The children of migrant families who are forced to leave their homes and villages for several months. They work on the various sites to earn for their families.

¹⁷ These children often work in the houses for domestic help either as taking care of young siblings, cooking, cleaning and other such household activities.

¹⁸ Constitution of India 1950, a 15, 16, 19, 29, 30.

¹⁹ Constitution of India 1950, a 15.

²⁰ Constitution of India 1950, a 21.

²¹ Constitution of India 1950, a 21A.

²² Constitution of India 1950, a 23.

provision shall be an offence punishable under the law. Article 24²³ prohibits the employment of children below the age of 14 years in factories mines or engaged in any other hazardous employment. But, it is very difficult to implement this provision because of the prevailing poverty in the country. This provision only prohibits the employment of children in a factory or mine but it does not prohibit employment in other sectors. The children below the age of 14 years are found working in other sectors. Article 39(E)²⁴ states that the state shall, in particular, direct its policy towards securing that the health strengths of the tender age of children are not forced by economic necessity to enter avocations unsuited to their age or strength. Article 45²⁵ makes provision for early childhood care and education to children below the age of six years. Article 51(k)²⁶ states that the parent or guardian has to provide opportunities for education to their children.

B. Laws relating to Child Labour

A plethora of laws and policies have evolved in these years for the protection of child labour in line with the International Labour Conference resolution, 1979. The resolutions talk about the prohibitory measures of child labour. There are various Acts in India about child labour protection but the percentage of the child labour force in our country is kept increasing over the years.

1. The Children (Pledging of Labour) Act, 1933.
2. The Employment of Children Act, 1938.
3. Factories Act, 1948.
4. The Minimum Wages Act, 1948.
5. The Plantation of Labour Act, 1951.
6. The Mines Act, 1952.
7. The Merchant Shipping Act, 1958.
8. The Motor Transport Workers Act, 1961.
9. Beedi and Cigar Workers (Conditions of Employment) Act, 1966.
10. Contract Labour (Regulations and Abolition) Act, 1970.
11. Shops and Commercial Establishment Act, 1969.
12. Radiation Protection Rules, 1971.
13. The Child Labour (Prohibition and Regulation) Act, 1986.

²³Constitution of India 1950, a 24.

²⁴Constitution of India 1950, a 39(E).

²⁵Constitution of India 1950, a 45.

²⁶Constitution of India 1950, a 51(k).

Table 1: Major features of Acts relating to Child Labour*

Acts/Legislation	Minimum Age	Hours of Work	Prohibition of night work
The Children (Pledging of Labour) Act, 1933	15	No specification	-
The Plantation of Labour Act, 1951	12	Not more than 40 hrs. per week	6 p.m. - 7 a.m.
The Employment of Children Act, 1938	15	-	10 p.m. - 7 a.m.
Apprentices Act, 1961	14	Upto 48 hrs. per week	10 p.m. - 6 a.m.
Beedi and Cigar Workers (Conditions of Employment) Act, 1966	14	Not specified	7 p.m. - 6 a.m.
Factories Act, 1948	14	6 hrs. maximum	10 p.m. - 7 a.m.
The Merchant Shipping Act, 1958	15	-	-
The Mines Act, 1952	16	4 ½ hrs.	10 p.m. - 7 a.m.
The Motor Transport Workers Act, 1961	15	6 hrs.	10 p.m. - 6 a.m.
Shops and Commercial Establishment Act, 1969	Varying state wise between 12 and 15 yrs.	30-42 hrs. per week	Hours that constitute night work have been specified differently in different states

**Adapted from Geeta Chopra, Child Rights in India: Challenges and Social Action (2015)*

C. The Child Labour (Prohibition and Regulation) Act, 1986: A Critical Analysis

There are some shortcomings in the Act. The Act was passed for regulation and prohibition of child labour. There is no precise definition of a child to determine the correct age of the child.

Table 2: Age prescribed for majority by different laws

Acts/Legislation	Section/Article	Age
Constitution of India, 1950	Articles 21A, 45	14
Indian Penal Code, 1860	Sec. 82	7
	Sec. 83	7-12
	Sec. 317	12
	Sec. 375 (6)	16
	Sec. 372-373	18
Factories Act, 1948	Sec. 2 (c)	15
Indian Majority Act, 1875	Sec. 3	18
Indian Contract Act, 1870	Sec. 11	18
Mines (Amendment) Act, 1952	Sec. 45	18
Apprentices Act, 1961	Sec. 3 (a)	14
Child Labour (Prohibition and Regulation) Act, 1986	Sec. 2(II)	14
Prohibition of Child Marriage Act, 2006	Sec. 2(a)	Male-21 Female-18
Right to Free and Compulsory Education	Sec. 2(c)	14

Act (Right to Education), 2009		
Protection of Children against Sexual Offences Act, 2012	Sec. 2(i)(d)	18
Immoral Trafficking (Prohibition) Act, 2006	Sec(s). 2(aa), (ca), (cb)	Child- 16 Minor/Major- 18
Criminal Law (Amendment) Act, 2013	Sec. 375 (6)	18
Juvenile Justice Act, 2015	Sec. 2(k) (l)	18

Section 3 of the Child Labour Act exempts the children who are working in the family enterprise. In a family enterprise, several members of the family works which is very difficult to identify the relative of the child. Hence, there is no measure to check upon this matter. In the Act, it also doesn't talk about the children who are working in the various sectors after school hours. There should be a complete ban on child labour. The Child Labour Act does not talk about the employment of children in the unorganised sector, where there are a huge number of children are working in this sector which is not getting reported. In the definition of child labour, the children who are working in the agriculture sector should also be included.

The word 'hazardous' has not been clearly defined which has been left to define by Technical Advisory Committee which they haven't defined yet.

Children working in the entertainment industry should also come under the purview of child labour but they are considered as its exploration of talent. In the Act, it is stated that the children who are working in the entertainment industry can work for limited hours for a day but the producers are making them work for long hours to meet the deadline, because of this their studies get hampered. They are also in mental trauma due to their work pressure because of hopping from one place to another place.

There is no nexus between the Child Labour Act and Right to Education Act (RTE Act) because RTE Act says about the compulsory education upto the age of 14 years but the Child Labour Act does not say about the employment of children below the age of 14 years in the unorganised sector. There is an urgent

need to amend the Act to make it consonance with the RTE Act. The government should make compulsory education till 14 years and it should be regulated stringently.

The Schedule which is given in the Act about the establishments and processes where child labour is prohibited, it is not an exhaustive list. It cannot be treated as complete and perfect schedule.

VII. Findings of the Study

The latest analysis of Census data released by the Child Rights and You (CRY), a day before World Day Against Child Labour, revealed that child labour has been decreasing at a mere 2.2 per cent annually over the last decade. At this pace, it would take more than a century to get the existing working children out of labour. Today, over a crore children continue to be part of the country's workforce. The analysis points out a critical trend: the child labour in urban areas in the country has increased by 53 per cent over 2001-2011,²⁷ Poverty is the main cause of child labor in rural areas, there is a general lack of support for the poverty hypothesis in urban areas.

Table 3: Age Group-wise children

Age Group	Respondents
9-11	23 [23]
12-14	37 [37]
15 -17	40 [40]
Total	100 [100]

²⁷BinduShujanPerappadhan "A study on rise in urban child labour" Published in The Hindu dated 20 June, 2015.

Table 4: Factors contributing Child Labour

Factors contributing Child Labour						
Age Group	Poverty	Low Income	Unemployment	Illiteracy	Large Family	Other Reasons
9-11	(100) 23 [23]	(100) 23 [23]	(30.43) 7 [7]	(73.91) 17 [17]	(56.52) 13 [13]	(0) 0 [0]
12-14	(100) 37 [37]	(100) 37 [37]	(32.43) 12 [12]	(64.87) 24 [24]	(62.16) 23 [23]	(0) 0 [0]
15 -17	(100) 40 [40]	(100) 40 [40]	(20) 8 [8]	(90) 36 [36]	(52.5) 21 [21]	(15) 6 [6]
Total	100 [100]	100 [100]	27 [27]	77 [77]	57 [57]	6 [6]

*Note: () is from total population from age group; [] is from total population from total collected sample.

Table 5: Occupation as Child Labour

Pattern of Occupations									
Age Group	Scrap collector children	Maid/servant	Food Shops	Tea Stalls	Cosmetic Shop	Construction (Mason/ Carpenter)	Groceries Shops	Vegetable Vendors	Automobile repair shops
9-11	(39.13) 9 [9]	(0) 0 [0]	(34.78) 8 [8]	(17.39) 4 [4]	(0) 0 [0]	(0) 0 [0]	(8.7) 2 [2]	(0) 0 [0]	(0) 0 [0]
12-14	(45.95) 17 [17]	(2.70) 1 [1]	(18.92) 7 [7]	(10.81) 4 [4]	(0) 0 [0]	(0) 0 [0]	(5.41) 2 [2]	(13.51) 5 [5]	(2.70) 1 [1]
15 -17	(17.5) 7 [7]	(7.5) 3 [3]	(15) 6 [6]	(7.5) 3 [3]	(15) 6 [6]	(7.5) 3 [3]	(7.5) 3 [3]	(12.5) 5 [5]	(10) 4 [4]
Total	33 [33]	4 [4]	21 [21]	11 [11]	6 (6)	3 [3]	7 [7]	10 [10]	5 [5]

Table 6: No of Dropout Children

Age Group in years	No of dropout children
9-11	(82.61) 19 [19]
12-14	(72.97) 27 [27]
15 -17	(90) 36 [36]
Total	82 [82]

Table 7: Level of Education

Education Category	Children
I – 1V	37 [37]
V – VIII	45 [45]
IX – X	14 [14]
H S	4 [4]
Total	100 [100]

Table 8: Daily wage of Family

Income	No. of family
Upto 150	33 [33 %]
151-250	57 [57 %]
251-350	10 [10 %]

Table 9: Wage of Child Labour per day

Income	No. of children
Upto 150	57 [57 %]
151-200	29 [29 %]
201-250	14 [14 %]

DISCUSSION

The preceding analysis of the study has led to offer the following observations.

Table 3 explains that age is one of the socio-economic factors which results in the efficiency of work and earning capacity. It is evident from the above table that out of 100 samples 40 percent belongs to the age group of 15-17 which is highest in number followed by the age group of 12-14 which is 37 percent of sample respondents and the lowest one belongs to the age group of 9-11 which is 23 percent of total sample respondents.

Table 4 shows that the Factors contributing to child labour. It can be seen that from all the age group 9-11, 12-14 and 15 -17 are in majority stating that the primary cause of child labour is poverty and low income. Illiteracy⁷⁷ and large families⁵⁷ are secondary cause which contributes to becoming one of the factors of child labour. Unemployment²⁸ is the least in number for the cause of child labour in all age groups. We have not found any other reason in the age group 9-11 & 12-14.

Table 5 states about the age group wise occupation as child labour. We have found nine types occupational activities as a child labour. From the age group of 9-11 and 12-14 has the highest number of scrap collectors wherein the age group of 15 -17 is the least number in comparing to another age group because as they grew they left this job for better opportunities and also to earn more. It has been found that only one male maidservant belongs to the age group of 12-14 has and 3 female maid servant belongs to the age group of 15-17. Very few in number are working in food shops, tea stalls, cosmetic shops, construction, groceries, vegetable vendors and automobile repair shops. In cosmetic shop category, it has been found that from the age group of 15 -17 the 6 female is working there. It is revealed that nine types of occupation has been found in the 15-17 age group and the other age groups is not involved in all working sectors.

Table 6 shows the total number of dropout children which are 82 out of a total of 100 samples. From the age group of 9-11, 19 percent out of total is dropout. Whereas 27 percent of children are dropout from the age group of 12-14 and 36 percent belongs to the age group of 15 -17.

²⁸Here unemployment is talking about the unemployed of their parents.

Table 7 states about level of education of the children. From the table, it is evidently seen that all the sample respondents are literate and has gone to school in some point of their childhood but they couldn't keep it up for long time. As we can see out of 100 samples 37% belongs to the category of I-IV, 45 percent sample belongs to V-VIII, 14 percent are from IX-X are going to school somehow and at the same time they are managing their work also and 4 percent of children are found in the category of HS who are still going to school and also at the same time they are managing their work after their school hours.

Table 8 describes about daily wages of family. We have found out that out of 100 samples 33 percent children family members are earning 150 rupees per day as labour or helper. 57 percent children family members belong to the category of 151-250 where they work as mason, grocery shop, sweet shop, automobile shop and etc. 10 percent children family work belongs to the category of 251-350 where they work in the cloth store and few of them work in the local factory.

Table 9 says about wages of child per day. As we have found out that 57 percent children are earning up to 150 rupees per day as scrap collector, mason helper, tea stalls, and grocery shop. 29 percent of children are getting paid from 150 to 200 rupees per day working in food shops, automobile shops, tea stalls, and vegetable vendor shop. 14 percent children are getting paid from 200 to 250 rupees per day working as mason, cosmetic shop, vegetable vendor shop, scrap collector, groceries shop and etc. Very few who are working as maid servant are getting monthly paid of rupees around 500 to 700. So in order to earn more they work into 4-5 houses daily so that they at the end of the month they can have money in four figures.

After analysing data, it can be seen that even after having a plethora of legislation to stop child labour, it is still prevailing which is a social evil of the society. Majority of the children are working for more than 3 years who belong to the age group of 9-11 and 12-14. It is sad to see that their childhood is getting ruined, where they should study, play and explore their talents at this age but they are working to support their family. They hardly earn 100 to 150 rupees per day for seven days for which they have to work more than 8 hours tirelessly. Most of them are not satisfied with their job but due to poverty, having a low income of a family, large families, unemployment of parents and illiteracy of the parents they have to work otherwise they will not survive. Majority of them are

staying in a rental house. Few of them complained that their employer is treating them badly. Sometimes they abuse them by saying abusive languages.

From interviewing them, it has also been found out that which was expected that they are not aware of their rights. Child labour played an important role in the Industrial Revolution from its outset, often brought about by economic hardship. The children of the poor were expected to contribute to their family income.²⁹

Case study 1.

Name of the informant: SK. Farukuddin,

According to him the socio-economic status of the family is very poor. The family member of the informant is six. The day labour is the only source of income. They have no agricultural land or other source of income. After completion the primary level education, they sent to their children to earn something. So, the children went search job in the Hotel, Restaurant, tea shop, Grocery shop in Asansol region. The informant also told 'our children are not interested to go to school due to lack of proper education'. The school authority only given mid-day-meal, they are do not bother about the education. The informant farther added asansol is the industrial region, so most of the family depends on daily wage as a source of income, this trend has been found among the children since very early age, which is their school going age.

Case study 2.

Name of the informant: Sabina Khatun.

The informant told us "we have no agricultural land, no domestic animal, no business, and no handicraft product only source of income is day labour. So, our children went to various restaurants for on the basis of 'no work no pay'. When the children age is above ten, at that time their mind is set up that to earn something. It is very difficult time to send them school. Very few children you will be found that who are completed secondary or higher secondary level of education. She farther added "earning is most important than education"

²⁹Barbara Daniels, "Poverty and Families in the Victorian Era

VIII. Conclusion and Suggestions

In practice, all these legislations are only on pen and paper and child labour is still prevailing throughout the country. The Apex Court also observed that these child labours cannot be stopped unless these children are not reinstated by the government. The present study shows that if these children start going to school again then there will be economic crises in their family. So to meet this situation, the government has to bring some policies to improve the family economically. The study revealed that starting age of child labour is nine. Most of the children are dropout in the age group 15-17 years. The education of the head of household has a positive impact on child's schooling; among the parent's parameters mother's education is more important than father's; parental education is highly associated with child schooling. Interestingly, in the study area the child labour has been found that they are involved nine working sectors. The employed person used the child as labour is very low price

The government has started *SarvaSikshaAbhiyaan* to provide elementary education to all the children. The government also started various programmes like mid-day meal, dress distribution, scholarship and book grant, etc. but still our country is not able to achieve a universal basic education. The government has put their action in the plan in the determination of elimination of child labour from the whole country and brings these children back to education. The employing authority should be careful to engage the children as labour employee.

Suggestions

1. There is no precise definition of a child to determine the correct age of a child. There should be a specific definition of a child to determine the age of a child.
2. The Child Labour Act does not talk about the employment of children in the unorganised sector, where there are a huge number of children are working in this sector which is not getting reported. In the definition of child labour, the children who are working in the agriculture sector should also be included. Children working in the entertainment industry should also come under the purview of child labour.
3. There is an urgent need to amend the Act so that the objective RTE Act can be achieved.

4. In the Act, it does not state about the rehabilitation of the children who are rescued from these evils. There should be some rehabilitation centre to bring back them in society again.
5. The Schedule which is given in the Act about the establishments and processes where child labour is prohibited, it is not an exhaustive list. It cannot be treated as complete and perfect schedule.
6. The government should create employment opportunities for these families so that these children will not go for work and will concentrate on studies.
7. The government and other agencies should follow the regulation strictly to eradicate this social evil practice of child labour.
8. The government and NGOs should create awareness about family planning so that it will help to reduce the population.
9. Government and NGOs should do a campaign to create awareness among Parents and children about child labour and make them aware of the negative aspects of child labour.
10. Some vocational training should be given to the children so that they can do some productive work and do not feel the wrath of their employer.

Infringement of Right to Privacy by Naming and Shaming of Accused

Pooja Kiyawat¹

Abstract

In what was broadly termed by the Government as the panacea for tackling the alleged rogue elements of the society, the Uttar Pradesh State Government decided to display the photographs, names and addresses of those accused of vandalism in Lucknow in December 2019 in the wake of the enactment of the controversial Citizenship (Amendment) Act 2019. The public display of the personal data of the accused was supposedly intended at 'naming and shaming' and thus deterring the accused from committing crimes, an act which certainly flies in the face of human dignity. The role of human dignity in our constitutional scheme is essentially a normative one. It ensures the unity of Human Rights into one bracket. While human dignity serves as the normative basis for the constitutional rights, it also serves as the foundation of parameter that determines the scope of all the constitutional rights.

Keywords: *Privacy, Posters, Doctrine of Proportionality*

I. Introduction

A State that does not take rights seriously, shall never take the law and order seriously and in order to rein in the Executive of such State, what a democracy like India needs is an activist court, a court that has the ability to frame and answer the issues of political morality. Thankfully, the Hon'ble High Court of Judicature at Allahabad made an exception to the prevalent approach of indifference of the Constitutional Courts and took *suo moto* cognizance of the matter and what followed was one of the boldest judgments defying the totalitarian tendencies of the State during our times.² A failure on the part of the Court to act against the blatant assault on the right to dignity of the individual, a right which has been repeatedly termed as the edifice of the lungs of constitutional culture, would have resulted in gargantuan loss to its credibility.³ The case at hand represents perhaps the first instance in the aftermath of the

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² In Re, Banners On Roadside In The City Of Lucknow, PIL No. 532 of 2020.

³ Dworkin, TAKING RIGHTS SERIOUSLY, Harvard University Press, 1977.

Aadhar judgment where a constitutional court in the country has adopted the Doctrine of proportionality test to ensure the sanctity of the right to privacy as a fundamental right.

II. The Activist Court: Widening the Scope of PIL

The Advocate General raised objection to the invocation of the public interest jurisdiction while relying on the guidelines laid down in *State of Uttaranchal v. Balwant Singh Chaufal*⁴ and contended that the issue at hand did not involve a question of larger public interest. It may be noted that the guidelines laid down in *Chaufal* were intended to weed out unnecessary PILs and the same do not have any application when the cognizance is taken *suo motu* by the Constitutional Court and hence the argument was devoid of merit.

*where there is gross negligence on part of public authorities and government, where the law is disobeyed and the public is put to suffering and where the precious values of the constitution are subjected to injuries, a constitutional court can very well take notice of that at its own. The Court in such matters is not required to wait necessarily for a person to come before it to ring the bell of justice. The Courts are meant to impart justice and no court can shut its eyes if a public unjust is happening just before it.*⁵

The powerful excerpt of the judgment reaffirms the activist character of the Constitutional Courts which doesn't look the other and shy away from its duties when the constitutional values are under attack. Further, it was acknowledged that the cause of action in the instant case was not the personal injury caused to the persons whose personal details are given in the banner but the injury caused to the precious constitutional value and its shameless depiction by the administration to justify the extra-territorial invocation of the jurisdiction.

III. The Issue of Privacy

The evolution of the right to privacy as an inherent aspect of the right to life has been dealt with elsewhere and need not be reiterated in its entirety. The Court

⁴ State of Uttaranchal v. Balwant Singh Chaufal , (2010) 3 SCC 402 (India).

⁵ In Re, Banners On Roadside In The City Of Lucknow, PIL No. 532 of 2020 (India).

referred to a catena of judgments to underscore the importance of right to privacy as an aspect of ordered liberty while relying on the judgment in *Kharak Singh v. State of U.P.*

“If physical restraints on a person’s movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man’s physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restriction or encroachments on his person, whether those restriction or encroachments are directly imposed or indirectly brought about by calculated measures.”⁶

The right to privacy was expressly recognized as an intrinsic part of Part III of the Constitution by the Hon’ble Supreme Court in the landmark case of *K S Puttaswamy v. Union of India*⁷ and any debate as to whether the unwarranted inferences in the privacy would amount to infringement of fundamental rights was put to rest. However, like most of the fundamental rights, the right to privacy too is not an absolute right and is subject to restrictions. But what we are concerned with is the sufficiency of the restrictions. This brings us to the pressing issue of determining the cases in which infringement of the fundamental rights can be justified.

IV. Doctrine of Proportionality

It is nobody’s case that the constitutional rights are absolute rights. There is a substantial degree of consensus amongst the legal theorists that, in the light of the larger public interest, these rights may be curtailed. The key elements that have an undeniable influence over the development of the modern constitutional theory of recognizing positive constitutional rights along with its limitations are the notions of a liberal democratic society and respect for the rule of law. It has been repeatedly observed that the very concept of a democratic society is based upon striking a balance between the public interest and the constitutional rights.⁸

⁶ *Kharak Singh v. State of U.P.*, (1964) 1 SCR 332 (India).

⁷ *Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

⁸ *Id.*

An express recognition of the theory can be traced in Article 19 of the Constitution which empowers the state to impose reasonable restrictions in the larger public interest. Constitutional rights being related to each other (as per this theory), have an implied constitutional license to place limitations on all the constitutional rights, where such curtailment is necessary for enhancing the public interest. This phenomenon gives birth to the enduring tension between the two fundamental components of a democratic society, namely the Rights and the People element (public interest).

In this respect, the Apex Court rightly held that:

*“while examining as to whether the impugned provisions of the statute and rules amount to reasonable restrictions and are brought out in the interest of the general public, the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as ‘doctrine of proportionality’.”*⁹

The object of invocation of the doctrine of proportionality is to ensure that the competing interests of a democracy coexist harmoniously without replacing each other. The balancing is usually done while keeping the relative social values of each social value in the backdrop. It is certain that one facet cannot give way to the other for this would amount to a subversion of the very notion of a society governed by rule of law.¹⁰ Instead, the tension has to be resolved by balancing the competing facets and for all practical purposes, this act of balancing is termed as the doctrine of proportionality.

V. **Relevance**

The doctrine of proportionality, as adopted by the Supreme Court in *KS Puttaswamy (II)* involves a four-fold test. The Allahabad High Court examined the issue in the instant case on the touchstone of these guidelines to do the balancing exercise in order to examine whether the interference with the fundamental right to privacy (displaying the posters with personal data) is

⁹ In *Re, Banners On Roadside In The City Of Lucknow*, PIL No. 532 of 2020.

¹⁰ V. Jeevalaya, *The Concept of Right to Privacy and Constitutional Validity of Aadhaar*, 8 *Indian Journal of Research* 7, (2018).

justified. It ought to be noted that all the four limbs must be satisfied in order to justify the infringement.

A. Whether the State is pursuing a legitimate aim?

The aim should not be legitimate just in the normative sense, instead it must be one sanctioned by the law. With no law in place, permitting the display of the banners disclosing the personal data of the individuals, fails the first prong of the test. The only way in which a proclamation can be issued is through the order of the court and that too only in the cases where all methods of ensuring the presence of the accused have been exhausted.¹¹

Is there a rational connection between the means adopted and the pursued aim?

The Court failed to find any rational connection between the selective publication of the names of the few chosen individuals when the personal data of millions of people facing charges of commission of offence has not been subjected to publicity. To the contrary, all the State needed to meet its objective of deterring criminals was to follow the due process instead of indulging in high-handedness.¹²

Necessity Stage:

This stage entails an enquiry into whether this was the least restrictive way of achieving the same objective? The answer to this question was perhaps the easiest one. The action under question was one of the most restrictive ways of achieving the said objective.

Balancing Exercise:

The stage involves an assessment of the impact that the measure has on the right holder. The Court found that the infringement of fundamental right to privacy, on the account of failure of the three limbs of proportionality was disproportionate and highly unjust.¹³

The question looms large that do your fundamental rights get waived once you are accused of violence by the State?

¹¹ Puttaswamy v. Union of India, (2017) 10 SCC 1.

¹² Puttaswamy v. Union of India, (2017) 10 SCC 1 (India).

¹³ *Id.*

Today, while challenging the Order of the High Court to remove the posters, the Solicitor General argued that the moment people indulge in violence, they waive their fundamental rights. It is submitted that the argument is based on a flawed notion that everyone who has been accused of vandalism has already been proven guilty, which is just not the case.¹⁴ Fundamental rights are based on a moral theory that the citizens have rights against the State and as per the argument of the State, all that the State will have to do in order to deny the citizens these rights is to accuse them of an offence!

VI. Conclusion

Is it not amusing to note that the justifications of regressive acts of an authoritarian State fall apart the moment the Constitutional Courts start performing their duties. These posters are no different from the CRIMESTOP propaganda posters of the dystopian society which are aimed at stifling dissent. If the other High Courts and most importantly, the Supreme Court fails to take a leaf out or two from this judgement, the conception of an Orwellian State in all probabilities will become a reality.¹⁵ While, the Supreme Court has refused to put a stay on the order of the High Court and the matter has been referred to a larger bench, the damage that these posters have done to the dignity of the individuals is irrevocable and immeasurable.

The application of the doctrine of proportionality for upholding the right to privacy as well as dignity of the accused represents a welcome and commendable approach by the Indian Judiciary. It has to be reckoned that the individual dignity is an inherent aspect of right to life, a life that is more than mere animal existence. Such flagrant use of state machinery to name and shame the accused may conform to the political truism of the times that we live in however such practices have no place in a society governed by rule of law.

¹⁴ *Id.*

¹⁵ Chakravarty, The government has stopped even trying to justify mass surveillance as necessary for the public good, (Mar. 19, 2020). <https://scroll.in/article/956586/the-government-has-stopped-even-trying-to-justify-mass-surveillance-as-necessary-for-the-public-good> .

Imperative Need of Conscripting a Legal Regime on Blood Transfusion

Sriparna Rajkhowa¹

Abstract

Hospitals, clinics and health care establishment while treating patients are at times required to suggest blood transfusion for various ailments, surgery and cases of accidents. Patients, relatives and attendants are required to fend for themselves due to absence of any comprehensive law and regulation mandating supply of blood through such establishments. The 2800 odd licensed blood banks do not have adequate stock as voluntary blood donations are yet to pick up in the country. Licensing too came to be introduced after banning of the operation of unlicensed blood banks by the Supreme Court. Hence most of the blood comes either from friends and relatives of patients or commercial donors which may not be of high quality.

The endeavour of the author has been to address the issue of absence of a comprehensive legal regime to ensure hygienic collection, safe storage and supply of whole blood and blood components. The resolutions, guidelines and guidance documents of the World Health Organisation as well the National Blood Policy has been analysed in relation to the implementation agencies. The provisions of the Drugs and Cosmetics Act and the Clinical Establishments Act in relation to blood banks safe transfusion reveal the shortcomings and highlight the necessity of a specific law on this score.

Analysis of judgments of the Supreme Court and recommendations of the Consumer Forums reveal and reflect the current state of affairs in the shape of much avoidable harm suffered by patients either on account of transfusion of contaminated blood or negligence on the part of health care professions involved in the process. Such a measure can lead to promotion of safe and healthy blood transfusion by encouraging donors targeting at cent percent voluntary bold donation. It can also lead to measures at accountability.

Key Words: *Blood Transfusion, Contamination, Blood Policy, Legislation, Haemovigilanc.*

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I. Introduction

Medical science is an arena of fast paced developments across the global. During the past decade or so, path breaking developments have been witnessed in the field of medical research. Yet, its outreach has not been uniform despite various efforts and initiatives. Emerging challenges have to be met with much alacrity in adherence to the regulatory bodies, be it at the domestic, regional and international level. At the tertiary level the World Health Organisation has been engaged with providing direction through guidelines and various instruments. However, initiatives at the domestic level matter the most.

The role of the WHO through policy initiatives and regulatory measures under the World Health Assembly are looked upon by member countries and the scientific community for guidance, technical support and cooperation. In the specific area of blood transmission or transfusion the WHO has been actively engaged towards providing an effective policy with a call to back up through effective legislative measures by all countries. This has been emphasised upon primarily attributed to the realisation that contaminated or unsafe blood is attended with the propensity of causing immense harm that may at times result in morbidity or mortality besides other forms of prolonged sufferings and surmounting medical bills. On the other hand, blood transfusion saves millions of lives besides improving the quality of life of many patients.

There is a propensity or possibility of atleast 50 percent morbidity or mortality in the event of failure to provide for blood transfusion². Therefore, it is of significance to note that blood transfusion is generally resorted to in many instances as a life saving intervention, either to replenish blood loss arising out of surgery or accident. Besides, situations may arise necessitating blood transfusion due to other factors.³ Transfusion besides saving lives can help

**The present article is primarily based on the ongoing research work on “Facilitating the Right to Health Through Patient Safety” and the author has liberally taken recourse to her work.

² Nabajyoti Choudhury, *Transfusion transmitted infections: How many more?* Asian Journal of Transfusion Science, Asian / transfusion Sci. 2010 Jul; 4(2):71-72. doi: 10.4103/0973-6247.67017
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2937299> accessed on 30.4.2021 at 9.13 pm.

³ Anemia, bleeding disorder, sickle cell disease.

restore functioning of vital parameters leading to recuperation of a patient. Therefore, transfusion in adequate measure has to be resorted to for achieving optimum results. It has been observed that at times it is taken recourse to in order to boost deficit blood components.

Before venturing into such policy framework, it is considered pertinent to delve into the ground reality in the context of India, since the article intends to revolve around the domestic developments, including law, guidelines and policy parameters. It is expected that this would throw light on ground reality relative on the extent of safe blood transfusion, it being an important parameter of patient safety. The need for safe blood transfusion stands unquestioned and assumes paramount importance. Despite such realisation the situation depicts a different picture, hence the present endeavour.

II. The Situation of Scarcity and Market Factors at Play

It is very much common for attendants of patients and relatives to encounter situations in health care establishments to meet urgent requirements of adequate blood supplies or components thereof when called upon by such establishments to do so. They often need to fend for themselves, at times very desperately at extremely short notice to provide for such matching whole blood supply or components like plasma, red blood cells and platelets when called upon to do so to save the lives of their near and dear ones or to be prepared at times for surgeries or other medical interventions. At times attendants are called upon to replenish blood provided by hospitals, because whenever provided by such medical establishments and clinics they do so on the undertaking that the emergency supplies are replenished, purportedly on the ground that such establishments are woefully short of requisite blood groups in their blood banks.

The plight of patients and attendants get all the more accentuated as many among them are unable to provide the same also on account of lack of equitable access. The Covid situation is a case in point where attendants in many cases after frantically searching and managing the requirement for plasma therapy realised that their efforts came to naught for want of matching supplies. Though the precarious situation more or less came to be witnessed across jurisdictions, the state of affairs under normal circumstances too reflect the sorry state of affairs in many jurisdictions including India. The helpless and shocking state of affairs are not far to seek. These are attributable in the main to the woefully

short supply of whole blood and blood components compared to the high demand. Against rising demand there is a shortfall in supply attributed to lack in knowledge of the benefits of voluntary blood donation and the immense benefit that accrues to suffering humanity. Though accurate estimates are difficult to be had, the scarcity, more particularly among the countries of the South are very much well known. According to WHO of the 118.5 million blood donations globally, the high income countries that account for 16 percent of the total population contributes upto 40 percent .⁴Against the ideally desirable 3 percent donors in the underdeveloped countries, hardly . 5 percent of the population happen to be donors, that too accounted for by family members of replacement donors.⁵ Shortage of available blood is due to lack of adequate number of donors as well as want adequate safety measures .This is accentuated by the short shelf life of blood that ranges between 35 to 42 days.

Such a state of affairs places attendants in a very delicate situation at the mercy of private players and touts who very often fleece their customers. Many a time they fall prey to professional donors, most of whom fail to provide healthy blood. The situation has been aggravated primarily on account of two factors; namely want of an effective law and policy and presence of touts and unscrupulous persons linked with the illegal trade. The latter, partly attributed to the lack of awareness about the need for blood donation as donors are far fewer in the country compared to the first world.

While foraying into the pertinent issues, the present endeavour has been to address the issue of blood transfusion in a holistic manner so that the primary concern of patients of receiving proper treatment are met through zero harm. This in the process of blood transfusion so that it does not imperil the lives and livelihood of patients and their dependants. In this regard, apart from addressing the concerns, emphasis is being laid on ensuring the guidelines of the Supreme

⁴ Factsheet, WHO Blood safety and availability, dated 10 June, 2020.
<http://www.who.int/newsroom/factsheets/detail/blood-safety-and-availability>
accessed on 31.5.2021 at 9.26 pm.

⁵ Risks and complications, American red Cross, One in two
, [https://www.redcrossblood.org/donate-](https://www.redcrossblood.org/donate-blood/blood-donation-process/what-happens-to-donated-blood/blood-transfusions/risks-complications.html)
blood/blood donation process/what happens to donated-blood/blood-
transfusions/risks-complications.html
accessed on 3.5.2021 at 5.15 pm.

Court⁶ focusing on strict compliance of procedure towards ensuring safe and healthy blood of high quality and the need to robe in blood transfusion either through a comprehensive law on patient safety or an exclusive enactment as called for by the WHO.

III. Implications of Blood Transfusion

It is evident from the above that blood transfusion involve the infusion of either whole blood or components thereof to a needy patient's bloodstream. At times instead of drawing blood from another person it may be drawn from the patient, prior in point of time, which is known in medical parlance as autologous transmission. Here it involves subsequent reinfusion. Such blood administered through a patient's vein takes time depending on the component administered.⁷ Whether it be whole blood or components thereof as mentioned above, extreme care and precaution is required to be taken in the process of transfusion taking into consideration any possibility of mismatch of the RH factor⁸ which is required to be avoided. Hence it is of utmost importance to ensure that facilities of blood transfusion are made available, ensuring easy accessibility of safe blood in highly hygienic conditions. Blood transfusion is normally regarded as safe, and as such the procedural formalities are required to be adhered to. However, as briefly mentioned above, contaminated whole blood or components thereof may lead to severe problems which may result in avoidable harm. All measures at ensuring safe transfusion to patients assume utmost significance as severe consequences may visit a patient in case of any lapses on account of safety measures. Hence administration of safe blood of high quality in compliance with the procedural requirements⁹ has to be taken up with right

⁶ Common Cause v UOI and Ors, AIR 1996 SC 929.

⁷ An unit of plasma may take between half an hour to one hour for administration whereas the time required for transfusion of an unit of red blood cells roughly takes double the time

https://www.who.int/bloodsafety/transfusion_services/ClinicalTransfusionPracticeGuidelinesforMedicalInternsBangladesh.pdf ACCESSED ON 3rd.July.2021 at 7 25 pm.

⁸ An Rh factor is a protein found on some red blood cells (RBCs). Not everyone carries this protein, though most do. They are **Rh-positive**. People who don't carry the protein are **Rh-negative**. <https://kidshealth.org/LAWW/en/parents/rh.html> accessed on 3rd. July.2021 at 8 pm.

⁹ All possible care and precaution has to be adopted to do away with any mismatch to avoid any sort of antibody resistance.

earnest to avoid any possibility of infection that may lead to transmission of virus, bacteria and parasitic infections agents¹⁰ as well as sepsis. At times minor complications may occur for which the administering professional and paramedics are required to adopt corrective measures which may include stopping further transfusion . These may be occasioned by allergies, acute haemolytic reaction or fever, myocardial infection and renal failure.¹¹

Such infection may be occasioned either through administration of contaminated blood or at times due to lack of resistance of one's body. Blood banks are required to filter such blood before being certified prior to transfusion to patients. In fact the magnitude of the problem can be gauged from the fact that upto 2 recipients per thousand get infected on an average.¹² Hence thorough examination of blood and blood products through strict procedural formalities as mandate is considered essential. The problem stands compounded and actuated accounted for by asymptomatic carriers in the shape of window period infection donors¹³ which are said to occur either during or within 24 hours of transfusion or even thereafter. It has been recorded that “ despite advanced technology use, particularly since the 1940s, the risks of infection cannot be undermined, as seen from several cases of pyrogenic reaction , HIV,¹⁴ Hepatitis B¹⁵ and C¹⁶ and Cytomegalovirus (CMV) infected persons in different parts of the world, particularly transfusion associated Leishmaniasis¹⁷. Chinkungunya and West Nile virus into the immune compromised recipients leading to protective antibodies.¹⁸The issue of infection again came to the fore in case of SARS 2 and COVID 19.The present endeavour has been to address the legal

¹⁰ Supra n 1.

¹¹ Sriparna Rakhowa, Facilitating the Right to Health Through Patient Safety (unpublished Ph.D thesis), 102.

¹² Supra n 1.

¹³ Fever allergic reactins, pruritus, or auticaria or shortness of breath and red urine.

¹⁴ Risks and complications, American red Cross, One in two .

, <https://www.redcrossblood.org/donate->

blood/blood donation process/what happens to donated-blood/blood-transfusions/risks-complications.html

accessed on 3rd Feb.2021 at 5.15 pm referred to in Supra n 9, p 102.

¹⁵ Ibid, One in 3,00,000.

¹⁶ ibid, One in 1.5 million.

¹⁷ Prevalent in South Asia.

¹⁸ Supra n 8.

issues and the prevailing state of affairs to ensure an adequate legal regime pertaining to safe blood transfusion. Yet it may be mentioned by way of passing reference that much depends on the progress achieved by the scientific community. Advances in science have undoubtedly been achieved but there remain certain identified issues that are yet to yield results like those of “alloimmunization to various blood components, those related to cold chain maintenance, platelet refractoriness, transfusion (iron) overload, transfusion associated graft versus host diseases (GvHD), immunomodulatory effects, etc.”¹⁹

Towards this end implementation of certain criteria by way of creation of a database of reporting by donors as well as identification of recipients as adopted by the WHO would go a long way in providing for an effective mechanism.²⁰

IV. Efforts of WHO in Promoting Safe Blood Transfusion

Before addressing the country situation it is considered apposite to briefly look at the efforts undertaken by WHO in promoting safe blood transfusion. Two important parameters related to blood donation as identified by WHO. These happen to be blood screening and blood processing., but the capacity of low income countries to process blood is much lower compared to high income countries. When it comes to separation into different components they account for only 37 percent as against 97 percent in high income countries.²¹ It has been revealed that 54 percent of countries lack in an effective surveillance system.²² Towards an effective policy it has called upon to adopt sustainable blood and plasma programmes and development of hospital transfusion committees in order to improve the safe transmission through universal access to safe blood and blood products. Towards this end it has encouraged effective

¹⁹ Ibid.

²⁰ Department of Blood Safety and Clinical Technology of World Health Organization.

²¹ www.int/news-room/factsheet/bloodsafety and availability. 10.6.2020 accessed on 22nd April.2021.

²² Id.

cooperation, adoption of ethical policies besides legislation and regulation.²³The key areas identified²⁴ include:

- appropriately structured, well-coordinated and sustainably resourced national blood systems;
- regulatory capacity to ensure the quality and safety of blood;
- functioning and efficiently managed blood services;
- effective implementation of patient blood management to optimize transfusion practices;
- effective surveillance, haemovigilance and pharmacovigilance, supported by comprehensive and accurate data collection systems;
- partnerships, collaboration and information exchange to achieve key priorities and jointly address challenges and emerging threats at global, regional and national levels.

Measures at ensuring supply of safe and compatible blood transfusion through adequate precautions and measures by the WHO have met positive dividends. Towards this end, it has impressed upon the member countries to facilitate effective collecting, testing and processing and distribution.²⁵ Pursuant thereto it has called for adoption of national blood policy and legislative measures. It has received encouraging response²⁶ from different countries as can be gauged from the fact that two thirds of the responding countries have indicated of the presence of such a blood policy with 64 percent putting in place legislative measures. Aspects of transfusion practices and blood services form part of an ongoing (2020-2023) action framework which *inter alia* provides for access to safe blood banks.²⁷

The ongoing process of WHO has been developed through identification of blood safety as one of the key priority issues. The theme 'Blood Saves Life:

²³ Id

²⁴ <https://www.who.int/news/item/26-02-2020-who-steps-up-action-to-improve-access-to-safe-blood> accessed on 2th.April.2021 at 6 pm.

²⁵ Supra n 14.

²⁶ World Health Assembly resolution WHA63.12.

²⁷ WHO Action framework to advance universal access to safe, effective and quality assured blood products 2020-2023, <https://www.who.int/news/item/19-02-2020-who-action-framework-to-advance-universal-access-to-safe-effective-and-quality-assured-blood-products-2020-2023> accessed on 3st Mar..2021 at 10.38pm.

Safe Blood Starts with Me.’ It was adopted two decades back, on the occasion of world health day precisely in the year 2000.

V. The Situation in India

India, a country with her teeming millions requires a robust health care system to be put in place. However, the allocation of resources leaves much to be desired. With her public health system much in need of improved infrastructure, many patients have to fall back upon the private sector that comprises about 70 percent of the health care establishments. In such a scenario it becomes all the more imperative to ensure good practices, particularly with regard to uncontaminated blood transfusion. This is all the more essential as till date no form of substitute or alternative exist with regard to blood transfusion. Blood transfusion provides life support, hence it should be made available and accessible

As stated before, such supplies being grossly inadequate in view of the very high demand, the need for a comprehensive policy backed up by an effective legal regime is all the more necessary. Without a vibrant system, that includes adequate number of licensed blood banks having adequate infrastructure with proper procedures in place, the possibility of illegal and unfair practices exist. People desperately in need of urgent supplies either of whole blood or components thereof can often be at the mercy of dubious laboratories, their personnel and touts who are on the lookout for exploiting helpless patients and their attendants and relatives. Strict adherence to procedures becomes all the more necessary since any form of negligence or lapse may result in innumerable sufferings, prolonged treatment resulting in avoidable escalated costs besides the possibility of morbidity even leading to mortality. Hence ensuring an effective system in place is regarded as absolutely vital, rather indispensable.

Besides existence of physical infrastructure the personnel involved and engaged in the blood transfusion process requires to be infused with proper knowledge and training. They should be able to handle cases of unexpected reactions as well. Besides ensuring proper patient identification, emphasis should be laid on safe transfusion therapy through integration and coordination of multiple

hospital services that requires setting up of hospital transfusion committee tasked with oversight of transfusion safety.²⁸

VI. Patient Consent prior to Blood Transfusion

The prime requirement of any health care professional is to inform the patient on the need for transfusion. This is necessary to obtain his consent based on his understanding of the benefits and attendant risks. Religious belief and practices too have to be taken into account. Here the issue of patient autonomy comes to the fore as it is for the patient to decide whether to opt from blood transfusion if such a patient is in a position to provide such consent. It becomes the duty to provide the reasons in detail and obtain a written consent if possible in the presence of witnesses. However while treating a patient for oesophageal variances, the physician has to arrange for blood in advance. Such blood has to be requested from recognised blood banks. In respect of transfusion in congestive cardiac failure resort has to be to transfuse packed blood cells.

A case in point that some people strongly invoke relates to the Jeovah's faith.²⁹ Though it does not pose much of an issue in India, in the United States it has very major ramification when the need for blood transfusion arises.

VII. Law and Policy

Till date the country lacks in a specific law on blood transfusion though the Drugs and Cosmetics Act deal with it in a certain measure. Hence in the said context the scenario in the country is being addressed in the following paragraphs.

As stated hereto fore, there was much slackness on the part of the government till such time the apex court issued a set of guidelines pertaining to blood banks in terms of its judgment in the Common Cause case. The judgment set in motion certain measures that have witnessed regulation of licensed blood banks³⁰

²⁸ Walter H Dazik et.al. *patient safety and blood transfusion: new solutions*. Transfusion Medicine Reviews, Vol 17, ., 169-18
<https://www.sciencedirect.com/science/article/abs/pii/S0887796303000178?via%3Dihub> accessed on 3rd April, 2021 at 6.22pm.

²⁹ Such people hold the belief that blood transmission is proscribed due to their interpretation of the Bible. They believe that injecting blood is prohibited by religion.

³⁰ On an average each of the blood banks caret to about three per 10 lakh population.

which have to operate under challenging circumstance of high demand on account of shortage of safe and quality blood to the extent of 1.95 million units.³¹ This brings to the fore the scenario of patients inability to obtain safe blood for transfusion even when it happens to be the only source of their survival. The situation of distress is compounded by the fact that unlike many other jurisdictions, where hospital authorities are tasked and mandated to manage blood transfusion in case of need, the situation is not so in India. Therefore it becomes the responsibility of patients, attendants and individuals to scout for the same. Even when they find sources the quality cannot be guaranteed as many a times these are from professional donors. Here, for want of voluntary blood donors not only the supplies are very much inadequate but the quality of available supplies remain much to be desired. Matters stand compounded due to transfusion transmitted infections despite the functioning of the centralized Hemovigilance Programme³² under the National Institute of Biologicals.³³

A. National Blood Policy

Due to the directions of the apex court as well as the policy guidelines of WHO, the National Blood Policy was adopted in the year 2002. However, public health being a state subject the existence of dualism has at times put on checks to the detriment in the uniform advancement of the policy. Another draw back has been the lack of enforcement and compliance due to the voluntary nature of the policy, hence proper supply and utilisation of human blood and blood products' besides availability, safety and quality that remain the prime mandate of the WHO cannot be vigorously pursued. To that extent enforcement needs to be geared up followed by adoption of effective legislative measures.

³¹ ET HealthWorld, Oct 14, 2020, 20:29 IST.

<https://health.economicstimes.indiatimes.com/news/industry/towards-achieving-safe-blood-transfusion-for-all-prof-bejon-misra/78664621> Accessed on 31 Jan. 2020 at 10.58 pm.

³² Its very aim of is to improve transfusion safety.

³³ chemiluminescence (CLIA) enzyme-linked fluorescence assay (ELFA) are increasingly being used by blood banks cited in Alvarez M, Chueca N, Guillot V, Bernal, MdelC, Garcia, F. Improving clinical laboratory efficiency: Introduction of Systems for the Diagnosis and Monitoring of HIV infection, *Open Virol J.* 2012;6:135-43, [PMC free article] [PubMed] [Google Scholar] accessed on 3.Feb.2021 at 7.56 pm.

The policy is considered to be of much significance in the health delivery system since it addresses the issue of Blood Transfusion Service aimed at eliminating transfusion transmitted infections. It aims at effective clinical use of blood through trained personnel. Towards this end, good manufacturing practices and quality management have been stressed upon identified through the set of the following eight objectives.³⁴

1. To reiterate firmly the Govt. commitment to provide safe and adequate quantity of blood, blood components and blood products.
2. To make available adequate resources to develop and reorganise the blood transfusion services in the entire country.
3. To make latest technology available for operating the blood transfusion services and ensure its functioning in an updated manner.
4. To launch extensive awareness programmes for donor information, education, motivation, recruitment and retention in order to ensure adequate availability of safe blood.
5. To encourage appropriate clinical use of blood and blood products.
6. To strengthen the manpower through human resource development.
7. To encourage Research & Development in the field of Transfusion Medicine and related technology
8. To take adequate regulatory and legislative steps for monitoring and evaluation of blood transfusion services and to take steps to eliminate profiteering in blood banks.

These are to be strategized through National Blood Transfusion Council, National AIDS Control Organisation besides providing for licensing it prohibited trade in blood with the ultimate aim of voluntary non remunerated donors. Maintenance of minimum standards through strategized quality schemes have been introduced. It has further been promoting transfusion medicine including research and development through related technology. Although in terms of the policy, regulatory measures have been adopted, legislative measures are yet to be on the envil.

The country has at present about 2800 licensed blood banks most of which are small in size, hence of limited capability. Further the need of trained manpower very much remain.

³⁴ Objectives of Quality Management .

The judiciary has from time to time through various judgments shed light on the level of adequacy of blood transfusion services. Though pursuant to some landmark judgments, the National Blood Policy has been adopted the country is yet to come up with a comprehensive law on the issue.

VIII. Judicial Gloss

The judgment of the Supreme Court in the Common cause³⁵ case can be regarded as a landmark decision delivered by the apex court. The issue of contaminated blood transfusion was taken up by HD Shourie through a writ petition wherein the court issued a set of 18 guidelines *inter alia* directing the State to set up a National Blood Transfusion Council to be registered as a Society along with State Councils. The intention behind was to promote voluntary blood donation so as to achieve the twin objectives of ensuring adequate supply of healthy blood and facilitating transfusion of safe blood. Towards regulating the growth of unlicensed blood banks it issued a direction to the government to close down all unlicensed blood banks within a period of two years. This has been done to obviate the malpractices and other deficiencies in the operation of blood banks.

The National Consumer Disputes Redressal Commission in *Mrs 'S' v. Dr Mohan Gerra*³⁶ disposing of an appeal against an order of the Maharashtra State Commission, held the doctor responsible for providing blood transfusion without informed consent, resulting in her being infected with HIV. The Forum found the action of the doctor to amount to deficiency in service. The facts of the case are that the appellant following labour was provided with four units of blood transfusion which on ELISA test was found to be HIV I and II positive, though she was tested negative prior to delivery. She breasts fed the infant who too turned out to be positive.

Earlier, the Supreme Court in "*PGIMER v. Jaspal Singh and Ors*,"³⁷ in disposing a Special Leave petition by PGIMER, Chandigarh against a decision of the National Consumer Disputes Redressal Commission concurred with the commission affirming their order relating to payment of compensation. The case arose out of an accidental burn injury suffered by Smt Harjit Kaur, wife of

³⁵ *Supra*, n. 6

³⁶ *Supra* n11, 111, FA No. 138 of 2008.

³⁷ (2008) 7 SCC 330.

Jaspal Singh. The lady having A positive blood group was administered B positive while under the supervision of Dr. Kulshastra, Senior Resident Doctor, after being initially transfused the right blood group. This led to severe complications, including a fall in her haemoglobin and rise in urea level, besides causing damage to her kidneys and liver that ultimately resulted in her death. The defendant doctor while admitting of blood mismatch denied negligence on his part in administering mismatched blood transfusion, contending that the patient suffered from septicaemia which resulted in her death. The court considered it to be a case of medical negligence resulting in administration of transfusion infection and dismissed the Special Leave Application.”³⁸

IX. Legislative Framework

“A legal regime pertaining to patient safety bears immense significance as it extends to providing a framework in the arena of blood transfusion services. Such a measure can ensure an effective and enforceable transfusion mechanism. It has to be kept in mind that resolutions and guidelines of WHO, as well as the National Blood Policy have envisaged and voluntary blood donation targeted more specifically in promoting an infection free blood bank service. Such a measure can promote and standardize an effective blood bank system, among other things through grant and renewal of license for operationalisation and regulation of such services following set international standards. The present blood bank policy does not permit blood banks operating in the hospitals to conduct camps for collecting blood from voluntary donors. Consequently, they mostly rely on replacement donations from relatives and family members of recipients. Moreover, these banks still await permission to open storage centres, these being the preserve of Regional Blood Transfusion Centres. In fact, many of the hospital based blood banks have been set up to meet requirements of insurance companies and for meeting reimbursements eligibility requirements of international insurance claims. Therefore a comprehensive and effective legal system requires to be put in place for ensuring an efficacious mechanism, that can lead to quality, exhibiting high standards.”³⁹

In India in the absence of an exclusive law on blood transfusion the establishment of blood banks are being facilitated through Rules adopted in

³⁸ Ibid.

³⁹ Ibid.

1945 under the Drugs and Cosmetics Act, 1940 (as amended), a pre-independence law where blood has been classified as a drug under the law.

The relevant provision, namely Section 2 (d) of the Drugs and Cosmetic Act, 1940 and section 18 thereof provides for issuance of license along with provisions for penalty under Section 27 (b) (ii). Section 33 enables the framing of Rules under the Act. “The Drugs and Cosmetic Rules initially framed in 1945 has been extensively amended from time to time, particularly with regard to provisions relating to safe blood collection and storage in 1996, and 2001 providing for the functioning and operation of blood banks. Yet, shortcomings have been noticed like lack of punitive action for professional blood sellers till introduction of such measure, providing for penal action under the national blood policy. Supplies reagents are provided for under the Rules,⁴⁰ besides ensuring good manufacturing practices.⁴¹ However, a conjoint reading of the Act and the Rules are a reflection that accommodation of the recent technological developments have not been brought within the ambit of the law. For instance, chemiluminescence or nucleic acid testing (NAT)⁴² find no mention in the Act.⁴³ So too, ‘products like pooled platelet concentrates or modified whole blood, therapeutic procedures like erythropheresis plasma exchange, stem cell collection and processing technologies like leukoreduction and irradiation are not a part of the Act⁴⁴.”

“Blood transfusion calls for a highly safe clinical and regulatory mechanism to be put in place, with adequate infrastructure, qualified and trained manpower to deal with manufacture, processing and scientific storage. An analysis of the said legislation reveals the lack of any effective mechanism towards safe transfusion.

⁴⁰ Drugs and Cosmetics Rules 1945, Schedule F, Part XII-B --- Clause I make mandatory to maintain all records to facilitate their checking and functioning of the blood banks.

⁴¹ *ibid*, Schedule F, Part XII-B-KG).

⁴² is mandatory and regularly used in many countries like New Zealand Australia, Egypt, Israel, Japan, South Korea, Singapore, Hong Kong, Thailand, Malaysia, Indonesia, South Africa, France, Denmark, Greece, Italy etc *Supra*, n.29.

⁴³ S.Chandrashekar & A. Kantharaj , Legal and ethical issues in safe blood transfusion, *Indian Journal of Anesthesia*, Volume 58(5): Sep

Oct2014, <https://www.ncbi.nlm.nih.gov/pmc/issues/246312/> accessed on 3.2.2021 at 7.29 pm.

⁴⁴ *Supra* n 11, 112-13.

Of course, the national blood policy adopted in the year 2002, following the WHO recommendations and WHA resolutions, has laid down provisions for protective measures through ‘informed consent, patient identification and administration of blood or haemovigilance.’⁴⁵ This has been done through facilitative terms towards improving blood transmission services and transmission medicine. In this regard the role of the National AIDS Control Organisation is considered important. It has laid down certain safety measures in respect of safe blood donors apart from safe blood issues, but is yet to be permitted to address safe transfusion.⁴⁶ Yet, along with the National Blood Transfusion Council and Blood Safety Technical Resource Group, it has formulated guidelines facilitating blood safety infrastructure and transfusion medicine including supervision during transmission.”

Similarly, “the Clinical Establishment (Registration and Regulation) Act 2010 that has been applicable to all recognized systems of medicine is a step in the positive direction. Adopted in the year 2010 it came to be notified on the 28th February, 2012. Presently the Act has been adopted by 11 states and six union territories. Some states have passed their own health laws similar to the Act. It aims at setting up of minimum standards of treatment protocols⁴⁷ towards achieving quality health and bring diagnostic centres and investigative services within its ambit. Enabling provision for adoption of Rules is provided for under section 52 and 53. Recently, Rules have been framed to specify minimum standards for human resources in respect of diagnostic laboratories.⁴⁸ The earlier

⁴⁵ PS Dhot, Amendments to Indian drugs and cosmetics act and rules pertaining to blood banks in armed forces. *Med J Armed Forces India*. 2005;61:264-66. [PMC free article] [PubMedGoogle Scholar].

⁴⁶ Supra n 11, p 113 Access to Safe blood, NACO, <http://naco.gov.in/access-safe-blood> accessed on 2.Feb.2021 at 9 am.

⁴⁷ OPERATIONAL GUIDELINES FOR CLINICAL ESTABLISHMENTS ACT. <http://clinicalestablishments.gov.in/WriteReadData/2591.pdf> accessed on 6.feb.2021 at 1.39pm.

⁴⁸ Supra n 11, p 113 Clinical Establishments (Central Government Amendment Rules, 2020 (Amendment in part III a) in respect of human resource minimum standards for Medical Diagnostic Laboratories (or Pathological Laboratories)].

Rules had been amended in 2018 providing for aspects of biochemistry and Haematology amongst others.⁴⁹

X. Conclusion

The brief analysis undertaken so far highlight the need for enactment of legislative measures incorporating certain aspects mentioned above. In fact they can be considered a dire necessity to replace the adhocism resorted to. Enactment of a law can certainly facilitate a holistic approach leading to regulation of centralized testing to protect Transfusion Transmitted Infections besides giving a fillup to the process of monitoring transmissions as per guidelines followed globally.⁵⁰ Furthermore, it would be ideal for any such legislation to consider the situation in respect of Jehovah's Witnesses as they refuse transfusion of whole blood as well as the components.⁵¹ The existing legislations in other countries can certainly provide a leeway and basis for formulation of an enabling legal regime in the country.

The author is of the view that such an Act and Rules there under can provide for a legal regime through an established framework. It can also hedge in provision for safe processing and storage of whole blood and segregated products leading to safe blood in the hands of the administering professionals.⁵² Yet it has to be acknowledged that the process of transfusion presents possibilities of infection. Hence such process has to be handled with utmost care in highly sanitized hospital settings, with all necessary precautions being religiously followed by the administering professionals, including nurses and other health care workers, leading to lower incidence of transfusion transmitted infections. Such a law should also contain provisions relating to elective transfusion in case of minors. Furthermore it should facilitate monitoring as per established international standards, procedures and mechanisms leading to meticulous adherence ,

⁴⁹ Gazette of India, Notification No. G.S.R. 468(E) dated 18 May, 2018.

⁵⁰ A M.Hurris, CLI Atterbury, B. Chaffe, C Elliott, T Hawkins SJ. Hennem, et al. Guideline on the Administration of Blood Components. British Committee for Standards in Hematology. 2009. Available from http://www.bcshguidelines.com/documents/Admin_blood_components_bcsh_050120_10.pdf. accessed on 3.2.2021.

⁵¹ P.Frati M..Arcangeli, *Faculty of Care and Self-Determination of Patient*, Torino: Medical Minerva: 2002 ISBN-13 978-88-7711-412-9.

⁵² Supra n 11, 115.

facilitating prompt action by adequately trained, qualified and competent personal in the event of any adverse reaction.⁵³ Enactment of a dedicated law would go a long way in the promotion of safe blood transfusion services through quality management laboratory practices, leading to quality assurance in the country. A more ambitious but effective way out would be to include various aspects of patient safety into a comprehensive law rather than treating different aspects as silos.

It has to be acknowledged that a law in itself may not prove to be a panacea removing all shortcomings. The law apart, advances in technology including artificial intelligence has to be incorporated to put to effective use. Clear communication with adequate monitoring and reporting has to be facilitated and developed, as many a case of adverse reaction through transfusion results from miscommunication. Resort to healthy laboratory practices can also reduce possibility of infection.⁵⁴

In the ultimate analysis, in order to promote safe and healthy blood transfusion, total voluntary blood donation should be the objective. This would ensure regular database of donors who can be fallen back upon in case of emergencies besides ensuring increase in stock of whole blood. Presently there is a demand for permitting unbanked direct blood transfusion as provided for in some countries. The matter is pending before the apex court, that should result in effective directions for implementation. Nevertheless, adequate safeguards are required to be put in place else it may run counter in reducing transfusion related infections. The flaws in the prevailing system calls for identification and elimination to remove blood transfusion impaired issues related to blood banks besides factoring other issues of contamination and other impaired issues aimed at promoting patient safety.⁵⁵

⁵³ *Ibid* n 11, 115.

⁵⁴ *Ibid*.

⁵⁵ *id*

A Study of Child Rights in Armed Conflicts under the International Legislative Framework

Dolly Biswas¹

Abstract

Protecting children in conflict is a key concern for international children's legislation and its implementation today, with over 250 million children living in conditions of armed conflict. The international legal measures that safeguard children during armed conflict are examined in this article. It examines the general legal rights afforded to children during times of conflict, particularly their access to critical resources for their physical and mental well-being (such as medical treatment, food, and clothes) and to developmental activities, including education. It also looks at how international law prevents children from becoming involved in armed conflicts, including the restriction on their recruitment and use in hostilities, as well as how children who are captured or detained should be treated. The article concludes with a brief description of how, over the last few decades, the protection of children in armed conflict has grown to be a major worldwide problem, particularly within the UN system.

Keywords: *Human Rights, Armed Conflict, International Law, UN System*

The hallmark of culture and advance of civilization consists in the fulfilment of our obligation to the young generation by opening up all opportunities for every child to unfold its personality and rise to its full stature, physical, mental, moral and spritual. It is the birth right of every child that cries for justice from the world as a whole.

V. R.Krishna Iyer J.²

I. Introduction

In a civilised society, the importance of child welfare cannot be underestimated because the welfare of the entire community, its growth and development

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² Mamata Rao, Women and Children 529 (Eastern Book Company, Lucknow, 3rd edn, 2012).

depends on the health and well-being of its children. Children are a “supremely important national asset”, and the future well-being of the nation depends on how its children grow and develop.

There has been great concern for the welfare of children at the international and national levels. Kofi A. Annan, secretary General of the United Nations(UN), observed:

*There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they grow up in peace.*³

The protection of children in armed conflict has always been high on the international political agenda. The Security Council has a special working group which pays specific attention each year to the most serious violations of children’s rights in armed conflict: the recruitment and use of children by armed forces or armed groups, the killing and maiming of children, rape and sexual violence, abduction, attacks on schools and hospitals, and the denial of humanitarian access by parties to armed conflict. To present and discuss all the relevant documents is beyond the scope of this introduction to the international legal framework for the protection of children in armed conflict.⁴

II. The Grave Violation of Rights of Children during Armed Conflict

Protecting children from the effects of armed conflict is a moral imperative, a legal responsibility and a question of international peace and security. The Security Council has resolved that the protection of children from armed conflict is an important aspect of any comprehensive strategy to resolve conflict, and should be a priority for the international community. The General Assembly and other UN bodies have repeatedly called for special protection afforded to children by all parties to conflict.

A. Recruitment and Use of Children

Recruiting or using children under the age of 15 as soldiers is incontrovertibly prohibited under international humanitarian law. Furthermore, international

³ Ibid.

⁴ Jaap Doek, The International Legal Framework for The Protection of Children in Armed Conflict, Disarmament Forum,2011.

human rights law clearly states 18 years as the minimum legal age for participation in hostilities.

The Charles Taylor case before the Special Court for Sierra Leone⁵

The Special Court sentenced Taylor to 50 years in prison and this sentence was upheld by the Appeal Chamber in September 2013. The Court's judgement against Charles Taylor marks the first time that a former Head of State has been convicted of war crimes against children that were committed by an armed group found not to be under his direct command and control but to which he gave his practical assistance, encouragement and moral support. The Special Court was also the first international court to determine that the recruitment and use of children aged less than 15 years constituted a war crime under customary international law.

The Lubanga case before the ICC⁶

On March 2012, the International Criminal Court convicted Lubanga Dyilo of committing war crimes consisting of the enlisting and conscripting of children under the age of 15 into the Forces patriotiques pour la libération du Congo and their use for active participation in hostilities. He was sentenced by the ICC to a total period of 14 years of imprisonment. The Lubanga case was the first of its kind before the ICC. Of great significance was the Court's acceptance that the line between voluntary and involuntary recruitment is legally irrelevant in the context of children's association with armed forces or armed groups in times of conflict.⁷

The Convention on the Rights of the Child's Optional Protocol on the Involvement of Children in Armed Conflict (2000) requires State parties to increase to 18 years the minimum age for compulsory recruitment and for direct participation in hostilities. Those countries that continue to permit voluntary recruitment of children under the age of 18 must introduce strict safeguards.⁸ Additional Protocol I of the Geneva Conventions and the Convention on the Rights of the Child both require that when recruiting children

⁵ SCSL-03-01-A

⁶ ICC-01/04-01/06

⁷ Ibid.

⁸ Art. 1-3, Optional Protocol to the Convention on the Rights of the Child on the Involvement of children in armed conflict (2000).

between 15 and 18 years old, priority should be given to the oldest.⁹The International Labor Organization's Convention No. 182 on the Worst Forms of Child Labor declares that recruiting children below the age of 18 is "one of the worst forms of child labor."¹⁰The Paris Principles on Children Associated with Armed Forces or Armed Groups (2007) to protect children from unlawful recruitment suggests States to ensure that armed groups within their territory do not recruit children under the age of 18 and that the States themselves respect the international standards for recruitment.¹¹The African Charter on the Rights and Welfare of the Child (1999) prohibits "recruitment and direct participation in hostilities of any person under the age of 18 years¹²".

B. Killing and Maiming of Children

The prohibition of violence to civilians, including children, in particular murder, mutilation, cruel treatment and torture is a principle of customary international law, with universal applicability in all situations of armed conflict.¹³

The principles aim to protect civilians against the effect of hostilities and prevent unnecessary "collateral damage" resulting from combat operations. They prohibit indiscriminate and disproportionate military attacks, as well as direct attacks against civilians. The principle of proportionality prohibits military attacks if they result in civilian death or injury, or damage to civilian objects that is excessive when compared to the concrete and direct military advantage anticipated from the attack. The principle of distinction demands that parties to conflict distinguish between civilians and combatants at all times and that attacks must not be directed against civilians.¹⁴

The use of indiscriminate weapons, such as landmines, cluster munitions and chemical weapons, are contrary to the law of armed conflict and contravene

⁹ Art. 77(2) "protocols Additional To Geneva Conventions of 12 August 1949", International Humanitarian Law, International Committee of the Red Cross, Retrieved 9th January 2020.

¹⁰ Art. 1-3 International Labor Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999).

¹¹ Para. 4 of Paris Commitments to protect children from unlawful recruitment or use by armed forces or armed groups (2007).

¹² Art. 22, African Charter on the Rights and Welfare of the Child (1990).

¹³ Common article 3 Geneva Conventions (1949).

¹⁴

multiple international treaties.¹⁵The growing body of international criminal jurisprudence recognized that willful killing in conflict situations may amount to war crimes or crimes against humanity.¹⁶

Furthermore, the International Criminal Tribunal for the Former Yugoslavia recognized in the *Kunarac, Kovac̃ and Vukovic*¹⁷ case that when children are the victims of murder, torture or injury it amounts to “aggravating circumstances” of such crimes, warranting lengthier than ordinary prison terms for perpetrators.¹⁸The CRC recognizes “that every child has an inherent right to life” and State parties must ensure to the “maximum extent possible the survival and development of the child.”¹⁹The Committee on the Rights of the Child tasked to monitor the practices of States relating to the Convention, has designated this inherent right to life as one of four guiding principles of the entire Convention.²⁰The African Charter on the Rights and Welfare of the Child (1990) and other regional human rights instruments also reflect the basic children’s right to life and the right to be free from torture and abuse.²¹

C. Sexual Violence against Children

Rape and other forms of sexual violence against children, both boys and girls, are serious violations of international human rights law and may amount to grave breaches of international humanitarian law.²²The obligation of humane treatment under Common Article 3 of Geneva Conventions, implicitly prohibits rape or any other sexual violence, be it against adults or children. Article 27 of the 4th Geneva Convention explicitly prohibits such acts stating that: “Women [including girls] shall be especially protected against any attack on their honour,

¹⁵ Art. 35 AP I

¹⁶ Art. 7(1), Rome Statute.

¹⁷ ICTY (2001).

¹⁸ Prosecutor v. Kunarac, Kovac̃ and Vukovic̃, ICTY (2001).

¹⁹ Art. 6, 37 CRC.

²⁰ World Conference on Human Rights, Vienna Declaration and Programme of Action (1993).

²¹ Art. 5, 16 African Charter on the Rights and Welfare of the Child, Organization of African States (1990).

²² Art.147 “Treaties/stateparties/commentaries: Convention (IV) Relative to the Protection of Protocols Additional to The Geneva Conventions of 12 August 1949”, International Humanitarian Law, International Committee of the Red Cross, Retrieved 9th January 2020.

in particular against rape, enforced prostitution, or any form of indecent assault.”²³The ICCPR and the Convention for the Elimination of all Forms of Discrimination Against Women (1979) (CEDAW) affirm a women’s right to liberty and security of person and to be free from discrimination.²⁴The Convention on the Rights of the Child and its Optional Protocol on Trafficking and Ex-ploitation unequivocally affirm that children must enjoy protection from torture, cruel, inhuman or degrading treatment, a protection broadly accepted as encompassing acts of rape and sexual violence.²⁵The Rome Statute of the ICC states that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or “other forms of sexual violence of comparable gravity” may constitute war crimes and crimes against humanity.²⁶

Furthermore, the International Criminal Tribunal in the *Prosecutor v. Furundžija*²⁷ case the ICTY Trial Chamber noted that prohibition of rape and serious sexual assault in armed conflict under customary international law has gradually crystallized. The Tribunal found the accused guilty of a violation of the laws and customs of war outrages upon dignity, including rape. And Furthermore, the International Criminal Tribunal recognized in the *Prosecutor v. Kunarac, Kovac and Vukovic*²⁸ case the ICTY Trial Chamber found the accused guilty of “crimes against humanity rape” and “violations of the law of customs of war rape.”

D. Attacks against Schools and Hospitals

Schools and hospitals are civilian institutions that often provide shelter and protection, and tend to the needs of children during conflict. Attacks against schools or hospitals are, in principle, contraventions of well-established international humanitarian law, including customary norms, and may constitute war crimes and crimes against humanity.

²³ Ibid.

²⁴ Art. 2, 3, 6 ICCPR.

²⁵ Art. 34, 35, CRC Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000).

²⁶ Art. 7,8 Rome Statute.

²⁷ ICTY (1998).

²⁸ ICTY (2000).

The 4th Geneva Convention prohibits the targeting of civilian objects, emphasizing the importance of schools and hospitals to the civilian population especially children.²⁹The Detaining Power shall encourage intellectual, educational and recreational pursuits, sports and games amongst internees, whilst leaving them free to take part in them or not. It shall take all practicable measures to ensure the exercise thereof, in particular by providing suitable premises. All possible facilities shall be granted to internees to continue their studies or to take up new subjects. The education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside. Internees shall be given opportunities for physical exercise, sports and outdoor games. For this purpose, sufficient open spaces shall be set aside in all places of internment. Special playgrounds shall be reserved for children and young people³⁰Whenever an evacuation occurs pursuant according to paragraph 1 Article 78, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.³¹

Article 24 and Article 28 of the Convention on the Rights of the Child recognizes the paramount importance of children's right to education and right to health and every child has the right to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. Every child has the right to education, and with a view to achieving this right progressively and on the basis of equal opportunity, primary education compulsory and available free to all and encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such

²⁹ Art. 11, 18 "Treaties/stateparties/commentaries: Convention(IV)Relative to the Protection of Protocols Additional to The Geneva Conventions of 12 August1949", International Humanitarian Law, International Committee of the Red Cross, Retrieved 9thJanuary 2020.

³⁰Article 94 "Treaties/stateparties/commentaries: Convention(IV)Relative to the Protection of Protocols Additional to The Geneva Conventions of 12 August1949", International Humanitarian Law, International Committee of the Red Cross, Retrieved 9thJanuary 2020.

³¹Article 78 "protocols Additional to Geneva Conventions of 12August 1949", International Humanitarian Law, International Committee of the Red Cross, Retrieved 9thJanuary 2020.

as the introduction of free education and offering financial assistance in case of need and make higher education accessible to all on the basis of capacity by every appropriate means and vocational information and guidance available and accessible to all children.³²

These rights are also reflected in international and regional legal instruments, including the Universal Declaration of Human Rights (1948) and the International Covenant on Economic, Social and Cultural Rights (1966), which address the right of all persons to enjoy “the highest attainable standard of physical and mental health” and the right of every child to education.³³

The targeting and destruction of schools or hospitals obviously constitutes an obstacle to fulfilling these rights. The International Criminal Tribunal for the former Yugoslavia has developed solid jurisprudence on the necessity to protect schools and hospitals from attack, for example in the Kupreskic³⁴ and Kordic & Cerkez³⁵ cases. The Rome Statute extends the criminal accountability for these acts (or “failures to protect”), providing the International Criminal Court explicit jurisdiction to prosecute and punish those that intentionally target schools or hospitals during armed conflict. Such acts amount to war crimes regardless of whether they occur during an international or non-international armed conflict.³⁶

E. Abduction of Children

Abducting or seizing children against their will or the will of their adult guardians either temporarily or permanently and without due cause, is illegal under international law. It may constitute a grave breach of the Geneva Conventions and in some circumstances amount to war crimes and crimes against humanity. The Geneva Conventions Common Article 3 requirement of humane treatment for civilians implicitly but undeniably prohibits the abduction of children.³⁷ Forced displacement or deportation of a civilian population, both of which are express prohibitions in the Geneva Conventions may also include

³² Dr.S.K.Kapoor, Human Rights Under International Law and Indian Law (166-177) (Central Law Agency, Allahabad, 6th edn, 2014).

³³ Art. 26, UDHR; Art. 12 and Art. 13 ICESCR (1966);

³⁴ ICTY (2000).

³⁵ ICTY (2001).

³⁶ Article 8 Rome Statute.

³⁷ Common article 3, Geneva Conventions (1949).

instances of child abduction.³⁸ Abduction may also amount to “enforced disappearance” and is thereby prohibited by several international legal instruments.³⁹ “State parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”⁴⁰ “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”⁴¹ The ICC’s Rome Statute states that “unlawful confinement” is a grave breach of the Geneva Conventions and may amount to a war crime.⁴²

In the *Kupreskic*⁴³ and *Kunarac*⁴⁴ cases, the International Criminal Tribunal for the former Yugoslavia stated that “enslavement as a crime against humanity is customary international law” and that enforced disappearance of persons was an inhumane act, which also amounted to a crime against humanity.

F. Denial of Humanitarian Access

Denying humanitarian access to children may violate several basic human rights, including the right to survival and the right to be free from hunger, fundamental rights enjoyed by all people⁴⁵. The Convention on the Rights of the Child has several provisions that necessitate the facilitation of humanitarian relief to children in need, including ensuring that children seeking refugee status “receive appropriate protection and humanitarian assistance.”⁴⁶ “Parties must also permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under 15, expectant mothers and maternity

³⁸ Art. 49, 147 Geneva Conventions IV.

³⁹ Art. 2, 25 International Convention for the Protection of All Persons from Enforced Disappearance (2006).

⁴⁰ Article 35, Convention on the Rights of the Child.

⁴¹ Article 9, International Covenant on Civil and Political Rights.

⁴² Art. 8(2)(a) Rome Statute.

⁴³ ICTY(2000).

⁴⁴ ICTY(2001).

⁴⁵ Art. 11 and 12 ICESCR.

⁴⁶ “Legal protection of children In Armed Conflict”, International Humanitarian Law, International Committee of the Red Cross, Retrieved 9th January 2020.

cases. And when distributing humanitarian relief priority must be given to such persons as children, expectant mothers and maternity cases.”⁴⁷

III. International legislative Framework Against Protection of Rights of Victims of Children During Armed Conflict

To present and discuss all the relevant documents is beyond the scope of this introduction to the international legal framework for the protection of children in armed conflict following as under:

A. Geneva Convention-

Geneva Convention IV guarantees special care for children, but it is API that lays down the principle of special protection: Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason (Art. 77). This principle also applies to non- international armed conflict (Art. 4, para. 3 Additional Protocol II). The provisions setting out this protection may be summarized as follows:

Evacuation, Special Zones

In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven (Art. 14 Geneva Conventions IV)⁴⁸

The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas (Article 17 Geneva Conventions IV),

⁴⁷ Article 23, 4th Geneva Convention.

⁴⁸ “Treaties/stateparties/commentaries: Convention (IV)Relative to the Protection Of Protocols Additional To The Geneva Conventions Of 12 August1949”, International Humanitarian Law, International Committee of the Red Cross,Retreived 9thJanuary 2020.

The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time. (Article 132 Geneva Conventions IV) ⁴⁹

No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required(Art. 78 Additional Protocol I).⁵⁰

Children shall be provided with the care and aid they require, and in particular measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being. (Art.4 Additional Protocol II).

Assistance and Care

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases(Art. 23, Geneva Conventions IV).⁵¹

⁴⁹ Ibid.

⁵⁰ "protocols Additional To Geneva Conventions of 12August 1949",International Humanitarian Law, International Committee of the Red Cross,Retrieved 9thJanuary 2020.

⁵¹ "Treaties/stateparties/commentaries:Convention(IV)Relative to the Protection Of Protocols Additional To The Geneva Conventions Of 12 August1949",International

If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69 Geneva Conventions IV, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection (Art. 70 Additional Protocol I)⁵². And Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason (Art. 77 Additional Protocol I).

Identification, Family Reunification and Unaccompanied Children

All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them. This correspondence shall be forwarded speedily and without undue delay. And If, as a result of circumstances, it becomes difficult or impossible to exchange family correspondence by the ordinary post, the Parties to the conflict concerned shall apply to a neutral intermediary, such as the Central Agency provided for in Article 140 Geneva Conventions IV, and shall decide in consultation with it how to ensure the fulfilment of their obligations under the best possible conditions, in particular with the co-operation of the National Red Cross (Red Crescent, Red Lion and Sun) Societies, and if the Parties to the conflict deem it necessary to restrict family correspondence, such restrictions shall be confined to the compulsory use of standard forms containing twenty-five freely chosen

Humanitarian Law, International Committee of the Red Cross, Retrieved 9th January 2020.

⁵² "protocols Additional To Geneva Conventions of 12 August 1949", International Humanitarian Law, International Committee of the Red Cross, Retrieved 9th January 2020.

words, and to the limitation of the number of these forms despatched to one each month(ART. 25. Geneva Conventions IV)⁵³.

Reunion of dispersed families The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task in accordance with the provisions of the Conventions and of this Protocol and in conformity with their respective security regulations (Art. 74, Additional Protocol I).⁵⁴

Arrested, Detained or Interned Children

The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour (Art. 51 Geneva Conventions IV).

Exemption from Death Penalty

In any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence (Art. 68 Geneva Conventions IV).⁵⁵

⁵³ "Treaties/stateparties/commentaries: Convention(IV)Relative to the Protection of Protocols Additional to The Geneva Conventions of 12 August1949", International Humanitarian Law, International Committee of the Red Cross, Retrieved 9thJanuary 2020.

⁵⁴ "protocols Additional to Geneva Conventions of 12August 1949", International Humanitarian Law, International Committee of the Red Cross, Retrieved 9thJanuary 2020.

⁵⁵ "Treaties/stateparties/commentaries: Convention(IV)Relative to the Protection of Protocols Additional to The Geneva Conventions of 12 August1949", International Humanitarian Law, International Committee of the Red Cross, Retrieved 9thJanuary 2020.

The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed(Art. 77 Additional Protocol I).⁵⁶

B. The Convention on the Rights of the Child and Its Two Optional Protocols⁵⁷

“Mankind owes to the child the best it has to give”. This was proclaimed by the Declaration on the Rights of the Child adopted by the General Assembly on November 20, 1959. The Declaration on the Rights of the Child set forth in 10 principles code for the well-being of every child. Earlier the Universal Declaration of Human Rights proclaimed in Article 25(2) that motherhood and childhood are entitled to special care and assistance. The provisions setting out this protection may be summarized as follows:

Rights of the child under the Convention of 1989⁵⁸

- a. Right to life (Article 6)
- b. Right to a name and to acquire a nationality- (Article 7)
- c. Right of the child to preserve his or her identity- (Article 8)
- d. Right of the child to express his or her views freely in matters affecting the child-States Parties shall assure to the child who is capable of forming his or her own views freely in all matters affecting the child.. (Article 12)
- e. The right to freedom of expression
- f. Right of the child to freedom of thought, conscience and religion- (Article 14)
- g. Right of the child to freedom of association and peaceful assembly-. (Article 15)

⁵⁶ “protocols Additional To Geneva Conventions of 12 August 1949”, International Humanitarian Law, International Committee of the Red Cross, Retrieved 9th January 2020.

⁵⁷ Dr.S.K.Kapoor, Human Rights Under International Law and Indian Law (166-177) (Central Law Agency, Allahabad, 6th edn, 2014).

⁵⁸ Ibid.

- h. Right of the child to be protected from all forms of physical or mental violence, injury or abuse or negligent treatment, maltreatment or exploitation-. (Article 19)
- i. Right of a mentally or physically disabled child to enjoy a full and decent life.(Article 23)

C. African Charter on the Rights and Welfare of the Child (ACRWC), adopted in 1990,⁵⁹

The African Charter on the Rights and Welfare of the Child is an African regional human rights instrument adopted by the Organization of African Unity (OAU), now the African Union (AU), on 11 July 1990. The Charter entered into force on 29 November 1999. It was adopted within a year of the adoption of the United Nations Convention on the Rights of the Child (CRC). One of the reasons for a separate African Children's Charter was that during the drafting process of the Convention on the Rights of the Child,

According to the Charter, any human being under the age of 18 is considered a child (Article 2). The Convention enshrines the traditional human rights: civil, political, economic, social and cultural rights, such as the right to non-discrimination (article 3); freedom of expression (article 7); right to religion (article 9); the right to privacy (article 10); right to education (article 11); the right of every mentally or physically disabled child to receive special measures of protection (article13); the right to health (article 14).The Charter, furthermore, addresses issues of particular concern to children such as: the best interest of the child shall be the primary consideration in all actions concerning the child (article 4[1]); a child's view is to be heard and taken into consideration in all judicial and administrative proceedings affecting a child (article 4[2]); the right to a name, nationality and to be registered at birth (article 6); economic and sexual exploitation of children (articles 15 and 27); in relation to the administration of juvenile justice, special protection is to be accorded to children (article 17); the right to parental care and protection (article 19); when necessary, material assistance is to be given to parents and legal guardians in relation to a child's nutrition, health, education.

⁵⁹WHO."Health And Human Rights, African Charter on the Rights and Welfare of the Child".Retrieved9thJanuary2020.

IV. Conclusion

The States should include the concept of child-specific protection in peacetime training and exercises at all levels of the armed and national security forces. Likewise, consideration should be given to introducing this subject into the curriculum of universities and specialized institutions, and to organizing campaigns to raise awareness among the general public, in particular among children and adolescents. The entire elements of international legislative framework are solid instruments for the protection of children affected by Armed conflict. Implementation of this framework needs continued investment with the involvement of the many agencies such as UN, Security Council, NGOs. It should not be limited only children associated with armed forces or armed groups. It should include the protection and other necessary measures for all children affected by armed conflict as necessary under the Convention on the Rights of the Child, The African Charter on the Rights and Welfare of the Child and NGOs.

Impact of Globalisation on Women Workers in Agricultural Sector: An Analysis

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Abstract

This article examines the impact of Globalisation on Women Workers in Agricultural Sector in India. Agriculture sector being unorganised sector it provides direct employment to millions of people including men and women throughout the country. Agriculture is said to be the backbone for the contribution of the economy of a nation where women plays an important role in the development of the economy of a nation. Different types of farming which is practised in India has been mentioned in this article. Further importance of women in agriculture sector and the problems faced by women workers in this sector has been discussed. What are the various Socio-Economic Conditions of Women Workers in India and has also examined about the social security legislation for women. The author in this article has also discussed the topic with some case laws decided by the supreme court of our country. At last the author has concluded the manuscript by pondering some suggestions related to it.

Keywords: *Globalisation; Women Workers; Agricultural Sector; Unorganised Sector; Socio-Economic Conditions; Social Security; Case Laws.*

I. Introduction

The women in India are considered as the back bone of agricultural workforce and are a vital part of Indian economy. Agriculture is known as the science or art of cultivating soil, growing and harvesting of crops, domestication of animals and raising of livestock.² India's agricultural sector has shown its strength amid the misfortune of COVID-19 induced lockdowns. The Agriculture and Allied activities observed a growth of 3.4 per cent at constant prices during

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² MAJID HUSAIN, AGRICULTURAL GEOGRAPHY, 45 (Rawat Publications, New Delhi, 2017).

2020-2021.³ Agriculture sector provides direct employment to millions of people. It is a social sector where non trading concerns like food and nutritional security, employment and income generation, poverty alleviation, gender equity, ecology and environment play a significant role. Agriculture has contributed to the nation's security during the time of economic sanction and in strengthening the national sovereignty. But even after so much of contribution to the nation agriculture has so far remained an unorganised sector.⁴

Agriculture again in its broader modern term includes not only the domestication of plants and animals useful to humans, but also many of the operations involved in marketing them.⁵

II. Types of Agriculture

India is a country where different types of farming is practiced primarily based on nature of the land, climatic condition and available irrigational facilities.

A. Subsistence Farming

All types of crops or livestock are raised in this type of farming. This farming helps to maintain the farmer and farmer's family.

B. Mixed farming

Different agriculture is practised by the farmers in this type of farming like cash crops and livestock together.

C. Shifting cultivation

This system of agriculture is a type of migrating agricultural activities to another land because when a plot of land is cultivated for few years and then later when the crop yield declines due to soil exhaustion and the effects of pests and weeds, as a result the farmers shift their cultivation to another area.

D. Extensive Farming

³ Ministry of Finance, <https://pib.gov.in/PressReleasePage.aspx?PRID=1693205> visited on 04.02.2021 at 01: 40 PM.

⁴ HAND BOOK OF AGRICULTURE, Indian Council of Agricultural Research, 1(New Delhi 2006).

⁵ MAJID HUSAIN, AGRICULTURAL GEOGRAPHY, 45(Rawat Publications, New Delhi, Reprint 2017).

In this system of extensive farming the farmer uses the limited amount of labour and Capital on a relatively large area for cultivation. Technology is used for farming in this system.

E. Intensive Farming

In this system of farming manual labour is used and the farmers uses a larger amount of labour and capital on a relatively small area.

F. Plantation Agriculture

Cash crops are specially cultivated in this type of farming.

III. Agricultural Labour: A Class of Unorganised Sector

The workers of unorganised sector or informal sector are concerned with their social security issues. The report of the National Commission defines unorganised sector as all the private enterprises which are owned by single person or households whoever are engaged in the production and sales of goods and services by employing less than ten person which are operated on a proprietary or a partnership basis.⁶ The informal sector has defined negatively by indicating the characteristics whichever are not present in the formal sector such as no better earnings, no social security benefits, no protective legislations, no employer- employee relationships, no protections from any unions, that is the reason why the unorganised or the informal workers are home based workers, casual and contractual workers and therefore they earn their livelihood through whatever skill they possesses.⁷

Therefore, rural women worker whoever works in an agricultural sector work as a labourer with low wage of income and even work up to the extended hours just because to earn a livelihood due to poverty, illiteracy and ignorance.

IV. Significance of Agricultural Sector Women in India

Food is a fundamental life support, which is very much essential for the consumption. Women plays an active role as a labour in agricultural farms and even in household activities. In the field she works as a cultivator, sowing of

⁶ Neetha N., *Invisibility' Continues? Social Security and Unpaid Women Workers*, Vol. 41, No. 32 ECONOMIC AND POLITICAL WEEKLY, 3497 (2006).

⁷ Mridul Eapen, *Women in Informal Sector in Kerala: Need for Re-Examination*, Vol. 36, No. 26 ECONOMIC AND POLITICAL WEEKLY, 2390 (2001).

seeds, weeding and within house hold apart from the responsibilities as a mother, wife she keeps poultry, livestock production. She even does the cattle management all alone like cleaning the cattle shed, fetching the cattle's, cutting grass, collecting foddors, milking, and also makes manure for the production in the field.

From the rural areas male members of the family migrate from village to cities in search of job for their livelihood, at such period of time the female members manages everything at home from rearing cattle to the agricultural production of crops at her village.⁸

Women produce around 60 to 80 percent of the food in most of the developing countries and women's are responsible for half of the world's food production, hence, women's role in food production ensures the survival of millions of people in all regions. Women's livelihood strategies, and their support and means of ensuring food security are diverged and complex, from cultivating field crops to livestock rearing.⁹

There is the growing dominance of women labourers in agricultural production and the decrease of men labourers in the agricultural sector in many regions and countries due to the trend of feminization of agriculture. This trend makes it more imperative than ever to take action to enhance women's ability to carry out their tasks in agricultural production and their other contributions to food security. This development goes hand in hand with the increasing number of female-headed households around the world.¹⁰ Apart from food production by women they also contribute to food security in the country.

⁸ Women - The unsung warriors of Indian Agriculture, <https://www.dhanuka.com/blogs/women-the-unsung-warriors-of-indian-agriculture> visited on 04.02.2021 at 01: 15 PM.

⁹ Nishi Slathia, Participation of Women in Agricultural Production, https://www.krishisanskriti.org/vol_image/07Sep201505094127.pdf visited on 04.02.2021 at 01: 55 PM.

¹⁰ Women's contributions to agricultural production and food security: Current status and perspectives, <http://www.fao.org/3/x0198e/x0198e02.htm> visited on 04.02.2021 at 02: 16 PM.

V. Impact of Globalisation in Agriculture in India

World has now become a global village due to the introduction of new technologies. The Growth in agricultural production in India up to the year 1965 was very low, with severe famines. Agriculture failed to meet the needs of India from the time of independence in 1947 until 1965 which reflected a neglect in favour of the industrial sector, this failure should be contrasted to the deplorable agricultural situation in India during the British colonial regime. The stagnation of agriculture during the colonial period left behind a worsening food situation in India. Disastrous droughts combined with relatively little technological change and sluggish land reforms brought India to the brink of famine in the mid-1960s. Famine was averted only by massive shipments of subsidized food grains from the United States of America. Due to this the policy makers were compelled to think about the development to increase cereal productivity by inducing changes in agricultural technology in our country.¹¹ High-yielding varieties (HYVs) of seeds were introduced then after. In India the Green Revolution brought about a modern approach to agriculture by incorporating irrigation systems, genetically modified seed variations, insecticide and pesticide usage, and numerous land reforms. It brought about a transformation in agricultural productivity in India and turned the country from a food importer to an exporter.

In order to note the impact of technological change in agriculture it is important to note three types of impacts:

- (1) Impact on employment and productivity,
- (2) Impact on income and expenditure, and
- (3) Impact on quality of life.¹²

VI. Problems of Women workers in Agriculture Sector

The problems which are faced by the women working in agricultural sector are many to be mentioned. First of all, it is the social hierarchy of rural society which has imposed different types of constraints upon the labourers. The women

¹¹ Govindan Parayil, *The Green Revolution in India: A Case Study of Technological Change*, Vol. 33, No. 4 TECHNOLOGY AND CULTURE, 739 (Oct., 1992).

¹² Nata Duvvury, *Women in Agriculture: A Review of the Indian Literature*, Vol. 24, No. 43 ECONOMIC AND POLITICAL WEEKLY, WS 99 (Oct. 28, 1989).

of upper class stores the agricultural products at their homes and feed the labourers. The landless lower-class women work as a wage labour and they are the sufferer of poverty, malnutrition, overextended hours of work and as well have no social security benefits. The Agriculture, household industry, and locals whoever have formed their main sources of livelihood traditionally are as well affected due to the globalisation from the shift of their traditional occupations.¹³

It has been estimated that 52–75 percent of Indian women whoever are engaged in agriculture sector are illiterate, an education is the key obstacle that prevents women from participating in more skilled labour sectors. There is an average gender wage disparity, with women earning only 70 percent of men's wage. Additionally, many women participate in agricultural work as unpaid survival labour. The lack of employment mobility and education contribute the majority of women in India vulnerable, as dependents on the growth and stability of the agricultural market.¹⁴

In early period irrigation was based on water harvesting and water was transferred from the small ponds to the land through the bucket system operated manually, and women participated actively in this work. Later when there was the introduction of diesel pumps in irrigation male workers started their monopoly. This has not reduced women's workload. Many women's access to resources including energy is actually declining, while their need for food and income is increasing.

With the introduction of green revolution in India there has been an increase in the production of crops using technological methods like monocultures and multicropping and the High yielding varieties methods have increased women's work in agriculture.

VII. Socio-Economic Conditions of Women Workers in Agriculture Sector

Our country India faces various socio and economic problems. The socio economic problems continues to prevail as our country have not been able to change our traditional socio economic structure and value system. Our country

¹³ Mazumdar, V., *From Research to Policy: Rural Women in India*, 10(11/12), STUDIES IN FAMILY PLANNING, (1979).

¹⁴ Women in agriculture in India, https://en.wikipedia.org/wiki/Women_in_agriculture_in_India#Gender_division_of_labor visited on 05.02.2021 at 09:50 PM.

is devoted to the principle of economic growth with social justice. This devotion can be materialize only if the women workers who form almost half of the population are brought into the mainstream of national life not only as beneficiaries of the socio economic growth but also as its agents.¹⁵

The socio economic condition of women working in agriculture sector is poor as can be seen. As I have already discussed above that agriculture is an unorganised sector and therefore, the workers of this sector are paid low wages that are often insufficient to meet minimum living standards, their work are seasonal and they do not have a fixed salary. The women working in agriculture sector are illiterate and due to the introduction of technology in the era of globalisation the women workers lack some skills as compared to the male workers in this sector.

The work participation of women in unorganised sector has grown in many developing countries in the 1980s and 1990s as economic crises and structural adjustment have reduced job opportunities in the formal sector and increased the need for an additional source of family income. One of the leading reasons for women's limited access to income and economic opportunities lies in their work being at the margin of major development efforts and programmes. Men dominate such assets and inputs as land, credit, seeds, livestock, technology and infrastructure. And the enormous potential contribution of women remains underused.¹⁶

India being a predominantly agricultural country, women do more than half of the total agricultural work. But their work is not valued. Although the technological development does not result in improving the economic activities among women. Pattern of women's activities are affected by prevailing social ideology and are also linked with the stage of economic development.¹⁷

¹⁵ MEDHA DUBHASHI VINZE, WOMEN ENTREPRENEURS IN INDIA, (A SOCIO ECONOMIC STUDY OF DELHI- 1975-76), 95 (Mittal Publications Delhi, 1987).

¹⁶ Human Development Report 1995 at 39.

¹⁷ M. Kamraju, M. Vani, Mohd Akhter Ali, *Socio- Economic Status Of Working Women In Shamshabad*, Vol. 2, Issue-IV April , AN INTERNATIONAL MULTIDISCIPLINARY E-JOURNAL, 143 (2017) .

VIII. Right to Work and Social Security

During the ancient period, when livelihood of a people were primarily based upon agriculture through the system of joint family, religious institutions, philanthropy, charitable institution, securities were provided to the needy during the spells of misfortune.¹⁸ Now in the era of globalisation technology came up, industrial system has been set up and it has now become easy to earn at less expenses due to many technological upgradation like hybridisation of seeds, monoculture and so on and can make good profits out of it but there is always an issue relating to wages of the women workers.

Social security is a basic requirement of the people regardless of the sector of employment in which they work and live in. the Constitution of India has guaranteed the equality of both the sexes. The preamble of our Constitution is a sole repository of social security measures and provide for establishment of socialist state. The principle aim of socialism is to eliminate inequality of income, status and standard of life and to provide a decent standard of life to the working people. Further it is designed to secure social, economic and political justice to all its citizens. Social justice is said to be signature tune of our Constitution. The objectives can be achieved through various Directive Principles of State Policy as enumerated in Part III of the Constitution of India.¹⁹

The right to maternity protection is enshrined in various human rights treaties including the Universal Declaration of Human Rights. Maternity protection is necessary in promoting the health, nutrition and well-being of mothers and their children, for achieving gender equality at work, prevent and reduce poverty and to advance decent work for both women and men. This makes maternity protection the first key step of the comprehensive set of care policies that promote women's economic empowerment.²⁰

¹⁸ J.Mahalakshami, *Social Security of Workers in India- A Human Rights Perspective*, 32 *IBR*, 390 (2005).

¹⁹ Suresh V. Nadagoudar, *Social security for Workers in the Unorganised Sector*, 28 (1) *IBR*, 120 (2001).

²⁰ Maternity cash benefits for workers in the informal economy, International Labour Office, Social Protection for All Issue Brief, November 2016 at 1.

VIII. Judicial Pronouncement

The Supreme Court in India has played an active role in recognising the rights of the workers of unorganised sector and has placed a landmark judgements in several cases decided by them. The Supreme Court held in a case²¹ that whenever the public interest litigation is initiated alleging the practice of bonded labour, the government should welcome it as it may give the government the opportunities and to examine the issues or problem of labour and make efforts to eradicate the practice of bonded labour and protect the labours. Article 23 of the Constitution of India, prohibits the practice of forced labour. In the year 1976 Bonded Labour System (Abolition) Act was enacted to give effect to Article 23 of the Constitution of India with a view to prevent the economic and physical exploitation of the weaker section of the society. It is one of the landmark decision of the Supreme Court where several basic rights of the individual specially to safeguard the workers working in unorganised sector.

A petition was filed in a case²² for the purpose of remedying gross violation of the Minimum Wages Act, 1948 as well as the violation of Article 23 of Indian Constitution. The Supreme Court held that Article 23 of the Constitution sanctions that no person shall be required or permitted to provide labour or service to another on payment of anything less than the minimum wage and if the Exemption Act, by excluding the applicability of the Minimum Wages Act 1948, provides that minimum wages may not be paid to a workman employed in any famine relief work, it would be clearly violative of Article 23.

Another Petition were filed on behalf of persons working as daily rated casual labour in the post and telegraphs department. The daily rated casual labour includes three broad categories of workers, namely, unskilled, semi-skilled, and skilled. The main complaint of the petitioner in this case was that even though many of them have been working for the last ten years as casual labourers, the wages paid to them are very low and far less than the salary and allowances paid to the regular employees. The Supreme Court held that Different rates of wages laid down therein are equally untenable. This is clearly violation of Article 14 and 16 of the Indian Constitution.²³

²¹ *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

²² *Sanjit Roy v. State of Rajasthan*, AIR 1983, SC 328.

²³ *Daily Rated Casual Labour v. Union of India*, (1988) 1 SCC 122.

IX. Conclusion and Suggestions

Therefore, agricultural growth has played an important role in the process of economic development. Economic growth originating in agriculture can have a particularly strong impact in reducing poverty and hunger. For the development of the economy of a country no doubt there is a need of improved technologies throughout the agrifood production, processing, and distribution chain, skills transfer, foreign capital, and increased export earnings. So the women workers working in this agriculture sector should be promoted in the rapid changes taking place, and are not left behind. The women workers of this sector must be benefitted through the wages and should be provided with social security.

The government must take necessary steps in increasing agricultural production with the help of the workers and create additional employment facilities for women labourers in agriculture sector and eradicate the problems between male and female workers. Therefore, globalisation stands for challenges and opportunities and I would like to say that our country should ensure rapid development for the progress and prosperity of our nation.

NOTES AND COMMENTS

Labour Rights under the Indian Labour Legislations: A Bird's Eye View on the Protection of Rights of Labourers under the Recently Introduced Labour Code of India*Dr. Dipankar Debnath¹***Abstract**

India, one of the most labour-intensive countries of the world, has finally taken a leap of faith and codified 44 of its national-level labour laws into four broad codes on 'wages', 'industrial relations', 'social security' and 'occupational safety and health'. This has triggered a longstanding controversy between the stakeholder and the government as, according to the government the existing labour laws have created hindrances to the Indian manufacturing sectors as well as it discourages foreign companies to set up their respective wings within the country. This in turn amounted to huge loss to the country's income and revenue. The Code has received criticism from trade unions and activists however, it has been welcome on the ground that the Code would help in reviving India's economy involving two-fold benefits providing to the workers as well as to the industrialists. It has been argued that India's existing labour laws as remnants of an archaic past considering them as ineffective for workers and burdensome on the employer and should be dismantled.

In the above backdrop, the pertinent questions that remain to be examined are whether the recent drastic changes in the various labour laws are going to fulfil the purpose fostering the economic development of the country at the cost of various rights of the labours? Whether such steps on the part of the governments are in consonance with the constitutional provisions? Whether the reformations in labour laws would help the government's initiative to implement the liberalisations concept attracting the foreign investors? Do we need a sustainable strong manufacturing sector? This paper has focused on the pros and cons of the recently introduced Labour Code in the light of above questions and made an attempt to dig out whether the Code would be successful in protecting the rights of the labourers?

Key Words: *Labourers Right, Labour Laws, Labour Code, Reforms, Legal vacuum*

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I. Introduction

In 2019, the Central government proposed to replace 29 existing labour laws with four Labour Codes on wages, social security, occupational safety and industrial relations². Since the issue of labour came under the Concurrent List of the Constitution, there were over 100 state and more than 40 central laws regulating the various aspects to it³. It is said that such initiatives on the part of the government is the second largest initiatives undertaken after independence with a view to make effective changes in the field of industry after the liberalisation policies since 1991. Such initiatives are based on the platform that the effect of liberalisation would be futile without improving the industrial relations to a larger extent and the same is possible only by bringing widespread changes in the existing labour legislations. It is claimed that such reformations in the labour legislations would help in raising the economic standard of the country in the world front, an apt decision and also contemporary at par with the very need and demand of the world economy. There have been hue and cry from all corners after the Central government and some of the State governments have stepped into bringing, as never before, a revolutionary change in various labour laws replacing all of them. The introduction of the Labour Code by the Central Government or Ordinances by few States (special mention should be made of Uttar Pradesh, Gujarat, Madhya Pradesh etc.) as it has been alleged, affected various rights of the workers/employees. The urge for reformation of existing labour legislations were based on the recommendation made by the Second National Commission on Labour established in 2002.

Reforms are based on demand for change and such demand can be either evolutionary or revolutionary. Reforms in any sector demands affirmative substantive change in that sector. The ultimate purpose for the change in law is the betterment providing, identifying and protecting various rights under the law. The demand for the reformations of the archaic labour laws bringing almost all of them under the umbrella of the Code, it has been argued that it would benefit all the stakeholders including labours and industrialists who have been

²Explained: Here's Why Workers, Opposition Parties Are Protesting Against the 3 New Labour Laws, The Wires available at <https://thewire.in/labour/labour-code-explainer-unions-strike-workers-opposition-parties> (Last visited on August, 15, 2021).

³List of Central Labour Laws under Ministry of Labour and Employment, Ministry of Labour and Employment.

directly affected by such laws. Labourers are afraid of the taking away of various rights guaranteed under the Constitution and industrialist/employers fear that the Code might have provided clean cheat providing protection to the rights of the labourers thereby making it difficult for them in the smooth functioning of the business activities which in turn would hinder the development as a whole. Our former Prime Minister Dr. Manmohan Singh was the staunch supporter in favour of reformation of labour laws. Attending the Indian Law Commission's 40th Session, he emphasized that "the process of doing business with India has to become less intimidating, less cumbersome and less bureaucratic to attract more investment. Many of the legacies of the past have not much relevance today. Indeed, some of them have become counterproductive today and may well be hurting the very people they are meant to benefit"⁴

II. Genesis of the Labour Laws and the Need for its Reform

The origin and evolution of the labour laws in India can be traced back in terms of providing protection and safeguarding the various rights of the labourers-the proletariat class, who due to its inability to fight against the capitalists had/has to surrender before the one having power over them. Such fights have been based on inequality, discriminatory, arbitrary action dividing the class into haves and haves not. It is not the fight against haves but actually a fight against oneself as to how it would be possible to survive based on the concept of survival of the fittest. Although the British legislature is the trend setter in providing protection to this section of the society by enacting various labour laws,⁵ however, there have been numerous instances of violations of such laws at the hand of the employers. In fact, such laws that have been enacted with view to protect the rights involving wellbeing of the labour class, however, the outcome being recapulation of the rights infringed time and again.

⁴ J. S. SODHI, LABOUR LAW REFORM IN INDIA, The Indian Journal of Industrial Relations, Vol.50, No. 1, July 2014, at p. 102, available at <http://www.wiego.org/sites/default/files/publications/files/IJIR%20July%202014.pdf> (Last visited on June 22, 2020).

⁵ Such as: The Factories Acts, 1883 and 1893 latest being the Act of 1948, The Workmen's Compensation Act, 1923 now The Employees Compensation Act, Trade Union Act, 1926, The Trade Disputes Act, 1929, etc.

In India, except for four decades 1950-90, the balance of power has remained with the employers⁶. Since the 1990s, however, the state has been soft in implementing labor laws in its letter and spirit.⁷ Due to the worsening of the industrial relations during the past decade between the haves-the industrialists and the weaker sections of the society-the labourers, it has been seen that management aggressiveness towards the labourer touch the extremity of exploitations. The situation necessitated to the need to reform various labour laws. The Second National Commission on Labour (2002) (NCL) also found existing legislation to be complex, with archaic provisions and inconsistent definitions recommended the consolidation of central labour laws into broader groups such as (i) industrial relations, (ii) wages, (iii) social security, (iv) safety, and (v) welfare and working conditions⁸.

Generally, labour law covers:

1. Industrial relations – certification of unions, labour-management relations, collective bargaining and unfair labour practices;
2. Workplace health and safety;
3. Employment standards, including general holidays, annual leave, working hours, unfair dismissals, minimum wage, layoff procedures, and severance pay.

All of the above objectives mainly deals either with the monetary or non-monetary rights of the labourers. These rights are being protected in return the labour they provide to the employer which in turn help them in making profit. A part of profit goes to the government as revenue which are being used for the welfare of the society contributing to the wholesome development of the country. Therefore, it can be said that the root of wholesome development vis-à-vis economic development lies in the hands of that section of the people without whose contribution nothing

⁶DR. JASWINDER SINGH & DR. KAWALJEET KAUR, LABOUR LAW REFORMS IN INDIA: AN OVERVIEW, *Public Business Review International*, Vol. 9, issue 12, (2017).

⁷ Available at <http://www.wiego.org/sites/default/files/publications/files/IJIR%20July%202014.pdf> (Last visited on June 22, 2020).

⁸Report of the National Commission on Labour, Ministry of Labour and Employment, 2002, available at <http://www.prsindia.org/uploads/media/1237548159/NLCII-report.pdf> (Last visited on August 11, 2021).

could be possible. Therefore, it is necessary and important that their rights must get protected under the laws for the smooth running of the economic cycle. Unfortunately, since last few decades the stakeholders showed their dissatisfaction towards such archaic existing laws as according to them, such laws are creating hindrances in the economic development of the country and hence forth the time has ripe up to remould it opening and fostering new vistas that would fulfil what has been lacking under the existing laws and the outcome is the introduction of the Labour Code.

III. Identifying Legislative Vacuum

The issues pertaining to the welfare of the labour protecting their rights, so called protected and safeguarded has been considered as a growing cause of concern during the past and there was a need to enact laws in favour of the labourers ensuring strictly that such rights should be maintained in accordance with the laws. However, since last decade it has been the issues at the hand of the industrialists that labour laws in India are excessively labour friendly, particularly in the organised sector resulted in adverse consequences in terms of the performance of this sector.

It can be said without raising any doubts that some of the laws are too old to suit with the changing dimension in the field of industrial relations that demanded for drastic amendments and are needed to be replaced. With the liberalisation and globalisation during 1991 which had totally changed the economic paradigm in the country, need was felt to have new and updated laws so that the country would be opened to the outer world for their ventures to be established here. In fact, the object of having such laws is to suit with the changing economic environment the country has intended for. This is with a view to create a conducive environment for investors and liberate the entrepreneurs from the tyranny of myriad labour laws. This will also help in opening and expanding the horizon of employment.

Out of the many factors that are considered as the constraints in the growth of India's manufacturing sector, surveys made during the past revealed that it is the quality of the business regulatory environment that is hindered on the path of economic progress of the country. Implementations of such regulations are cumbersome being complicated, confusing and tardy and above all the same is under corrupted hands.

To remove all the difficulties referred above the efforts to codify our labour laws had made in early 2000 and finally have seen the light of the day. The Code on Wages, 2019 was notified by the government in 2019. The remaining 3 codes, being the Industrial Relations Code, 2020, the Code on Social Security, 2020 and the Occupational Safety, Health and Working Conditions Code, 2020, were enacted on September 29, 2020. The effective date of the codes is yet to be notified in order for them to come into force⁹.

While the codification exercise was primarily focused on consolidation of the labour laws relating to employment conditions, social security, wages and occupational health and safety and working conditions the exercise has, in this process, also led to:

1. expansion of the ambit and applicability of some laws
2. removal of multiple definitions and authorities
3. transformation of obsolete laws
4. ease of compliance
5. rationalization of penalties and increased focus on implementation of the law.

A closer look at the codes reveals that while consolidating the national level laws, several new changes have been introduced which are likely to have an impact on employers in India¹⁰.

III. The Quest for the Protection of the Rights of the Labourer under the existing Labour Laws

As labour is in the concurrent list, both the Central and States are empowered to enact laws. However, it has been subject to many complexities ever since. Multiplicity, rigidity and overlapping nature of laws leading to the exploitations of the labourer, neglecting the unorganised sector which constitutes more than 90% of labours, are mostly contract labours and the need to introduce fixed-term employment has been the demand of the hours.

⁹ AJAY SINGH SOLANKI, ARCHITA MAHAPATRA, SAYANTANI SAHA AND VIKRAM SHROFF, INDIA CONSOLIDATES AND CODIFIES ITS NATIONAL-LEVEL LABOUR LAWS, *The National Law Review*, Jan. 15, 2021 available at atlawreview.com/article/india-consolidates-and-codifies-its-national-level-labour-laws (Last visited on August 18, 2021).

¹⁰ *Ibid.*

In addition to this, the female labour force participation is very low and they are mostly engaged in informal sectors, the collective bargaining of the labourer was weak and there is a need to strengthen the same. All the above grounds are mainly concerned with various rights of the labourers that have been neglected under the laws in force in our country creating a huge vacuum in the existing labour legislations and hence the need to have a consolidated and comprehensive law has been felt. Moreover, the existing labour laws on sound industrial relations based on effective social dialogue leading towards promoting better wages and working conditions as well as peace and social justice have failed leave its impressions over such relations created a huge gap between the labours and employers.

Most significant among all disputes is the wage, most important right of the labourers, a major subject of collective bargaining. Wages in the organised sector is generally determined through negotiations and settlements between the employer and the employees. The minimum rates of wages are fixed both by Central and State Governments in the scheduled employments falling within their respective jurisdictions under the provisions of the Minimum Wages Act, 1948. The existing laws on minimum wages have failed to provide economic safety to the labourer creating confusions and complications regarding such wages. Therefore, for a uniform minimum and time bound laws on wages have been considered as an emerging necessity.

The social security legislations in India that derives its strength and spirit from the Directive Principles of the State Policy contained in the Constitution of India is another important factor for which need was felt to review the existing laws. These laws provide for mandatory social security benefits either solely at the cost of the employers or on the basis of joint contribution of the employers and the employees. While protective entitlements accrue to the employees, the responsibilities for compliance largely rest with the employers. Here also the existing laws such as The Employees' State Insurance Act, 1948, The Employees' Provident Funds & Miscellaneous Provisions Act, 1952, The Employee's Compensation Act, 1923, The Maternity Benefit Act, 1961, The Payment of Gratuity Act, 1972 etc. have failed to satisfy the working class.

Finally, in pursuance of the recommendations of the Second National Commission on Labour, it has become necessary to enact a Central Legislation in the form of a Code, namely the Occupational Safety, Health

and Working Conditions Code, 2019 which incorporates the essential features of the thirteen enactments relating to factories, mines, dock workers, building and other construction workers, plantations labour, contract labour, Inter-State migrant workmen, working Journalist and other newspaper employees, motor transport workers, sales promotion employees, beedi and cigar workers, cine workers and cinema theatre workers and to repeal the respective enactments.

Safety, health, welfare and improved working conditions are pre-requisite for well-being of the workers and also for economic growth of the country as healthy workforce of the country would be more productive and occurrence of less accidents and unforeseen incidents would be economically beneficial to the employers also.

IV. The New Labour Codes: A Bird's Eye View

The Four Codes: The Code on Wages, 2020, the Industrial Relation Code, 2020, the Occupational Safety, Health and Working Conditions Code, 2020 and the Code on Social Security, 2020 aimed at broadening the scope and coverage, protection of rights, reducing multiplicity in definitions, embraces more on digitisation. However, they are the consolidations of existing laws with some significant changes protecting the rights of labourers in unorganised sectors also.

1. The Code on Wages, 2020:
 - a. Applies to all establishments, employees and employers as defined.
 - b. Covers all employees including managerial cadre.
 - c. Wage definition standardized. Revised definition of wages leading to higher minimum wages, statutory bonus, provident fund, retrenchment compensation and gratuity.
 - d. State government minimum wage rates to be aligned to national floor wages.
 - e. Need to meet wages payment dates as prescribed.
 - f. Recoveries from wages specified with monthly recovery capped at 50%.
2. The Code on Social Security, 2020:

- a. Coverage broadened to include gig/platform workers, fixe term employees and those in the unorganized sectors with the organized sector.
 - b. it makes provisions to notify a separate social security fund for unorganised workers.
 - c. It also contains provisions on social security for gig and platform workers, wider definition of migrant workers, etc.
 - d. It enables the government to formulate schemes for the benefit of unorganised workers, and gig and platform workers. Therefore, the provisions for Provident Funds, Employee State Insurance, Gratuity has been extended to these sectors also.
 - e. It increases the threshold to 300 workers while retaining the notice and compensation requirements specified under the Industrial Disputes Act, 1947. It allows the government to further increase the threshold by notification.
 - f. The Codes are now extended to fixed term employees, worker re-skilling fund, social security for gig workers and platform workers
3. The Occupational, Safety, Health and Working Condition Code, 2020 covers:
 - a. Occupational safety continues to apply to establishments over a certain size (typically, above 10 or 20 workers). Currently, contract labour provisions apply to establishments/contractors hiring at least 20 workers. The Code on Occupational Safety and Health increases this threshold to 50 workers.
 - b. The Code has reduced in daily working hour limit in certain cases.
 - c. Prohibition of engagement of contract labour in core activities.
 - d. Mandatory free health check-up for those attained the age of 45 years engaged in prescribed industries and in hazardous process.
 - e. A major step has been the grant of general permission for engaging women with employee consent between 7 pm - 6 am. need for consent for overtime work. The Code on Social Security introduces definitions for 'gig worker' and 'platform worker'. The Code also defines unorganised workers which include self-employed persons. The Code creates provisions for different schemes for all these categories of workers.
 4. The Industrial Relations Code, 2020 covers:

- a. Limit of worker enhanced from 100 to 300 for applicability of standing order.
- b. Grievance redressal committee to complete its proceedings within 30 days of receipt of application.
- c. Increase in retrenchment cost-additional compensation towards re-skilling fund, retrenchment compensation etc.
- d. Preference to retrenched worker for re-employment within one year.
- e. Additional ground for strike-mass leave.
- f. Prior approval of government for lay-off, retrenchment and closure where 300 or more workers are engaged.
- g. Introduced the concept of negotiating union.

V. Conclusion

The Codes are formulated with the main motive to energise the industry and economic activity and free employees from the constraints of earlier labour laws protecting their rights. The areas that are critical for establishments transition smoothly from the existing laws to the new legislation with optimal efficiency is the need of the hour. The Codes must be examined keeping in view the goal aimed to achieve. Whatever reforms are to be made in the labour laws must be assessed with this goal in mind and must support the strategy required to reach it. Industrial relations will be damaged if Government forces any changes in labour laws that are not founded on an understanding between unions and employers. The government seems to have made a conscious effort towards balancing the rights of employees' vis a vis those of employers. If implemented pragmatically, it can have scope to immensely benefit India's working-class demographic. It ensures fairness to the employees and enable faster learning and improvement of competitiveness in enterprises. The Codes afforded considerable flexibility to employers and contractors by exempting more establishments from regulations concerning standing orders, retrenchment and closure, safety and health, contract labour welfare, etc.¹¹

¹¹K. R. SHYAM SUNDER, MAY DAY 2021: WHAT HAS (NOT) CHANGED SINCE THE PANDEMIC RAVAGED LIVELIHOODS OF WORKERS, *The Wire*, available at <https://thewire.in/labour/may-day-2021-india-migrant-construction-workers-covid-19-labour-codes> (Last visited on August 13, 2021).

LGBT Movement in India: The Journey towards an Inclusive Society

Sagnika Das¹

Abstract

Equality in the society between the individuals irrespective of race, sex, religion, caste, place of birth or colour is a sign of a progressive society as it lays the path towards stability and harmony. Every human being has the right to be treated equally. However, Social hegemony² has tendency to exclude persons with “differences” which violates their inalienable Basic Human Rights.

Till the year 2018, the LGBT community in India was suffering from exclusion. These people were considered to be either sex workers or criminals. They demanded a positive radical social change. The LGBT movement took the urge for tolerance and inclusion to a whole new level. The judiciary responded to their plea for equality first in Suresh Kumar Koushal v. Naz Foundation³ which culminated in Navtej Singh Johar v. Union of India⁴ where the Supreme Court upheld the constitutional rights of the LGBTQ+ people. In this backdrop, the present paper intends to point out the factors which led to inclusion of the LGBTQ+ community and led to social transformation.

Key words: Social change, LGBTQ+ community, Human Rights, Inclusion and Equality.

I. Introduction

Gender is a constitutive element of social relationship based on perceived differences between the sexes, male and female and it is the result of socially constructed ideas about the behaviours, actions and roles, a particular sex performs.⁵ These practices in the society characterize certain features of both the sexes and give an oversimplified image, which leads the society towards an

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² Hegemony- predominant influence or authority over others or the social, cultural, ideological or economic influence exerted by a dominant group, (last visited Aug 5, 2018), <https://www.merriam-webster.com/dictionary/hegemony>.

³ (2014) 1 SCC 1.

⁴ W.P. (CrI.) No. 76 of 2016.

⁵ Gender, (Aug 5, 2018, 08.00 AM) <https://www.merriam-webster.com/dictionary/gender>.

imbalance.⁶This stereotyping of the two genders becomes so powerful in the society that there remains no room for the third gender or the Transgender⁷and becomes the subject of exclusion. Thus the term Transgender becomes an umbrella term for those whose gender identity differs from what is typically associated with the sex they were assigned at birth. The term LGBTQ+ denotes lesbian, gay, bisexual, transgender and queer people whose sexual orientation is not heterosexual and inclined towards homosexuality.

Article 14 of the Constitution of India lays down that “the State shall not deny to any person equality before law or the equal protection of law”. The Preamble to our Constitution emphasizes that the right to equality enshrined in it is not a formal right and the State is under an obligation to make it effective. Therefore, it is necessary to take affirmative measures to equip the least advantaged group of the society so that they can come up to the level of the mainstream group of people.

In *National Legal Service Authority v. Union of India &Ors*⁸ where the Apex Court of India dealt with the grievances of the members of the LGBTQ+ Community who seek a legal declaration of their gender identity, as the non-recognition of the same violates their Fundamental Right.

II. International Conventions and Gender Equality

International Conventions are significant for understanding of the matter of gender equality. The Preamble of the Universal Declaration of Human Rights, 1948 states that the inherent dignity and equality among humans are the foundation of freedom, justice and peace in the world. It states that all human being are born free and equal in dignity.⁹

The International Covenant on Civil and Political Rights, 1966 under Article 6 reaffirms the inherent right to life for all, which is to be protected by law and no one shall be arbitrarily deprived of his life, liberty and privacy unreasonably.

⁶*Feminist Perspective on Sex and Gender*, (Aug 5, 2018, 08.00 AM) <http://plato.stanford.edu/archives/fall2012/entries/feminism-gender/>.

⁷Transgender, being a person whose gender identity differs from the sex the person was identified as having birth, (Aug 5, 2018, 08.00 AM), <http://www.merriam-webster.com/dictionary/transgender>.

⁸Writ Petition (Civil) No. 400 of 2012.

⁹The Universal Declaration of Human Right, 1948, art. 1.

The UDHR, 1948 under Article 12 and the International Covenant on Civil and Political Rights, 1966 under Article 17 simultaneously state that no one should be subjected to arbitrary interference with anyone's privacy.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979 and the Declaration on the Elimination of Violation against Women (DEVAW), 1993 jointly assert that discrimination against women is fundamentally unjust and it constitutes an offence against the human dignity. Any act of violence against women amounts to violation of her Fundamental Right and the States must protect the dignity of women in the society.

These international Conventions show that every person irrespective of their gender, colour, and place of birth, has equal right to live with equal dignity and privacy and discrimination between them under any ground amounts to violation of the inalienable basic Human Rights.

III. Constitution of India and Gender Equality

Article 14 of the Constitution of India proclaims Equality before Law and Equal Protection of Law. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality is the basic feature of the Constitution and treatment of everyone equally in unequal circumstances itself amounts to violation of the Fundamental Right to Equality.¹⁰

Article 15 of the Constitution of India prohibits discrimination on the ground of sex. Unfortunately, Before the National Legal Service Authority v. Union of India¹¹ the word 'sex' was interpreted to mean only 'male sex' and 'female sex' and though not expressly excluded, the third gender remained excluded from the purview of Article 15 of the Constitution.

Article 16 of the Constitution of India guarantees equality of opportunity in matters of public employment, irrespective of religion, race, caste, sex and so on. Under this Article too the word 'sex' does not exclude the third gender expressly yet the third gender remained outside its purview.

¹⁰ JUSTICE PALAK BASU, LAW RELATING TO PROTECTION OF HUMAN RIGHTS UNDER THE INDIAN CONSTITUTION AND ALLIED LAWS 126 (2nd edition, 2007).

¹¹Writ Petition (Civil) No. 400 of 2012.

Article 19 (1) (a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes right to express self-identified gender, which can be expressed through dress, words, action or behaviour. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19 (2) of the Constitution.¹²

Article 21 of the Constitution of India states that no person shall be deprived of his/her life and personal liberty except according to the procedure established by law. Thus, every person including LGBT people have right to life.¹³

In Francis Coralie Mullin v. Administrator, Union Territory of Delhi¹⁴ the Court held that the right to dignity forms an essential part of the constitutional culture which seeks to ensure the full development. It shows inclusion of all in the society irrespective of the sexual orientation of a person.

IV. Indian Judiciary and the Rights of LGBTQ+

A. Section 377, IPC

Through the interpretation of the words of Section 377 of Indian Penal Code, 1860 all the members of different sexual orientation other than Heterosexual, came under the purview of the provision. The LGBTQ+ community spoke against this provision of IPC as it violates their Right to Life and Personal Liberty and this protest first came into light through the judicial response in Naz Foundation v. Govt. of NCT Delhi,¹⁵ where the High Court of Delhi held that Section 377 is unconstitutional and violates the right to dignity and privacy of the LGBTQ+ community.¹⁶

The historical background of the LGBTQ+ community shows the pattern of their exclusion from the main stream society. It is noteworthy to state that the Transgender community shared a much enriched place in the Hindu mythologies and ancient Indian literatures. Hijras, eunuchs, Kothis, Aravanis, Jogappas,

¹² National Legal Service Authority v. Union of India &Ors, Writ Petition (Civil) No. 400 of 2012.

¹³Maneka Gandhi v. Union of India, AIR 1978 SC 597.

¹⁴(1981) 1 SCC 608.

¹⁵WP (C) No. 7455/2001.

¹⁶(2014) 1 SCC 1.

Shiv-Shakthis etc. are some expressions denoting the third gender in the ancient Indian literatures. The Concept of ‘tritiyaprakrti’/‘napunsaka’¹⁷ has also been used in mythologies in India.¹⁸

The exclusion politics against the Transgender community began in the beginning of the British colonial period in India through the Criminal Tribes Act, 1871 which deemed the entire Transgender community as persons innately ‘criminal’ and ‘addicted to the systematic commission of non-bailable offences. The Preamble of the enactment explicitly mentioned that it is an Act “to provide for the registration, surveillance and control of certain criminal tribes and eunuchs.” Section 24 of the said Act stated that the names and residence of all Eunuchs have to be registered who are “reasonably suspected” of kidnapping children or of committing offences under Section 377 of the Indian Penal Code, 1860.

The enactment further stated that ‘Eunuchs’ are “deemed to include all persons of the male sex who admit themselves or on medical inspection clearly appear, to be impotent”.¹⁹ Thus infertile men also came under the purview of this enactment. This Act was repealed in August 1949 but the social stigma against the Transgenders and Homosexual people remained intact and they had been subjected to social exclusion.

In 2012, through National Legal Service Authority v. Union of India & Ors²⁰ the identity crisis and plight of the Transgender community first came to light. The Apex Court held that there are instances when the mainstream society of India ridicules and abuses the Transgender community in public places like buses, railways, schools, workplaces. These people are subjected to exclusion and are treated as untouchables which amount to violation of their Fundamental Rights.

Here the Supreme Court of India held that-

- The Transgender community should be treated as ‘third gender’ for the purpose of safeguarding their rights under Part III of the Constitution of India,

¹⁷The word ‘napunsaka’ has been used to denote absence of procreative capability.

¹⁸ National Legal Service Authority v. Union of India & Ors, Writ Petition (Civil) No. 400 of 2012.

¹⁹ Criminal Tribes Act, 1871, Act XXVII (Sec. 24).

²⁰Writ Petition (Civil) No. 400 of 2012.

- The Government should grant legal recognition of their gender identity, and
- Take steps to treat them as socially and educationally backward class and extend reservations for them in order to uplift their condition in the society,
- Take measures to make separate public toilets for them along with male and female toilets,
- Create public awareness so that the Transgender community can feel that they are also a part of the society as recognition of gender identity lies at the heart of the fundamental right to dignity.

Finally, on September 6, 2018 in *Navtej Singh Johar v. Union of India*,²¹ the Supreme Court relinquished the ruling in *Suresh Kumar Koushal v. Naz Foundation*²² and ruled that LGBTQ+ people in India are entitled to all constitutional rights which includes the choice of whom to partner, the ability to find fulfillment in sexual intimacies.

V. The Transgender Persons (Protection of Rights) Act, 2019

After the landmark judgment of the Supreme Court in *Navtej Singh Johar v. Union of India*²³ the Parliament of India passed the Transgender Persons (Protection of Rights) Act, 2019 to protect the rights of the Transgender persons, which came into force on December 5, 2019.

The Act defines a Transgender as a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations and person having such socio-cultural identities as kinner, hijra, aravani and jogta.²⁴

In its definition clause the Act talks about 'inclusive education' which means a system of education wherein transgender students will learn together with other students without fear of discrimination, harassment or intimidation and the

²¹W.P. (CrI.) No. 76 of 2016.

²²Writ Petition (Civil) No. 400 of 2012.

²³W.P. (CrI.) No. 76 of 2016.

²⁴The Transgender Persons (Protection of Rights) Act, 2019 (Act no 40 of 2019), s.2 (k).

system of teaching and learning is suitably adapted to meet the learning needs of such students.²⁵It under Section 13 states that every educational institution funded or recognized by the Government has to provide inclusive education to include Transgender persons without any discrimination.

Section 3 of the Act states that no transgender person shall be subjected to any discrimination in any educational institutions, place of employment, health care services, enjoyment of any goods or services, right to movement and right to reside, rent, purchase or occupy any property. Section 5 further proclaims the right of a Transgender to be recognized as third gender person and also that person can apply to the District Magistrates to issue a certificate of identity as a Transgender person.

This Act under Section 8 enumerates that the Government has to take affirmative steps to secure full and effective participation of trans-genders and their inclusion into the society. Their rights and interests should be protected through the welfare schemes and take effective measures to enable them participating in cultural and recreational activities. Section 15 further states that the Government shall make provisions to cover the medical expenses by comprehensive insurance scheme for Sex Reassignment Surgery, hormonal and lesser therapy and any other issue of Transgender person.

To redress the grievances of the Transgender persons, the National Council for Transgender Persons has been established under Section 17. Section 18, states that whoever compels a Transgender person to indulge in bonded or forced labour or denies right to passage to a public place, forces them to leave the households or locality; endangers their lives by causing physical, mental or emotional abuse, shall be punished with imprisonment which shall not be less than six months which may be extended to two years and with fine. However, this Act does not talk about reservation of the Transgender people in case of public employment which is needed for their upliftment to the level of the mainstream society.

²⁵The Transgender Persons (Protection of Rights) Act, 2019 (Act no 40 of 2019), s. 2 (d).

VI. Mainstreaming the LGBT Community: An Empirical Outlook

After the judgment of Navtej Singh Johar²⁶ in 2018, a field survey has been conducted to find out the real condition of the LGBTQ+ people. To serve these purpose two groups of LGBTQ+ people were chosen as sample in two different places of West Bengal.

The first sample was 'The Northern Black Rose Society' of Siliguri, Dist-Darjeeling. Total number of enlisted members of the society was 1375 which includes LGBTQ+ people and out of them only 180 members was active who were engaged in different professions in different places. Hence only 35 members were willing to participate in the survey and the data was collected accordingly.

A. Sexual Orientation

These 35 members of the Northern Black Rose Society belong to different sexual orientations and they make a perfect bond between each other within the group. The following Table shows division of the sexual orientation of the LGBT community-

Lesbian (L)	1	02.8571%
Gay (G)	7	20%
Bisexual (B)	1	02.8572%
Transgender (T)	26	74.2857%
Total	35	100%

Comment: From this above Table it is found that the majority number of members of this group belongs to Transgender community.

B. Family and Social Life

Among these 35 members, 14.285% people are not able to live with their parents and extended family and are not even allowed live in their inherited premises because of their sexual orientation. Those who live with their Parents or Extended Family or with wife live a dual life and the truth about their sexual orientation is hidden from their family. The following Table shows the numerical data-

²⁶W.P. (Cri.) No. 76 of 2016.

Extended Family	6	17.1429%
Parents	19	54.2857%
Alone	5	14.2857%
With Wife	2	05.7143%
Community	3	08.5714%
Total	35	100%

Comment: They said that at the time of their puberty they came to know about their sexual orientation and from then their internal struggle began.

C. Sexual Orientation known to the Family Members

The following table shows that many are not able express their sexual orientation-

Sexual Orientation known to the Family	19	54.2857%
Sexual Orientation unknown to the Family	16	45.7143%
Total	35	100%

It is visible that majority of them have outspoken about their sexual orientation to because of their vehement external and internal changes.

D. Education

Through the following table the educational status of the LGBT community is visible-

Primary (Class 1 to 4)	1	02.8571%
Upper Primary (Class 5 to 8)	11	31.4287%
Madhyamik (Class 9 to 10)	7	20%
Higher Secondary	10	28.5714%
College	6	17.1428%
Total	35	100%

None of them got the opportunity to go for Post Graduation or Ph.D.

E. Sexual Offences and the LGBTQ+ Community

The following Table shows the number of people who are the victim of Sexual Offences.

Victim of Sexual Offences	14	40%
Safe from the Sexual Offences	21	60%
Total	35	100%

40% of them have been subjected to sexual offences and they could not get any remedy as nobody listened to them and they accepted the violence as their fate.

F. Economic Status of the LGBTQ+ Community

The following table shows the number of people engaged in different types of economic activities-

Sex Worker	8	22.8571%
Lagan Dancer	4	11.4286%
Badhai/Mangti	5	14.2857%
Engaged in Study	5	14.2857%
Other Professions	13	37.1429%
Total	35	100%

Only 1 member was a Government Service Holder and the majority of the people who are Transgender are engaged in sex work or lagan dance or Mangti/Badhai.

The second sample was the ‘Daughters of the Cross Kolkata’ which initiated an agenda to gather a certain number of LGBT people and give them training in Tailoring, English Speaking and catering business. The total number of the trainees was 20, but the number dropped to 8 as the Transgender group was engaged in Sex Work or Begging and they earned a big amount of money out of that and they needed to pay a lump sum amount to their ‘Guru Maa’ at the end of each month.

Sexual Orientation

In this initiated programme eight people have taken part, the sexual orientation of them are shown into the following table-

Lesbian	2	25%
Gay	1	12.5%
Bisexual	2	25%
Transgender	3	37.5%
Total	8	100%

Education

All of these eight people are the members of an NGO called 'Koshish' and most of them are graduate or higher secondary passed. The following Table shows their educational qualification-

Madhyamik	1	12.5%
Higher Secondary	1	12.5%
Graduation	6	75%
Total	8	100%

This Table shows that none of them have got the opportunity of Post Graduation and when asked they said that because of their sexual orientation it was difficult for them to continue their study in the School or College as they were being continuously subjected to bully and sexual abuse. They further stated that being human being they only want a dignified life and that can only be possible with the cooperation of the mainstream society.

VII. Conclusion

The collected data for the purpose of this paper show that the LGBT community of the 'Northern Black Rose Society' of Siliguri, Dist- Darjeeling is more backwards and less developed in comparison with the LGBT community of Kolkata, who are the trainees of the 'Daughters of the Cross, Kolkata'. The trainees under the 'Daughters of the Cross' are more developed in the aspects of educational and economical point of view. But both the groups have been

subjected to social exclusion in each and every aspect of life and even from the family.

The people belonging to LGBTQ+ community have been subjected to exclusion for long and they had to determine a strenuous and tiresome journey to avail the judgment of *Navtej Singh Johar v. Union of India*²⁷ where they earned their right to Equality, Justice, Freedom and Privacy. This judgment had given them the right to choose a partner and the ability to find fulfillment in sexual intimacies and the right not to be subjected to discriminatory behavior. This has paved the way for social transformation for an inclusive society and created social awareness. But at the same time they are still being subjected to bully, social exclusion, inhumane torture which obstructs the absolute social transformation in case of their inclusion.

Finally, it can be said that in a progressive society where everyone wants to develop themselves in the modern globalized world, there every human being should be treated equally. A society can only develop to the fullest where the cent per cent population has got equal opportunity to develop themselves. Exclusion of a particular group from the mainstream society does not help to serve the purpose. Therefore each and every part of the society should be included in the process of development and only then it can pave towards social transformation.

²⁷W.P. (Cri.) No. 76 of 2016.

BOOK REVIEW**THE POWER OF PRECEDENT, by Michael J. Gerhardt. New York: Oxford University Press, 2008***Suparna Bandyopadhyay¹*

The author Michael J. Gerhardt in his book has lucidly examined and defined the concept of precedent existing in U.S. legal system. The author stated, any past constitutional opinions, decisions, or events which the Supreme Court or non-judicial authorities make with normative authority are called precedent. The author has thoroughly examined precedent and proposed a positive as well as negative meaning of it by dividing it among the people who believe precedent to be meaningful which has a legal force and those who believe precedent to be meaningless without any legal force. But the author was more inclined towards the idea of having a binding authority of precedent. In which he further stated that the judges must treat others' precedent or judgments in such a manner as they wish their own judgments to be treated. In addition to the bindingness of precedent the author, he examined the Courts of U.S. also starting from Marshall Court (1801- 1835) followed by Taney Court (1836-1864), Chase Court (1864-1873), Waite Court (1874-1888), Fuller Court (1888-1910), White Court (1910-1921), Taft Court (1921-1930), Charles Evan Hughes Court (1930-1941), Stone Court (1941-1946), Vinson Court (1946- 1953), Warren Court (1953-1969), Berger Court (1969-1986), Rehnquist Court (1986-2005) and Robert's Courts in post-2005.² While discussing the Courts the author emphasized that the judges in 19th century were reluctant to overrule precedents. As a result, negligible numbers of cases have been overruled till 1930. But from the Hughes Court, a significant number of overruling has been noted. Hence, it can be presumed that the courts of initial period were conservative in nature; they neither questioned nor voted to overturn any of the court's prior constitutional decision which somehow exhibited the importance of collegiality and their respect towards the

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² These are the U.S. Court system beginning from 1801 which was identified by the last name of the presiding chief judges of the relevant time period.

tradition of precedent. In the later instances of courts, post-1930 the judges gave importance to the individual liberties and progressiveness of law which may get deviated from precedent for the sake of justice which altogether does not amount to disrespect precedent. Hence, as per the author, the real nature of constitutional adjudication and the negligible number of overrulings demonstrated by the U.S. Courts shows the constructive authority of precedent not the destruction of the very institution of precedent.

Therefore, the book is multi-dimensional which not only focuses the Supreme Courts and the cases pronounced by it but also the horizontal and vertical influence and significance of non-judicial precedents which comes from executive authorities.

In the first chapter, the author states, a basic principle of constitutional law prevails in the United States which prevents Congress from overturning the Court's constitutional decisions through ordinary legislation. So far only four Supreme Court decisions have been overturned through constitutional amendments namely, *Chisholm v. Georgia*³, through the Eleventh Amendment; *Dred Scott v. Sandford*⁴, through the Fourteenth Amendment; *Pollok v. Farmers' Loan and Trust Co.*⁵, through the sixteenth Amendment; and *Oregon v. Mitchell*⁶ through the Twenty-Sixth Amendment. This chapter is also comprised of appendix and some statistical data from 1789 to 2004. During this period the Courts, in 133 cases has expressly overruled 208 precedents. The book has a detailed analysis of U.S. Supreme Court cases only by leaving rest of the countries. Gerhardt ends the chapter by saying that precedent influences judicial reasoning and decision making process but in many cases, judges do not address that influence directly. The instances of such cases have not been properly written down.

The author emphasized more on the practice of retaining precedent other than overruling it. He states, the average life span of an overruled precedent is 29.2 years, which is in excess of the average length of service of a judge on the court. Indeed, 29.2 years exceeds the tenures of all chief justices, only with the

³ U.S. 419 (1793).

⁴ U.S. 393 (1856).

⁵ U.S. 601 (1895).

⁶ U.S. 112 (1970).

exception of the C.J. John Marshall.⁷ The Marshall Court did not overturn a single constitutional precedent, though J. Joseph Story tried unsuccessfully to overturn one ruling.⁸ Thereafter, the Berger's court (1969-1986) has overruled 76 precedents which were the highest of all.

The chapter immensely deals with cases, facts, judgments and their ratio in terms of overruling but no such discussion has been given to the dissenting opinions. The author has discussed few case laws and role of justices from 17th century but no express mention of precedent and judges before 17th century has been laid down. The chapter highlights the court system particularly from Marshall Court which started in 18th century.

In second chapter, the author mentioned about the theories of precedent prevailing among legal scholars and social scientists. He divided these theories into two groups: the "weak view" and the "strong view" of precedent. In the weak view of precedent, the court owes little or no respect to precedents. The strong view of precedent perceives precedent as the principal, or most meaningful, touchstone in constitutional law. Drawing on the work of Thomas Lee⁹, Gerhardt traces the origins of the weak view from the writings of Blackstone along with other British writers and the judges of 17th-18th century. Gerhardt to some extent supported the opinions of Lee. Blackstone conceived the idea of precedent in terms of declaratory theory of law. Declaratory theory states, the Law had a 'Platonic or ideal existence' even before it was reduced to a judicial opinion. On this view, any decision will be deemed to be inconsistent if it does not follow the law and needed to be overruled. If a decision merely declares the law then overruling will be considered bad. Lee explains that those who shared this view believed that "a judicial decision was not law, but mere evidence of it, and accordingly could be disregarded by a subsequent court.

⁷ John Marshall served as Chief Justice for 34 years and several months.

⁸ Although Justice Story believed *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812), was wrongly decided, the Court reaffirmed the decision in *United States v. Coolidge*, 14 U.S. 415, 416 (1816)

⁹ Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 *Vand. L. Rev.* 647 (1999); see also Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to 'Unpublish' Opinions*, 77 *Notre Dame L. Rev.* 135 (2001).

The overruling of precedent in weak view was intensified in modern era. The Constitution is designed for the vicissitudes of time which must not become a code that carries the overtones of one period which may be hostile to another period. From Warren's Court *i.e.*, from 19th century the overruling of cases through rationality increased because the liberal judges followed the strong view of precedent in comparison to the conservative judges who disregarded liberal interpretation because weak view of precedent disregard precedent as a principle and tend to overrule it.

In criticizing the weak view, Gerhardt states, 'weak view' needs to be disregarded as it does not acknowledge the importance of dissenting opinions which also has the potential of becoming a law in near future.

But the idea of precedent conflicts with the primary sources of law that includes the constitution itself along with texts, natural laws, codes etc. It was pointed out by the author that the conflict may not arise because the sources fully support the lawfulness of precedent as the Constitution explicitly authorises the lawfulness of precedent through Article III. Article III of the U.S. Constitution provides that the judicial power of the U.S. extends to decide cases and controversies. But such exercise may overstep with the powers of congress by violating the principle of separation of powers. Therefore, the norms and practices of reading and writing judicial opinions are exclusively left to the judicial wing. It can exercise the power of adjudication with the help of precedent.

The weak view accords inadequate acceptance of precedent in constitutional adjudication. That is why the strong view needs to be applied. This insures values of stability and consistency. Gerhardt mentions some prominent scholars, such as Ronald Dworkin, David Strauss and Kathleen Sullivan, who argue that precedents shape constitutional doctrine over time through the force of their reasoning and logic.

Gerhardt classified social scientists who study Supreme Court cases into five groups:

- (1) Attitudinalists,
- (2) Rational choice theorists,
- (3) Empiricists,
- (4) Post-positivists and

(5) Skeptics.

Through this classification the author demonstrated the role of judges, their internal influences and external factors while determining precedent or overruling it. But the classifications have not been elaborated in this chapter.

In the third chapter the author proposed a moderate view of precedent as an alternative to the weak and strong perspectives which is also regarded as a 'golden rule of precedent'. This golden rule is gathered by Justices and other public officials from their experience, training, and temperament of not being disdainful of precedents or else they risk having other justices' show the same or even more, disdain for their preferred precedents. This realization leads most judges to carefully pick and choose which particular precedents to challenge. Gerhardt meant that the 81st judge of Supreme Court while considering an issue previously decided by the Court will not write anything anew about the issue or on a blank slate by ignoring what the previous 80th judge have said or the next 82nd judge may say about the same issue. Gerhardt concentrates on 'historical institutionalists' who were post-positivists like Howard Gillman. The term institutionalists illuminate the patterns in decision making that can be attributable to the Court as an institution and a judgment must reflect the historical exigencies and needs. The historical institutionalists differ from attitudinalists and rational choice theorists. Howard Gillman explains, judging in good faith is all one can expect from judges. Post-positivists have amassed considerable empirical data to support their beliefs that justices try to make the best decision possible in light of their training and sense of professional obligation who do not stick to the strict positivist approach of decision-making. While attitudinalists generally claim the Court primarily functions as a cipher for justices' expressions of their individual preferences. Attitudinalists mean a person whose happiness depends on his attitude not on his environment. Similarly, it focuses on the nature of the judge, like a sensible or a progressive judgment is often a product of a liberal or a modern judge. And rational choice theory suggests that the justices' different orderings and intensities of preference might produce inconsistent outcomes. No matter from which background a judge has come, once he is in a position of a judge he must have rationality in his judgment.

The other group of social scientists whom Gerhardt cites as an unpersuaded by attitudinalism and rational choice theories is skeptical¹⁰ of post-positivism. This diverse group includes, Herbert Kritzer, Mark Richards, Lawrence Baum, Cass Sunstein, Stefanie Lindquist and Frank Cross. Their approaches and results differ, but they all share the conclusion- existing models of precedent which inadequately express its authentic dynamics and effects in judicial decision making.

According to Gerhardt, the best conception of precedent in the Supreme Court should acknowledge its “limited path dependency”. This means the judges while pronouncing law must incline or depend onto the path taken by their predecessors. This involves five prerequisites namely- Permanence, Sequentialism, Consistency, Compulsion and Predictability. In **permanence** author argued that in some of the cases the court showed no intention to revisit the landmark decisions, including those upholding the incorporation of most of the Bill of Rights through the Fourteenth Amendment due process clause. Nor does it show any inclination to reconsider its decisions by upholding the constitutionality of the Voting Rights Act, 1964, Civil Rights Act landmark environmental regulations because a revisit might disrespect the past decision itself. These are some examples of precedents that have been widely accepted by the Court, government, and the society which are immune to modifications.

The second prerequisite is **sequentialism**. This philosophy suggests that the cases should get decided in proper order or sequence so that the Court can influence the outcomes. Sequentialism presupposes that what came before the court has some definite or measurable effects on what comes after. It is, however, impossible to prove sequentialism determines specific outcomes but it is very much obvious that the past cases through proper sequence of years, facts, background and judge’s ratio gives assurance as on how to impart justice today in a better way.

In the third prerequisite, the author said **consistency** is required in precedents to fit it logically or coherently into particular lines of decisions. Consistency ensures that the precedents in areas of constitutional law are analogous to each other and are based on similar reasoning.

¹⁰A skeptic is a person who doesn't believe something is true unless they see evidence.

The fourth prerequisite is **compulsion** which compels judges to deviate from precedent or overrule them if found irrational or error of law.

The final and fifth prerequisite is **predictability** which creates likelihood that past choices make forecasting of future easier. Predictability states, the choices judges make, it creates expectations about the path of constitutional adjudication and these expectations are largely justified and realized. Hence, a case with the same fact creates predictability that a future case with the same fact may have similar decision. But the same path is not always possible to follow. For instance, since the Court reaffirmed *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹¹, it has not allowed challenges to *Roe* as many Court observers would have predicted.

Here, the author deviated the work from ‘dependency path of precedent’ to ‘limited dependency path of precedent’ as best suited. It expressed eight related factors to generate limited dependency path, those are:

- (1) Constitutional design which gives separation of power and overlapping of the same;
- (2) Peculiar nature of constitutional adjudication;
- (3) How the Court frames its judgments;
- (4) Entrenchment in Constitutional law;
- (5) Changes in the Court’s composition;
- (6) The dynamics of the Court as a multi-membered institution that makes decisions by majority vote;
- (7) Absence of formal rules for construing precedents; and
- (8) X factor- social, economic and political forces that influence the justices’ reasoning in various ways.

Gerhardt clarifies that the social scientists have the wrong paradigm in mind when they analyze courts. They presume that the Court functions like a legislature. Legislators are directly subject to political pressure and accountability, but justices are not. Courts interpret law in various forms in order to resolve disputes. Gerhardt criticizes scholars who treat constitutional and common law adjudication similarly. In common-law adjudication,

¹¹ 505 U.S. 833 (1992).

precedents play a vital role, because the arguments are majorly based on pre-incident. In constitutional adjudication, arguments are based not only on precedent, but also on other conventional modes of constitutional discourse like text, original meaning, structure, moral reasoning, and consequences. But the claim that precedents are the exclusive source of legal authority is historically, legally and politically untenable because legislative enactments also had and have a significant effect on the U.S. legal system. This makes U.S. a common law country with a feature of precedent as one of its legal source. To the contrary the author has not made any detailed distinction of common-law and civil-law legal systems rather; he has restricted himself to the U.S. legal system only.

In Chapter four, Gerhardt examines non-judicial precedent. Non-judicial precedent is technically a constitutional judgment made by a non-judicial public authority, which is claimed or treated as a norm by that authority. Gerhardt not only considers judicial authority but also non-judicial authority, a competent organ to produce precedent. It ranges from presidential signing statements to the use of senatorial courtesy and most of these non-judicial precedents remain undisturbed by the Court. This indirectly indicates that most of the laws having constitutional significance is not, made by the judicial wing. Gerhardt considers discoverability a distinct characteristic of non-judicial precedent. Discoverability is the effort of public authorities to discover their past governmental action and enforce it with normative authority. Until and unless an act is discovered it will be impossible to regard it as precedent because nobody will know about it.

In order to simplify the meaning of non-judicial precedents Gerhardt has given three examples of it which over the time get invested with normative precedential force: vice-presidential succession to the presidency, presidential signing statements and the non-impeachability of Congressmen. The Constitutional institutions that create them are congress, president, cabinet officials, and head of the federal agencies. It also includes state and local officials- governors, state legislatures, and mayors who have power to make precedent. The most complicated examples of non-judicial precedent that Gerhardt considers are the actions of congress to censure a president, majority rule in the Senate and treaty authorization by the Senate as a prerequisite for presidential commitments of military forces. But these cases demonstrate the

difficulties of discovering precedents when there are incomplete historical records, conflicting precedents and few citations to establish precedential authority.

There is a problem with Gerhardt's analysis of non-judicial precedent. Gerhardt defines precedent in a judicial context as a golden rule. So, when he discusses discoverability as a distinctive feature of non-judicial precedent, it is not clear whether it is to replace the golden rule as the definition of non-judicial precedent.

According to a prevalent view, if a precedent is a judicial norm then judges has the obligation to follow it. But how the executive and legislature act towards non-judicial precedent, are they obliged to follow it or not are still not clear. There is an unexplained contention that if a conflict arises between the legislative, executive or judiciary branch *i.e.*, in between non-judicial and judicial precedent then which branch will prevail. In connection with this point, Gerhardt later mentions the famous instances of *United States v. Nixon*¹² and *Clinton v. Jones*¹³ in which the Court refused to accept the non-judicial precedent set by presidents to have an absolute privilege to maintain confidentiality of internal White House communications. Hence, by rejecting the principle of absolute privilege, the court recognized the principle of qualified privilege where information needs to be disclosed if not communicated in public interest.

In response to these doubts and contentions, Gerhardt notes that certain non-judicial precedents are constitutionally established, and the Court's authority to review is also constitutionally limited as they possess limited path dependency. Gerhardt categorized non-judicial precedents under vertical-vertical head (binding authority within the branch creating them and on other branches), vertical-horizontal head (binding within the branch that created them but persuasive in other branches), horizontal-horizontal head (persuasive within the authority creating them and in other branches, such as the tradition of selecting a Chief Justice from outside the Court), and horizontal-vertical head (persuasive authority within the institution that created them but binding on other institutions).

¹²418 U.S. 683 (1974).

¹³520 U.S. 621 (1997).

In the fifth Chapter, Gerhardt explains multiple functions of Precedent in which constraint is one of the multiple functions that judicial and non-judicial precedent follows. In addition to its constraining force, Gerhardt highlights precedent as a mode of constitutional method, through which judges resolve legal disputes, precedent acts like a binding and persuasive principle, it also acts like a means of facilitating constitutional dialogue between the Court and other non-judicial actors. Non-judicial precedents have played major role in U.S. history as in *Dred Scott v. Stanford*¹⁴; it was held that black people, regardless of whether they were enslaved or free, could not be considered [citizens of the U.S.A.](#) As a consequence, they could not enjoy the rights and privileges that the Constitution confers upon [American citizens](#). The decision led to the Civil War. After the Union's victory in 1865, the Court's rulings in *Dred Scott* was declared void by [Thirteenth Amendment](#) to the U.S. Constitution, the authority abolished slavery, and the [Fourteenth Amendment](#), guaranteed citizenship for all persons born or naturalized in the U.S. subject to the jurisdiction thereof. In *Bush v. Gore*¹⁵ the decision did not settle a dispute rather by trying to resolve the dispute and preempting any political solution, the Court became a part of the dispute.

Judicial decisions reflect the attitudes of a particular historical period. Justices and non-judicial authorities, for that matter cannot stand apart from the culture, society, and historical period in which they live. The Court's decisions are not only shaped by the values of the society in which the Court operates, but also shape those values. The author has mentioned numerous cases of U.S. to support his argument but no mention of Indian case has been found.

In later parts, author mentioned four additional functions of precedent. First, precedent is sometimes described as the Court's medium for educating the public about the Constitution. Second, precedent can be invested with symbolic meaning as a part of a larger social movement or historical period. Third, judicial and non-judicial precedent plays a key role in constructing American national identity. Fourth, precedent can serve as the Court's effort to articulate or defend constitutional values. Gerhardt is right in noting that each of these functions plays an important role in making a just society.

¹⁴60 U.S. 393 (1857).

¹⁵531 U.S. 98 (2000).

In the final sixth Chapter Gerhardt examines “super precedents.” These are the judicial decisions or non-judicial precedents that are so deeply embedded in our law and culture that they have become practically immune to overturning. The first best example of super precedents that established the power of judicial review is *Marbury v. Madison*¹⁶ and *Martin v. Hunter’s Lessee*¹⁷. The next group of super precedents established by Gerhardt is “foundational doctrine”. These involve cases relating to incorporation of the Bill of Rights against the states and non-justiciability of political questions. Gerhardt also discusses many foundational decisions, which he views as the most potentially controversial super precedents. Foundational decisions are longstanding, often cited, enjoy social approbation, and are viewed by courts as well-settled decisions of upholding the constitutionality of the matter in question. Similarly, the Civil Rights Act of 1964 and the Sherman Antitrust Act of 1890 are examples of “super-statutes as per the author.¹⁸

In the conclusion, Gerhardt says consideration of judicial and non-judicial precedent is necessary for accurate understanding of constitutional law of U.S. and through this understanding we can agree with some particular precedents, but we cannot disagree or break away from the concept of precedent, as it is as indispensable part of law making and adjudicating.

¹⁶5 U.S. 137 (1803).

¹⁷14 U.S. 304 (1816).

¹⁸ William N. Eskridge, Jr., & John Ferejohn, *Super Statutes*, p. 50 *Duke L. J.* 1215 (2001).

**LAW RELATING TO SEXUAL HARASSMENT AT
WORK (2015) by Alok Bhasin, Eastern Book Company,
Lucknow. Pp. 998, Price: Rs. 1250**

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Women for a very long time were forced to keep themselves away from the mainstream workforce by putting forward several reasons and excuses by the society. They had limited access to the opportunities to prove their skills and capabilities which men have been accessing and harnessing for long. For a very long time, the role of women was constrained to that of a homemaker and they were always considered ineligible to be a part of the employment sector because of their gender. However, after globalization we find a drastic change in the status of women throughout the world where both men as well as women being employed are contributing to the economy of the world. With mass scale involvement of women in the mainstream workforce, sexual harassment of women at workplace has assumed greater dimensions. Sexual harassment of women at workplace is a form of gender discrimination violating a woman's fundamental rights which creates a sense of insecurity. An unhealthy working environment for women also creates a barrier to showcase their ability to deliver in today's competing world. Such harassment directly affects their skill and performance of work and in turn adversely affects the victim by putting them into physical and emotional suffering. Such type of degrading activities at workplace by the male counterpart is not only harmful to the victim but also affects the economic and social growth of the nation. In India women were also subject to sexual harassment at their workplace for a long span. It was only after the case of *Vishaka v. State of Rajasthan*² where a dalit woman named Bhanwari Devi was gang raped by a group of influential people in Rajasthan when she was employed in a development programme of the Government of Rajasthan and was making efforts to curb the then prevalent practice of child marriage. This case acted as a siren with the urgency and need of formal guidelines and

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² AIR 1997 SC 3011

legislation was felt after this case was reported. In this the Supreme Court laid down certain guidelines to be followed by the employees when any woman employee is faced with or subjected to sexual harassment at workplace which was later turned into legislation in the year 2013.

The book under review is *Law Relating to Sexual to Sexual Harassment at Work* authored by Advocate Alok Bhasin where this edition was published in the year 2015 by Eastern Book Company, Lucknow. This book is primarily divided into four parts describing in details each and every section covered by a heading followed by subheading, parts and subparts. The chapters include PART I which describes descriptively about activities that constitute sexual harassment under the heading “What is Sexual Harassment?” and PART II contains the details of the need to stop sexual harassment and the effects of workplace abuse under the heading “Why Sexual Harassment Needs to be Combated”. PART III puts forwards various means to minimize, prevent and stop such degrading activities that constitute sexual harassment at workplace under the heading “Combating Sexual Harassment at Work”. PART IV contains in details the redressal mechanism available to the victim under the national forum which is mentioned under the heading of “Liability and Remedies”. This book has two annexure at the end whereby the first one, ANNEXURE I contains the act on existing legislation on workplace harassment in India namely Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redressal) Act, 2013 and ANNEXURE II containing the rules available in India to deal with the subjected issue namely Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redressal) Rules, 2013.

PART I under the main heading “What is Sexual Harassment?” is divided into five chapters. In first chapter named “Quid Pro Quo” and “Hostile Environment” the manner in which a woman is sexually harassed at workplace is divided into two distinct forms. Quid Pro Quo is described as a condition at workplace where is woman is forced or threatened to return some sexual favour to someone at workplace who shall provide her some appraisal, benefit or promotion. On the other hand, Hostile Environment is described as some unwanted or unacceptable sexual behaviour faced by a woman at workplace which adversely affects her performance resulting is her degradation. This distinction is well described by the author. However, the means to determine what exact types of sexually harassing behaviour falls under which form is not

specified properly by the author is this chapter. The second chapter titled “Defining Sexual Harassment” covers in details the different types of definition put forward by the United Nations and its agencies mainly ILO (International Labour Organisation). This chapter focuses in details the prevalent debate about the origination of recognition of workplace sexual harassment. Here the author puts forward that malicious practice of sexual harassment existing since long but different terms are used in different countries to describe the act. The definition put forward by United States, United Kingdom, Canada, Australia and other countries are discussed in details. Also the definition and concept put forward by the Supreme Court of India after the *Vishaka Case* (1997) is also explained descriptively in this chapter. This chapter is sufficient to create a detailed idea about when and how the concept of sexual harassment of women at workplace emerged. Chapter three titled “Legal Test for Sexual Harassment” describes what types of behaviour at workplace constitutes sexual harassment at workplace. To understand the intensity of such activities, the author has made use of the term “welcome” and “unwelcome”. He has mentioned that whenever certain sect of activities at workplace makes a woman uncomfortable and such activity under normal circumstance is unwelcomed then such activities are considered to be sexually harassing to the woman. It is extremely tough to determine how and when to draw a line between welcome and unwelcome behaviour faced by woman at workplace especially if the woman doesn’t report the case or decides to remain silent on it. The author here has described and differentiated between welcome and unwelcome behaviour under several situations with relevant instance, illustrations and cases of many other countries. The author through different types of cases tried to put up and explain some procedure and process by which the intensity and nature of sexually harassing behaviour faced by a woman at her workplace is determined. The following chapter is “Sexual Harassment: A Species of Sex Determination”. This chapter begins with the fact that workplace sexual harassment is violation of the human rights and infringement of right to life and liberty. The different types of international instruments, conventions and declarations which are trying to prevent and minimize these forms of violence on woman are discussed in details. The provisions provided in Indian Constitution to protect women against such discriminatory treatment meted out against women is placed and

also discussed. Here the author has mentioned about *Janzen Case*³ of the Manitoba Court whereby it was held that sexual harassment is a form of sex discrimination. The author here puts forward several points and grounds explaining that sexual identification is not the sole reason of sexual harassment. The case of *Brooks v. Canada Safeway Ltd.*⁴ is also mentioned by the author whereby it was held that women should not be discriminated by the employer on grounds of sex. The author in this chapter also brought to the notice of the readers the same sex discrimination and mentions the case of *Oncale*⁵ which was decided in favour of the victim by the US Supreme Court and this case acted as a precedent for similar types of cases. Different aspects of homophobic harassment and legislations available in different countries to curb such acts are a relevant portion of this chapter. Chapter five is “Reasonable Perception: Reasonable “Person” or Reasonable “Victim”?” whereby the objective and subjective parameter of this issue is put forward by the author referring to the observation of Justice J S Verma Committee on Sexual Harassment Act. Here the procedure for dealing with hypersensitive complaint is discussed by taking into account the intensity of the complaint and act. In this chapter jurisdictions and legislations of other countries is placed to clarify the facts to the readers.

Part two is comparatively a shorter portion comprising of four chapters under the main heading “Why Sexual Harassment Needs to be Combated?”. This part begins with an introduction followed with four chapters where chapter one is “A Serious and Real Problem”, chapter two is “Most Vulnerable”, chapter three is “Violation of Dignity and Human Rights” and chapter four is “Fall Out”. In brief the chapters mainly describe that workplace abuse and harassment faced by a woman needs to be combated as its impact is intense and under certain condition it can even ruin the personal and professional life of a woman. It is the violation of basic human rights which degrades the dignity of a woman leaving a permanent scar in her life.

Part three “Combating Sexual Harassment at Work” is divided into two subparts namely “A” and “B”. Subpart A is “Preventive and Procedural Action” comprising of an introduction along with three chapters and subpart B is

³ (1989), 10 C.H.R.R. D/6205 (S.C.C.)

⁴ [1989] 1 S.C.R. 1219

⁵ 523 U.S. 75 (1998)

“Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013” comprising of an introduction followed by eight chapters.

Under Part A, the first chapter after the introduction is “Preventive and Procedural Action by Employers”. In this chapter the author refers to the guidelines provided by the Supreme Court after the *Vishaka Case*. As per the guidelines the employer is allotted with the main duty of constituting the Internal Complaints Committee with the requisite number of members for dealing with the cases of sexual harassment of women in her workplace. In addition to this the author puts forward few international instruments and legislations in support of his point. He referred to the European Commission Recommendation and Code of Practice whereby sexual harassment had been considered as a grave problem faced by several working women. Under this report sexual harassment was accepted as a form of sex discrimination and was included under Equal Treatment Directive. Here a new directive was set out towards the employer to establish such working environment where women can work freely without the risk of sexual harassment. Then the author refers to a very popular US Labour law case of US Supreme Court namely *Meritor Savings Bank v. Vinson*⁶ popularly known as Vinson case whereby sexual harassment for the first time was considered as an illegal form of workplace discrimination. The court recognized sexual harassment at workplace as “actionable”. The Court also held that hostile working environment creates a form of sex discrimination under Title VII of the Civil Rights Act of 1964 and the employer cannot be excused from all liabilities only with the mere existence of the procedural framework and policies as prescribed but no effort on the part of the employer to initiate a complaint or thoroughly look into a complaint filed by the victim. The author in this chapter refers to several national case laws like the case of *Saurabh Kumar Mallick v. Comptroller & Auditor General of India & Anr* (2008), the Delhi High Court widely interpreted the term “workplace” in its general context and held that it includes any place where employees work, and where active work (whether temporary or permanent) is being conducted in connection with the employment. Again in the case of *G V Vishwanth*, 2005 the Karnataka High Court held that a fresh enquiry is not mandatory when enquiry officer is changed. This part includes many other relevant cases which help to

⁶ 477 U.S. 57 (1986)

understand the duty of the employer in dealing with such cases. The case of *Medha Kotawal Lele*⁷ (2013) is also referred to here after which for the first time it was brought to the notice of court that the employers have a casual attitude towards dealing with cases of sexual harassment at workplace. The employers do not comply with guidelines specified in the Vishaka Case and so even with the existence of formal guidelines women are still suffering and victims of workplace harassment. It was placed before the court that though an enquiry was conducted by the complaints committee as required but after enquiry the matters started being dealt with as a disciplinary misconduct according to the existing service rules or labour laws. The Supreme Court after this directed the State Governments to file affidavits to emphasize on the steps taken by them to implement the Vishaka Guidelines. The second chapter “Sexual Harassment of Students” is a very important chapter whereby the author wants to sensitize the readers about the sexual harassment faced by student in different tiers of education and what are the legal protections available to them under the present legislation. Several types of harassments faced by students like that of ragging, torture and bullying are also discussed in this chapter. Several case laws have been referred to by the author that shows certain judgments and rulings can be treated as precedent to deal with the issue. The third chapter under this subpart is “Role of Employees, Trade Unions and Collective Bargaining”. In this chapter the functional role that is to be played by other employees and trade Unions are described in details and several international instruments are also referred.

Part B of the third part has eight chapters apart from the introduction. This part mainly describes each and every procedure and component of the “Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013” commonly known as the POSH Act. The first chapter under part B is “Preliminary” which consists of different kinds of definitions explained supported by several relevant case laws like that of *Mohd. Azizur Rahman* (2013) whereby the Delhi High Court held that any textual messages received from anyone at workplace with degrading gestures and words also amount to sexual harassment. The author recommends that the sexual harassment can be tested on the basis of the committee’s report on change or amendments in

⁷ [2012] INSC 643

criminal laws. This part analyses aggrieved woman, nature of sexual harassment, what activities can amount to sexual harassment, definition of workplace under a broader ambit and other relevant areas connected. Chapter two is “Constitution of Internal Complaints Committee” and chapter three is “Constitution of Local Complaints Committee”. These two chapters contain elaborate description of the constitution of the Complaints Committee as prescribed by the Section 4 to Section 8 of the POSH Act, 2013. Chapter four named “Complaint” deals with complaint that is to be made by the aggrieved woman in written form within three months from the date of happening of the act. This section is criticized by the author because a written complaint that too within three months is a major loophole in the legislation as it can restrain several victims from coming forward and getting remedy after the expiry of three months. To support his statement he has referred to the case of *VK Matta* (2011) whereby the Delhi High Court held that any complaint of workplace sexual abuse by any person with no name or designation supported with facts and evidences can be admitted by the Court. Here the author also mentions about hearsay evidence which needs primary evidence to be prove the act. Chapter five “Inquiry into Complaint” speaks of the procedure to be followed and the relief to be provided during pendency of inquiry. This part is a vast portion dealing in details about the functions of the Complaint Committee, details about the manner in which inquiry to be conducted and about the actions to be taken whether disciplinary action or compensation post enquiry is placed by the author with relevant case laws. The publishing of the facts of any case or its inquiry is also punishable and this is discussed in the last portion of this chapter. Chapter six and chapter seven namely “Duties of Employer” and “Duties and Power of District Officer” are two small chapters mainly dealing with sections 19 and 20 of the POSH Act, 2013. This huge portion ends with chapter eight that is “Miscellaneous” where the duty of the employer for submission of the annual report under Rule 14 and penalty for non compliance of the provisions of the Act is laid out.

Part four namely “Liability and Remedies” is the last part of this book. It consists of five chapters apart from the introduction. These portions consist of various kinds of procedural and substantive laws available in India. The first chapter is the “Constitution of India” dealing with the different types of fundamental rights available to a woman who is sexually harassed at her

workplace supported by different case laws. The second chapter is “Criminal Law” which includes all the penal provisions available in India. The third chapter is “National Commission for Women, 1990 and Protection of Human Rights Act, 1993” which deals with these legislations specifically. The fourth and fifth chapters are “Torts” and “Vicarious Liability of Employer for Sexual Torts of Employees”. This part consists of several types of liabilities of the employer towards such incidents of workplace sexual harassment. This section is supported by several types of foreign legislations, judgments and Indian case laws. With this the book comes to end.

The book is followed by two annexures namely ANNEXURE I namely Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redressal) Act, 2013 and ANNEXURE II containing the rules to deal with the subjected issue namely Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redressal) Rules, 2013.

The book as a whole is informative and covers almost all the aspects of law relating to sexual harassment of women in India supported by different types of national as well as international case laws. But the book is extremely lengthy in comparison to the information provided in it with several flaws in the footnoting style and also high priced as compared to the other similar books available in the market. The title of the book is “Law Relating to Sexual Harassment at Work” so if the word “work” is to be taken into consideration so it should have covered all sectors of employment. But this book does not cover or mention cases or the redressal mechanisms available to Indian women who work in unorganised sectors or as freelancers though majority of women are employed in such kinds of employment.