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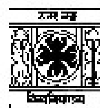

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DEPARTMENT OF LAW

UNIVERSITY OF NORTH BENGAL

DARJEELING, WEST BENGAL, INDIA

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From the Editor's Desk

Season's Greetings!

I am glad to announce the publication of the Vol. 14 No. 01 issue of the Indian Journal of Law and Justice. The Indian Journal of Law and Justice has come a long way in the last one decade from being a national law journal to being an internationally acclaimed journal and from being a mere print version to having a website of its own, namely ijlj.nbu.ac.in. I also announce the indexing of the journal with SCOPUS along with the HeinOnline. Innumerable scholars, academicians and professionals from the field of law as well as other social sciences sector have been relying on this journal for their scholarly publications and have played a pivotal role in their early career success. I along with my highly efficient editorial team pledge to building on the legacy of this journal. We are making an endeavour for online submissions of articles and research papers to improve and expedite peer review. We, as a team, shall continue to remain committed to making it a forum that welcomes scholarship from a diverse and global group of authors, whose ideas are at the cutting edge of law and policy research.

Keeping the trend of the Indian Journal of Law and Justice going, authors across the globe have contributed on varied topical matters and raised relevant and pressing questions in their papers to enrich the journal. The current issue opens with Dr. Alhendi's paper on "The Disciplinary Sanctions in the Jordinian and French Law" which deals with the power of the administrative authority to determine what constitutes a disciplinarian violation which necessitates disciplinary punishment of public servants in Jordan and France. The issue of combatting international crime is currently one of the most pressing and critical issues of modern international criminal law. Dr. Vadym Popko, who's from Kyiev, Ukrain, analyses this in his paper entitled "Legal Force of International Criminal Law Norms".

Papers on various aspects of environment protection, preservation and rehabilitation have yet again taken centre stage in this volume of IJLJ. One of the most pervasive environmental threats in the world is solid waste which includes trash, refuse, garbage and rubbish from residential and business operations. Authors Yahaya and Kehinde have lucidly presented their analyses on solid waste management in United Kingdom and South Africa and the takeaway for Nigeria from these countries in their paper entitled "An Examination of Legal Framework for Solid Waste Disposal and Management in United Kingdom and South Africa: Lesson for Nigeria". There are papers on other diverse issues on environment like

rights of air, groundwater management and environmental pollution. Dr. Kavita Goel's article on "Conferring the Rights of Air: A Way to Change Social Behaviour in India", specifically looks into the judgements pronounced by the Supreme Court of India and rightly suggested a shift towards the eco-centric social behaviour from the principles of anthropocentric approach. Again, Prof. Arup Poddar makes a study of the Paris agreement and the sound principle of 'common but differentiated responsibility and tries to provide a discussion as to how the developing nations will be benefitted from such principle in "A Study of 'Common but Differentiated Responsibility' and Paris Agreement".

In "South Asian Economic Constitutionalism and the (Re) Building of Constitutional Order in South Asia", Prof. Dilip Ukey and his co-author Adithya Anil Variath have convincingly argued for a need for the South Asian States to develop formative practices that focus on accountable constitutional governance of the economy and strengthening financial institutions. The need and importance of co-operative federalism in India need not be exaggerated. Taking this forward Dr. Manjula S.R. has reviewed the Doctrine of Repugnancy with reference to the much criticised Farm Laws in India in "The Doctrine of Repugnancy, the Constitutional Governance and Judicial Interpretation with reference to Farm Laws in India". The age old debate over primacy of rights or duties in an evolving legal system like India has been the crux of Dr. Ajay Kumar Sharma's "Duties or Rights: Should Duties Trump over Rights?" Articles highlighting crucial issues on Live-in Relationship and its morality (Live- in Relationship: Morality, Ethics and Need for Legislation by S. K. Chaturvedi & Shradha Baranwal), recognising LGBTQ rights through persuasive legal instruments in India (The Role of Persuasive Legal Instruments for the Recognition of LGBTQ Rights in India by Prerna Lepcha), individual liberty and public interest and the COVID-19 (A Jurisprudential Study on Individual Liberty v. Public Interest: A Case of COVID-19 by G. Rajasekar), constitutional morality in judicial appointments (Constitutional Morality and Judicial Appointments in the Higher Judiciary by Paras Chaudhury) and studying potential impact of the National Education Policy on the education of Particular Vulnerable Tribal Groups in India (Implementation of National Education Policy, 2020 amongst Particularly Vulnerable Tribal Groups in India: A Critical Study by Vijoy Kumar Sinha) have endeavoured to establish the changing demands of a rights based society and evolving legal system.

At the backdrop of start-up ventures, Dr. Bharat and Priya Gupta's paper on "Legal Framework of Single-Member Company in UK vis-à-vis One Person Company in India: A Conceptual Analysis" successfully attempts to trace the journey of One-Person Company in United Kingdom and India.

Citizenship and the dual problems of refugee and migration have occurred in two articles authored by Dr. Satarupa Ghosh and Sriparna Rajkhowa.

Apart from the above long articles, two commentaries on impact of child trafficking entitled “Cataclysm within Cataclysm: Do Catasytrophic Events impact Child Trafficking?” by Luvleen and Shikhar Bhardwajnand “Protection of Women from Domestic Violence: Legal Challenges and Issues” by Mun Choudhury and Prof. Madhumita Dhar Sarkar have been included.
Ms. Simantini Sarkar, an independent researcher and freelancer, has contributed her book review on ‘Democrats and Dissenters’ by Ramachandra Guha.

I thank all contributors for their submissions to this edition and their cooperation with the editorial team during the production phase. I express my gratitude again 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

Prof. Rathin Bandyopadhyay
Chief Editor

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The Disciplinary Sanctions in the Jordanian and French Law

***Dr. Noor Alhendi*[1]**
***Dr. Muamar Salameh*[2]**

Abstract

This study deals with an important administrative issue which is the Disciplinary Sanctions in the Jordanian and French Law, as we know in the administrative laws there is no exclusive enumeration of the actions constituting disciplinary violation in occupational legislation, and hence any dereliction on the part of a public servant in his positive or negative obligations may constitute errant conduct, and therefore the matter is up to the administrative authority to make a determination whether the conduct of the employee constitutes a disciplinarian violation necessitating disciplinary punishment or not, and the onus is also upon the administrative body to prove the occurrence of the act of violation. In this case, the public administration may misuse its powers and privileges granted to it by the Jordanian and French legislators and harm the public employee by issuing disciplinary administrative decisions that contradict administrative legislation. Therefore, there must be judicial oversight of administrative decisions in this case. Therefore, his study deals with codified disciplinary penalties in Jordanian law, by standing on the principle of the legitimacy of disciplinary punishment, by defining codified disciplinary punishment, stating its objectives and legal divisions, and finally stating the position of the administrative judiciary on disciplinary penalties.

Key words: *codified disciplinary sanctions, disciplinary authorities, administrative authority, principle of the legitimacy of the disciplinary sanction, administrative judiciary.*

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I. INTRODUCTION

The importance of this study stems from the fact that it stands on the codified disciplinary sanctions in the Jordanian and French Law, to reveal the abuse of power by the administrative authority, because the public administration may misuse its powers and privileges granted to it by the Jordanian and French legislators and harm the public employee by issuing disciplinary administrative decisions that contradict administrative legislation. Therefore, there must be judicial oversight of administrative decisions in this case. So, the aim of the present study is to elucidate the principle of the legitimacy of the codified disciplinary sanctions, the codified disciplinary punishment, its objectives, its legal divisions, the extent of the administrative judiciary's control over disciplinary sanctions. Therefore, the descriptive analytical method was of extreme help in describing, analyzing, and comparing legal provisions, judicial rulings, and the jurisprudential opinions related to the subject of the study with all the tools it has. The problem of this study can be solved by answering several questions, most notably: What is the principle of the legality of disciplinary punishment? What is the codified disciplinary punishment? And what are its objectives? What are its legal divisions? What is the extent of the administrative judiciary's control over disciplinary sanctions? One of the most important academic obstacles that faced the study; The lack of specialized references in the core of this topic, the researcher did not find studies that intersect with it except for a study: Nofan Al-Ajarma, the authority to discipline a public employee issued in 2007, and a study by Abdel Fattah Hassan, Discipline in Public Service issued in 2008 that dealt with discipline in public office in Egyptian law, and a study Nawaf Kanaan, Disciplinary System in the Public Service, issued in 2008. As for the current study, So I took a different approach than that adopted by previous studies, as they compare the Jordanian and French legislation in the field of disguised penalties, which legitimizes their birth. The study concludes with a set of findings and several recommendations.

II. Principle of the Legitimacy of the Disciplinary sanctions

The content of the principle of the legitimacy of the codified disciplinary sanctions is represented in restricting the disciplinary authority in imposing sanctions, such through exclusive stipulation, for the Jordanian Civil Service Regulation Number (9) of 2020 determined the disciplinary sanctions while leaving it to the disciplinary authority to choose the appropriate disciplinary

punishment for the administrative violation from among those sanctions.[3] Thus Article (142) stipulates: "In case a public servant commits a violation of the laws, regulations, instructions and resolutions in effect in the civil service, or in applying them, or embarks on an action or conduct in dereliction of responsibilities and powers assigned to him, or hinders them, or affronts the professional ethics and the duties and conduct of the employee, or was derelict or neglectful in performing his duties, or infringed on the property and interests of the State; then the following disciplinary sanctions will be imposed on him: notification, warning, deduction from his basic salary of not more than seven days a month, suspend the annual raise for a one year period, suspend the annual raise for a three year period, suspend the annual raise for a five year period, termination of services, dismissal."

As regards the French legislative or organizational rules which determine the disciplinary sanctions for public service employees in France they are represented in the following:

− Law Number 79-587 dated 11 July 1979 related to the motives for administrative measures in case of the imposition of disciplinary sanctions,[4] Law Number 83-634 dated 13 July 1983- Articles 19,29,30- concerning the rights and obligations of the civil servant,[5] Law Number 84-53 dated 26 January 1984- Articles 89 to 91- which stipulates legal provisions related to domestic civil service,[6] Circular Number 1078 dated 26 June 1986 related to entering the disciplinary sanctions in the file of the public servant,[7] Edict number 88-145 dated

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[3] Ahmad Hiasat, Disciplinary Sanctions Imposed on the Public Service and the Consequence of their Extreme Application on the Administrative Decision, A Comparative Study, Nayef University Publishing House, Riyadh, 2015, p.79.

[4] **Loi n° 79-587 du 11 juillet 1979 relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public;** https://beta.legifrance.gouv.fr/jorf/id/JORFTEXT000000518372

[5] **Loi n° 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires:**https://beta.legifrance.gouv.fr/loda/texte_lc/LEGITEXT000006068812/

[6] **Loi n° 84-53 du 26 janvier 1984 portant dispositions statutaires relatives à la fonction publique territorial:**https://beta.legifrance.gouv.fr/loda/texte_lc/LEGITEXT000006068842/

[7] **Lettre circulaire 1078 DH/8D du 26 juin 1986** relative à l'inscription de sanctions disciplinaires au dossier du fonctionnaire.

15 February 1988- Articles 36 and 37- adopted to apply Article 136 of Law 26 January 1984 amending the important legal provisions.

concerning domestic public service related to temporary employees in the domestic governmental service,[8] Edict Number 92-1194 dated 4 November 1992- Article 6 which defines the joint provisions applicable to the civil service employees who are trainees in the domestic public service,[9] the response of the Civil Service Ministry in the Senate which was published in the Official Gazette on 10 February 2011 according to which it was determined that an employee referred to the Disciplinary Board is entitled to recover his travel expenses.[10]

Thus, the disciplinary authority has no power to impose any sanction on the contravening employee, unless stipulated in the abovementioned legal provisions, and it has no right to innovate new disciplinary sanctions,[11] and this is not the limit for the administration is not just bound by the list of codified disciplinary sanctions but is obliged to comply with the formal and objective restrictions which the legislation framed, for in form, it must adhere to the term of sanction which the legislation offers, or what is known as (semantic compliance), whereby if among the sanctions is that of warning for instance, then it is incumbent on the disciplinary authority to use the same term and not to substitute it with another, otherwise its conduct in this case would be in contravention of the principle of the legitimacy of the disciplinary sanction. And insofar as subject matter, the disciplinary sanction impinges on the job benefits of the employee, and thus if the disciplinary authority resorts to impinging on the dignity of the employee, such as through material degradation or impinging on his freedom through imprisonment, or impinging on his private property, then its measures go beyond

[8] **Décret n°88-145 du 15 février 1988 pris pour l'application de l'article 136 de la loi du 26 janvier 1984 modifiée portant dispositions statutaires relatives à la fonction publique territoriale et relatif aux agents contractuels de la fonction publique territorial:** https://beta.legifrance.gouv.fr/loda/texte_lc/LEGITEXT000031840083/

[9] **Décret n°92-1194 du 4 novembre 1992 fixant les dispositions communes applicables aux fonctionnaires stagiaires de la fonction publique territorial**:https://beta.legifrance.gouv.fr/loda/texte_lc/LEGITEXT000006080323/

[10] publiée dans le JO Sénat du 10 février 2011

[11] Nofan Ajarmeh, Power of Disciplining a Public Servant, A Comparative Study, House of Culture, Amman, 2007, p.117.

the limit of legitimacy,[12] and in case the sanctions of warning and reprimanding do not impinge on the job features and benefits but they become of a serious nature in case the disciplinary administrative decision includes harsh wording.[13]

Thus French jurisprudence[14] is of the view in the field of disciplinary sanctions that there are two procedures which must be taken into consideration; the first is to follow the legal disciplinary measures, and the second is for the administration to ignore the legal procedural method, and the administration might intentionally resort to an illegitimate means to take a measure notwithstanding its awareness that its conditions are not met, and hence the use of any measure to achieve a particular outcome inside an institution is for this measure to deviate from its subject, and hence if the legislator to achieve this aim prepares a particular means it must be respected and not ignored, because the end and the means are an integral part of the domain of legitimacy.

The administrative court: the Supreme Court of Justice of Jordan emphasized the principle of the legitimacy of disciplinary sanctions in a number of rulings: "… it is impermissible for any disciplinary authority to impose on the petitioner the sanction of deprivation from availing of the services of the Health Insurance Fund, because it is not among the disciplinary sanctions stipulated in the Electricity Authority laws and regulations…"[15] Moreover, it is necessary to allude to the guarantees which must be given due regard by the disciplinary authority prior to imposing any sanction on him,[16] for Article (141) of the Jordanian Civil Service Regulation provided for those guarantees represented in "notifying the employee in writing of the wrongdoing and accusations assigned to him, and it is incumbent on the heads and members of the investigation committees or the formed disciplinary board pursuant to the provisions of this regulation to resign in cases where there is kinship ties or personal considerations which may affect the proceedings of the investigation or the imposition of sanction, and it is also

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[12] Abdel Qader Al-Shaykhali, Legal System for Disciplinary Sanction, Dar El Fikr Publishing House, Amman, 1983, p.256.
[13]Nofan AL-Ajarmeh, Authority to Discipline a Civil Servant, op.cit., p.118.
[14] Rene CHAPUS, Droit administrative general, t l, Montchrestin, 15 ed, 2001, p 348.
[15] Decision of the Supreme Court of Justice (Administrative Court) in Case Number 131/93, issued on 13/7/1973, The set of the legal principles of the Supreme Court of Justice from the beginning of 1993 until 1997, Section One, Bar Association, p.269.
[16] NAWWAF KANAAN, DISCIPLINARY SYSTEM IN PUBLIC POSITION, 9, (Ithra`for Publication, Sharjah, 2008).

impermissible for any person who partook in the stage of investigation or accusation or testimony to participate in considering to impose a sanction or to decide on it, and it is impermissible to impose more than one of the sanction stipulated in Paragraph (a) of Article (142) of this Regulation, for the single misconduct committed by the employee, where the sanction imposed is commensurate with the nature of the committed violation, and not to be extreme or excessively lenient regarding the disciplinary measures taken regarding the employee, and to obtain reasoning for the disciplinary decision adopted by the competent authority concerned with adopting the disciplinary measures and sanctions, and to inform the employee in writing of the sanction adopted against him within ten days from the date of its imposition."

In France, both Article 19 of Law number 83-634 dated 13 July 1983 related to the rights and obligations of civil service personnel, and paragraphs 2 and 5 of Article 211 of the code of relations between the public and the administration stipulated the decision to pronounce the disciplinary sanctions to be reasoned, while the decision must include a statement of the factual and legal considerations constituting the basis of the decision. Moreover, the administrative authority, when desiring to penalize an employee shall summon him to a meeting beforehand as a part of the disciplinary measures, and the meeting must be fair,[17] to enable the employee to be informed about the subject of the complaint, and to know the reasons for rendering him the subject of a disciplinary sanction. Recently, the trial judges in French administrative courts have adopted the position of not accepting the statement of re-amending the reasoning addressed to the employee by the quarter issuing the decision through a separate letter when the statement of reasoning is insufficient or illegal even if the cause of punishment is explained to the concerned person in the counterclaim.[18]

III. Nature of the codified undisguised disciplinary sanction

The disciplinary sanction is considered the weapon through which the administration can make the employees to perform their job duties and responsibilities, for the aim of the disciplinary punishment is to achieve the public

[17] in this regard the ruling of the Administrative Court of Appeal in See CAA Nancy, 6 février 2018, n° 16NC00727.
[18] TA Dijon, 29 mars 2018, n° 1601508.

interest, and it is for this purpose this part exposits the codified disciplinary punishment and elucidates its aims and legal divisions as follows:

IV. Definition of the codified and undisguised disciplinary sanction

Jordanian and French legislation have avoided defining the codified disciplinary sanction, and amid this legislative silence some administrative jurists have made statements in this regard given that the task of definition is among the aims of jurisprudence, and hence some jurists have defined the codified disciplinary punishment as "a type of sanctions emanating from the Public Service system which is visited on an employee accused of committing a disciplinary violation by the disciplinary authority specialized in disciplining him and deterring other employees."[19] On the other hand other jurists have refrained from providing a specific definition of disciplinary punishment, and were sufficed with stating its divisions represented in material sanctions and administrative punishment, or with citing the sanctions that may be imposed on the employee in breach. Moreover, French jurisprudence defined disciplinary sanctions as those sanctions associated with behaviors that are inconsistent with the obligations particular to the staff of the administration, and they concurrently point out that the disciplinary law is the totality of rules which govern the elimination of professional misconduct."[20] The disciplinary error constitutes an infringement of a professional obligation that exists a priori, and the disciplinary punishment is represented by loss of position (job) or some of its powers or even its benefits, and disciplinary error arises from the nature of the action which affects directly or indirectly the employment status.[21]

The aims of codified disciplinary sanctions are represented in disclosing the defects of administrative activity as a prelude to rectifying them which would prevent the commission of violations in future, for it is a remedial measure which aims to bridge the gaps and prevent the occurrence of error, and it also aims to reform the employee by making him aware of the reality of the errors he

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[19] KHALED AL-DHAHER, ADMINISTRATIVE LAW, Al-MASEERAH 245, (Publishing House, Amman, 1997).

[20] NAWWAF KANAAN, COMPENDIUM OF JORDANIAN ADMINISTRATIVE LAW, 164 (Second Book, AL-Afaq AL-Mushriqah, 2012).

[21] Bonnard (Roger), De la Répression disciplinaire des fautes commises par les fonctionnaires publics, Bordeaux, Imprimerie Y. Cadoret, 1903, p.28

committed so as not to repeat them again,[22] and it also aims to ensure the good functioning of public facilities, for when an employee recognizes that any dereliction on his part would be dealt with by the administration with disciplinary sanctions this would spur the public functionary to assiduously perform his duties.[23]

Disciplinary responsibility does not only penalize the reprehensible acts which may be committed by the public functionary in the course of carrying out their duties, but also the actions committed in their private lives which tarnish the image of the institution to which they are affiliated.[24] It is worthy of mention that the employment legislations are usually confined to stating the duties of the functionary and the prohibited actions in general, and thence stipulate that every functionary who is derelict in performing these duties, or deviates from their imperatives and requisites, or acts in a manner violating the dignity of the public function shall be disciplinarily sanctioned pursuant to the punishment exclusively stipulated in legislation,[25] and some jurists are of the view that the cause of the inability to specifically delimit the disciplinary violations is the diverse trajectories of the imperatives of Public Service and accordingly it is impossible to put in place specific stipulations where the person in breach would deserve the deterrent disciplinary punishment, however it would be possible to support the jurisprudence which is of the view that not specifying the disciplinary violation is inconsistent with the principle of legitimacy which signifies for the legislator to determine the actions considered as violations, and stating the sanctions prescribed for them once proven clearly and specifically, for defining the crime and the punishment is considered a fundamental principle in criminal law for there is no crime or punishment except with the presence of a stipulation, and this is contrary to the disciplinary domain, where the principle of legitimacy in the criminal domain is not applied to the disciplinary violation, because not restricting the disciplinary violations will confer on the disciplinary authority considerable freedom in considering the action or refraining from it a crime, and the means to face this freedom lies in what the administrative judiciary exercises in oversight

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[22] NOFAN NAWWAF KANAAN, COMPENDIUM OF JORDANIAN ADMINISTRATIVE LAW, 164 (Second Book, AL-Afaq AL-Mushriqah, 2012).
[23] ALI MUHAREB, ADMINISTRATIVE DISCIPLINING IN PUBLIC SERVICE POSITIONS, 98 (Dar Al-Thaqafah, Amman, 2004).
[24] CE, 24 juin 1988, Secrétaire d'Etat aux P. et T., *AJDA*, 1988, p. 614.
[25] AL-WASEET IN ADMINISTRATIVE LAW AR., 277 (Dar Al-Thaqafah, Amman, 2016).

in this regard, and the sound exercise of disciplinary policy entails endeavoring to codify the job duties and the possible associated punishment as is the case in the criminal domain, and a gradual codification helps in achieving the aim while avoiding the negativities, for it would be possible as a first stage to endeavor to codify the foremost job duties and the most connected to the facility or to codify the violations associated with the severest sanctions.

Moreover, the lack of a stipulation that criminalizes the action in employment legislation does not necessarily mean that it is a licit act, but rather it is permissible for the administration to disciplinarily penalize the functionary upon breaching the job duties, for the administrative law does not adopt the principle of no crime and no punishment without a stipulation, but rather adopts one element thereof, namely (no punishment except with a stipulation), in the sense of the administration necessarily relying on a legislative text conferring on it the authority to penalize him, and this does not mean that its authority is absolute, but is rather subject to the oversight of administrative courts. Hence, it is necessary not to mix between the disguised disciplinary punishment and the measures taken for the service which is not of a repressive nature, and for example the French State Council considered the changes produced by the decision to transfer a functionary who is subject to the oversight of an administrative judge as not impinging on his occupational situation,[26] and in particular cases the transfer which is consistent with the functions performed by the functionary might not constitute a disciplinary punishment upon giving du regard to his rank which does not diminish his salary rights even if this measure would lead to a relative decrease in his responsibilities, but does not lead to a forfeiture of the privileges association with his job.[27] Furthermore, the decision to alter the appointment of the functionary inside the institution is a legal decision and constitutes a simple measure to organize the services which does not affect his legal guarantees and the privileges he possesses in exercising his functions and does not impinge on his salary, where such a decision is an internal procedure that is connected to organizing the services and may not be challenged on grounds of abuse of authority. [28]

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[26] Conseil d'État, 17 décembre 2007, n°301317, Dazord.
[27] Cour administrative d'appel de Bordeaux, 13 décembre 2005, n° 02BX01491.
[28] Conseil d'État, 17 décembre 2008, n°294362, Département des Ardennes.

V. Divisions of the Codified Disciplinary sanctions

The codified disciplinary sanctions are of a gradual nature, for they are not of an equal level of enormity, and hence the disciplinary sanctions which may be imposed on a functionary are notification, warning, deduction from the basic monthly salary not exceeding seven days a month, suspending the annual raise for one year, suspending the annual raise for a period of three years, suspending the annual raise for five years, dismissal from service, and dismissal. These sanctions may be divided to moral punishments, financial punishments, exclusionary punishments, which is what we will address as follows:

A. Moral disciplinary sanctions

The following disciplinary measures shall be taken against an employee who is repeatedly late for work, according to the following:

A- The warning penalty for the employee whose delay is repeated in one month three times.

B- The warning penalty for the employee who is repeatedly late for work more than three times in one month. In all cases, one day is deducted from the employee's annual leave if he is late for official working hours by a total of one hour per week. If the employee exhausts his annual leaves, then that hour is deducted from his salary and allowances. average of one day.

The moral disciplinary sanctions are considered to be the lightest of punishments, for they are a preventive warning practiced by the administration vis a vis its staff to prevent them in future from committing new violations based on which they are subject to the imposition of more severe punishments,[29] and among examples of such punishments are warning and notification,[30] for notification is a form of reprimand for the employee and reminding him of the imperative of behaving in accordance with his job duties and not committing the transgressive action once again, and a part of jurisprudence is of the view that notification is not considered a disciplinary punishment and is not more than administrative guidance to the functionary reminding him of his job duties, and it does not involve any legal consequence which is reflected on the other job conditions of the functionary.

[29] Abdel Qader AL-Shaykhali, Legal System for Disciplinary Sanction, p.399.

[30] Ahmad Hiasat, Disciplinary Sanctions Imposed on the Public Service and the Consequence of their Extreme Application on the Administrative Decision, p.70.

Moreover, the semantic connotation of this punishment does not entail causing pain presumably associated with punishment, and legal logic requires facing disciplinary violation however simple with an appropriate punishment which involves the meaning of pain for the functionary.

Nevertheless, it would be possible to agree with an aspect of jurisprudence[31] which is of the view that notification is considered a disciplinary punishment, for the Jordan Civil Service Regulation expressly stipulated that notification is considered among the disciplinary punishments, and it is known that the legislator transcends vain talk, and if he intends he expresses it, for notification entails urging the functionary and reminding him of the necessity of giving due regard to his professional duties, for the administration cannot be silent on such a violation, and at the same time cannot impose a more severe punishment, and hence the notification sanction is the appropriate punishment in such a case, and in case the functionary once again commits the same violation then the administrative body shall have the right to impose a more severe punishment

Furthermore, there exists a significant consequence in case any disciplinary punishment is imposed on the functionary from among the sanctions stipulated in Article (142) including the notification sanction, given that it is impermissible for his annual evaluation to be more than good during the year of evaluation, and also within the data and information which are included in the report of the evaluation of the performance of the functionary shall be the warnings addressed to him, and the disciplinary decisions and the categorical judicial rulings issued regarding him, whether convicting him or acquitting him.[32] As to the sanction of notification

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[31] NOFAN AJARMEH, AUTHORITY OF DISCIPLINING THE PUBLIC SERVANT, p.354.

[32] The disciplinary sanctions in France were stipulated in Article 66 of Law number 84-16 dated 11 January 1984 related to the legal rules related to state public service and they were divided into four groups: the first group, warning and reprimand- temporary exclusion from the job for a period of three days; second group, removal from the table of allowances; demotion from the grade held by the employee, temporary exclusion from the job for a period of four to fifteen days, third group- decrease the rank associated with the grade of the employee; temporary exclusion from the job for a period of sixteen to twenty days- fourth group- retirement; termination of service. And in French Law the sanction of reprimand and temporary exclusion from the job is automatically removed from the file of the employee after three years from its imposition unless a new sanction is imposed on him during this period. CAA Bordeaux du 10 février 2009 - N°08BX01158.

it entails both reprimanding and notification, where the functionary is warned of a more severe punishment if he repeats the action in future,[33] whereby the warning aims to alert the functionary of the error he committed, and to warn him of not repeating it, by means of complying with his job duties and to guide his conduct failing which he would be subject to a more severe punishment.[34]

B. Financial disciplinary sanctions

The Jordanian legislator in the civil service system granted the public employee financial rights:

Salary: It is the amount that the employee receives monthly, on a regular basis, in return for discontinuing the management service. The system defines the salary according to Article (2) of it as (the monthly basic salary that the employee is entitled to and receives in return for carrying out the tasks of the position he occupies, and it does not include allowances and allowances of any kind).

2. The annual increment: It is the amount decided automatically for the employee annually to be added to his basic salary without his grant being suspended on the issuance of a decision from any party, because this right is directly sourced by the system. In this regard, Article (21) of the system stipulates that: The date of granting it if a decision is not issued to withhold it) and the increase is due after one year has elapsed from the date of maturity of the previous annual increase or the date of appointment. with this increase.

3. Bonuses: They are sums of money granted to employees that lead to an increase in salary to help employees cope with the steady increases in the burdens of living. These allowances are determined according to the specified job grades and categories.

So, the Financial disciplinary sanctions are of a financial nature which impinge on the financial benefits of an employee, and those punishments or sanctions are represented in deduction from the basic monthly salary not more than seven days a month and suspending the annual raise for a one-year period and suspending the

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Article 66 de la**Loi n° 84-16 du 11 janvier 1984 portant dispositions statutaires relatives à la fonction publique de l'Etat:**https://beta.legifrance.gouv.fr/loda/id/LEGIARTI000038922925/2020-04-11

[33] Muhammad Al-Khalayleh, Al-Waseet in Administrative Law, p.282.

[34] Abdel Qader Al-Shaykhali,The Legal System for Disciplinary Sanction, p.375.

annual raise for a period of three years and suspending the annual raise for a period of five years. An orientation of jurisprudence- which we subscribe to- finds that this kind of punishments is inconsistent with the principle of the personality of the punishment,[35] for its effect is not confined to the person of the employee but exceeds it, especially when the matter relates to the married employee who supports a family where harm is done to them, and hence France has endeavored to abolish this penalty and we hope for the Jordanian legislator to follow in the steps of the French legislator.

C. Exclusionary Disciplinary sanctions

The dismissal punishments are considered the severest of punishments which are imposed on the employee because it leads to terminating the professional connections between him and the administration, and these punishments are represented in dismissal from service and dismissal from the job, whereby the employee is dismissed either by virtue of a decision of the disciplinary council for committing a grave offense, or automatically in case three different punishments are imposed on him from among the following disciplinary punishments: deduction from the basic monthly salary not in excess of seven days a month, and withholding a salary increment of the annual raise for a period of one year, and suspension of the annual raise for a period of three years, and suspension of the annual raise for a period of five years, and this punishment entails the following: "..it is impermissible to allow an employee to apply for appointment on a competitive basis to a position in the civil service pursuant to the provisions of this regulation except upon the passage of at least three years from the time of the issuance of the dismissal decision, and his obtaining a decision from the president of the Civil Service approving his application for employment with the Civil Service Bureau."[36] As to dismissal from the job it shall be in three cases stated in Article (172/a) of the Jordanian Civils Service Regulation and these cases are represented in "a decision from the Disciplinary Board associated with his committing a grave offense, and in case he is convicted by a competent court for committing any felony or misdemeanor in violation of honor such as bribery, embezzlement, theft, counterfeiting, abuse of trust and

[35] Suleiman Al-Tamawi, Justice of Disciplining, p.290.
[36] Article 171 of the Jordanian Civil Service Regulation.

position, false testimony or any other crime that is inconsistent with public morality, and in case he is sentenced to prison by a court for a period in excess of six months for committing any other crime." And consequent upon this punishment are serious effects where Article (177) of the Civil Service Regulation states that an employee shall be deprived of his financial entitlements in case his service expires or is terminated in any of the following cases: dismissal from job, loss of job, and loss of the Jordanian nationality.

Perhaps this is the difference between and layoff and dismissal from service,[37] for in the second case and notwithstanding the termination of service the Civil Service Regulation states in Article (177/a) thereof that: "The financial entitlements of an employee shall be paid to him pursuant to the provisions of this Regulation and the relevant laws and regulations in case his service expires or is terminated in any of the following cases: dismissal from service." Moreover, resulting from this punishment is that "it is impermissible to re-appoint the employee who is dismissed from the job in any department, however, it is permissible with the approval of the president of the Civil Service Bureau to allow the employee who was dismissed in accordance with the provisions of Clause (2) of Paragraph (a) of this Article or those included by the general amnesty or whose status is rehabilitated to apply for employment in the Civil Service."[38]

Moreover, Article (19) of French Law Number 634 issued on 13/7/1983 stipulates that the disciplinary power is the entitlement of the quarter that has appointing power,[39] and this underscores and confirms what is stipulated in the French Employment Law number 244 issued on 4/2/1959 which the law of 13/7/1983 supplements and complements, and the French law grants the administration the power to impose the sanctions of warning and reprimanding without consulting any quarter,[40] while the more severe punishments including the punishment of ending the professional relationship it may impose it upon engaging the opinion of the joint administrative committee which includes equally representatives of the employees and the administration, and in case the administration imposes the

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[37] Ahmad Hiasat, Disciplinary Sanctions Imposed on the Public Service and the Consequence of their Extreme Application on the Administrative Decision, p.73.

[38] Article 172/d of the Jordanian Civil Service Regulation.

[39] Article (19) de la loi n ° 634 du 13/07/1983 **portant droits et obligations des fonctionnaires** https://beta.legifrance.gouv.fr/loda/texte_lc/LEGITEXT000006068812/

[40] Ali Muhareb, Disciplining in Public Office, p.292.

punishment contrary to the opinion of the committee in such case the employee is entitled to present his grievance before the Higher Council of Public Service within a month from the date of being notified of the decision of the imposition of the punishment,[41] and hence the higher administrative chairman represented by the person of the president of the French Republic or the competent minister or the head of the facility is responsible for signing all the punishments stipulated in Article (30) of Law 4/2/1959 including the punishments of terminating the professional relationship, and the only restriction which the administration must abide by is to consult the committee referred to, and the opinion of this committee is not binding on the administration.

Finally, the transfer of an employee is considered among the most prominent applications of disguised disciplinary sanctions in the Jordanian and French administrative judiciary, given that the administration possesses discretionary power to issue decisions to transfer employees so long as they aim to achieve the public interest, and hence the spontaneous transfer is considered an internal measure to which resorts the administration to achieve the public interest, without relying in the process on a disciplinary error from the employee, where the administration might utilize the transfer procedure in order to organize work activity based on its management of the public facility, but it could actually impose a punishment on the employee without following disciplinary procedures, as is the case in adopting the transfer decision with a view to concealing the original purpose or aim, and worthy of mention is that the measure of transfer differs from the measure of disciplining, for the administration possesses discretionary power in its adoption of the transfer procedures with limited guarantees for the employee in this case if not their non-existence, while the authority of the administration is limited by particular parameters, and the employee in this regard has numerous guarantees, which is what impels the administration to be rid of the restrictions and guarantees of disciplining, and resorting to a means that is easier and more secure for it, and perhaps the decisive judge in considering the transfer decision to be a disguised disciplinary punishment is the judiciary which determines based on the conditions and situational components, that the intention of the administration is inclined to

[41] Article 6 of French Edict Number 311 issued on 14/2/1959.

impose punishment on the employee.[42] In this context the French State Council faced this kind of punishments through numerous cases such as the Bidault[43] case and the Ferrand[44] case, but the mission of the administrative judge could be strenuous and profound. [45]

The French administrative courts ruled to compensate a fire fighter in the position of the director of the service of the fire department in (Calvados) district in France for being subject to a disguised punishment. In summary the case had to do with a fire fighter and after eight years in his position began to receive several criticisms of his job performance, and while receiving training for a period of 9 months he was transferred to another position and his job became vacant, and his request to be restored to his position as the fire department manager was rejected. The fireman submitted the dispute to the "Caen Administrative court" which revoked the transfer decisions, and ordered the district (Calvados Fire and Rescue Department) to pay the sum of 18000 Euro as compensation for his various losses, and the fire and rescue services in Calvados appealed the decision before the administrative court of appeal in Nantes, which not only rejected the appeal but also increased the compensation amount to 31872044 Euro, and it ordered the Defense and Security Department in Calvados to pay this sum to the fireman, and in fact the court found that the plaintiff was subject to a disguised punishment, and the court stated firstly that the disguised punishment is characterized by when the protagonist intended actually to punish the employee, and the concerned decision negatively affected his job situation, and the court also stated that the new tasks assigned to the concerned person are not concordant with his rank and he fell under the responsibility of another person, which manifests the intention to penalize the employee, We deduce from this that the rejection of restoring the plaintiff to his position, and appointing him to a position that is not consistent with his grade has actually revealed a disguised disciplinary punishment which generates the right to claim compensation.[46]

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[42] Bawadi Mustafa, Application of Disguised Sanction in the French, Algerian and Kuwaiti Disciplinary Domain, p.37.
[43] .E, 11/6/1993, bidault, no 105 576. Cite par pierre BANDET, Laction disciplinaire dans les trios fonctions, 3 edition, Berger-Levrault, paris, 2001, p.25.
[44] C.E , 4 fevrier 1994FERRAND, no 98 233. Cite par pierre BANDET, p. 26.
[45] CAA Bordeaux, 3 avril 1997*, « Commune de Port-Vendres*.
[46] CAA Nantes 16 mars 2018, n° 16NT00748, SDIS du Calvados.

Moreover, the ruling of the Jordanian Supreme Court of Justice also stated that "the administration may issue a decision to transfer the employee from one position to another so long as the position to which he was transferred is not less than the position from which he was transferred where the underlying cause is the public interest, and so if it becomes evident to the court from the circumstances surrounding the issuance of the transfer decision that the individual of the administration aimed for a purpose contrary to the public interest then the decision would be marred by the defect of misuse of authority, and entails a disguised disciplinary measure, and hence the transfer of an employee from a purely technical job to an educational job that differs from the job he held insofar as qualifications and the conditions of appointment to it, and it therefore follows that the transfer was not based on keenness for the public interest, but rather to impose a punishment on the employee without following the procedures of disciplinary punishment which makes it marred by misuse of authority."[47]

The transfer of an employee is not a disciplinary measure. The administration possesses discretionary power in its adoption of the transfer procedures with limited guarantees for the employee, whereas for disciplinary sanctions the authority of the administration is limited, and the employee in this regard has numerous guarantees. This second kind of action frees the administration of the restrictions and guarantees of disciplining, allowing it to resort to a punishment that is easier and more secure for the administration. The judiciary decides whether the transfer decision is a disguised disciplinary sanction based on circumstantial and situational components, including whether the administration intended to punish the employee.[48] The French State Council considered this type of punishment in numerous cases such as the Bidault[49] case and the Ferrand case.[50]

In another well-known case, the French administrative court ruled to compensate a firefighter in the position of the director of the service of the fire department in the Calvados district for being subjected to a disguised punishment. In summary,

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[47] Publications of Center of Justice, Ruling of the Supreme Court Number 363/1995 Five Member Judging Panel, date 4/2/1996.

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[49] CE, 11/6/1993, bidault, no 105 576. Cite par pierre BANDET, L'action disciplinaire dans les trios fonctions, 3 édition, Berger-Levrault, Paris, 2001, p.25.

[50] CE, 4 Fevrier 1994 FERRAND, no 98 233. Cite par pierre BANDET, p. 26.

the case was about a firefighter who after eight years in his position began to receive several criticisms of his job performance, and while receiving training for a period of nine months he was transferred to another position and his position was declared vacant. The firefighter's request to be restored to his position as the fire department manager was rejected. The fireman submitted the dispute to the Caen administrative court which revoked the transfer decision and ordered the district (Calvados Departmental Union of Firefighters) to pay a sum of €18,000 as compensation for his various losses.

The court found that the plaintiff was subject to a disguised punishment and stated firstly that the disguised punishment is characterized by the protagonist intending to punish the employee and the decision negatively affecting his job situation. The court also stated that the new tasks assigned to the concerned person are not concordant with his rank, which manifests the intention to penalize the employee. We deduce from this that the rejection of restoring the plaintiff to his position and appointing him to a position that is not consistent with his rank has revealed a disguised disciplinary punishment that generates the right to claim compensation.[51]

Moreover, the ruling of the Jordanian Supreme Court of Justice also stated that:

[…] the administration may issue a decision to transfer the employee from one position to another so long as the position to which they were transferred is not less than the position from which they were transferred and where the underlying cause is in the public interest, and so if it becomes evident to the court from the circumstances surrounding the issuance of the transfer that the administration aimed for a purpose contrary to the public interest then the decision would constitute misuse of authority, and entails a disguised disciplinary measure […][52]

VI. Conclusion

After examining the disguised disciplinary sanctions and the extent of their legitimacy the study reached a set of findings and conclusions represented in the following:

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[51] CAA Nantes 16 Mars 2018, n° 16NT00748, SDIS du Calvados.

[52] Publications of Center of Justice, Ruling of the Supreme Court Number 363/1995 Five Member Judging Panel, date 4/2/1996.

- The administrative authority is circumscribed by applying the codified disciplinary punishments represented in notification, warning, deduction from the basic salary not more than seven days a month, suspending the annual raise for a one-year period, suspending the annual raise for a period of three years, suspending the annual raise for a period of five years, dismissal from service, and layoff and dismissal.

- Codified disciplinary measures are defined as a type of punishments emanating from the Public Service regulation which are imposed on the employee ascribed to whom is the commission of the disciplinary violation by the disciplinary authority competent to discipline him and deter other employees, and those punishments aim to disclose the defects of administrative work and guarantee the sound operation of public facilities.

- The codified disciplinary sanctions are divided into moral disciplinary sanctions, financial disciplinary sanctions, and exclusionary disciplinary sanctions.

Legal Force of International Criminal Law Norms

***Dr. Vadym Popko*[1]**

Abstract

The article analyzes the concept of the norm of international criminal law, its characteristics, structure. Particular attention is paid to characterizing the legal force of international criminal law. The issue of combating international crime is currently one of the most pressing and vital issues of modern international criminal law. As a branch of international law, international criminal law was formed in the second half of the twentieth century. Overtime has acquired a feature of a recurring character, manifested in the growing number of rules that carry out regulatory action in close connection with other countries' management of international law. The affiliation of a norm to its normative system gives it binding legal force. A significant increase in the number of law rules led to the formation of its own system of sources, which became a form of existence of the practice. Norms have become real, their content has been enriched, and the scope has expanded.

Keywords: Norm of International Criminal Law, Structure of Legal Norm, Legal Force of Norm, Imperative Norms of Jus Cogens, Sources of Law

I. Introduction

In the late 20th – early 21st century, the international community's efforts were aimed at the development and adoption of criminal procedure rules in the field of combating international terrorism, organized crime, and other forms of international danger. To this end, international conventions, resolutions, and recommendations are adopted, international forums and congresses are convened, and international organizations' activities that contribute to the development of international norms to combat international crime are intensified.

Despite a large number of internationally approved conventions (universal and regional), the focus of the United Nations, the Council of Europe, the European

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Union on combating crime, terrorism, corruption, drug trafficking, money laundering, ongoing work on the implementation of International standards of administration of justice, policing, punishment and treatment of offenders, legal regulation of relations in this area are not perfect: international crime is growing rapidly, diversifying the forms and types of offenses and expanding their geographical boundaries. Therefore, the development, systematization, and codification of international legal norms in the field of international criminal relations require special attention from states and international organizations. It also encourages the conceptual study of the concept of international criminal law, its structure, and legal force.

The most important feature of the system of normative regulation of international relations is that it contains a normative basis for creating a mechanism to maintain general peace and security and comprehensive cooperation on a universal basis. Professor I.I. Lukashuk writes: "Social norms are the main regulation instrument. They arise simultaneously with human communication and are present in any group of people, in any social system. This indicates that without norms, the social organism cannot exist. Society does not tolerate a regulatory vacuum. All forms of public consciousness use this tool. They are largely normative in the sense that they affirm the goals, principles, ideas about the proper rules of human behavior, the organization of society, the state, etc.".[2] The diversity of regulations (morals, law, customs, traditions, corporate norms, religious norms) is due to the complexity of its object. According to scholars, the question of the nature and binding force of international law and its norms has been and remains controversial in legal science, which is relevant for international criminal law.[3]

II. Materials and Methods

The author uses a conceptual approach to clarifying the legal force of international criminal law, studies the techniques of scientists to the subject of study, which determines the soundness of theoretical research, and modern principles of scientific methodology.

The article aims to provide theoretical and legal characteristics of the legal force

[2] VSEVOLOD MYTSYK ET AL., INTERNATIONAL PUBLIC LAW: TEXTBOOK: IN 2 VOLUMES. VOL. 1: FUNDAMENTALS OF THEORY 91 (Kharkiv: Pravo 2019).
[3] GRIGORII TUNKIN, INTERNATIONAL LAW 45-48 (M.: Legal literature 1982)

of international criminal law and identify its features, species characteristics, and structural organization.

III. Results

Norms of law belong to the traditional and most common categories (concepts) of law, which embodies one of its most characteristic features and other social regulators — normative. Normative means that norms do not reflect individual life situations, but the most common, repeatedly repeated, typified, and positively evaluated people's actions and associations.

If the state creates the norms of domestic law, the standards of international law are of collaborative nature. Norms of international law and its principles are created not by bodies standing above states and other subjects of international law but by themselves due to decisions based on mutual concessions, and reasonable compromises agreed with positions on specific international issues. When creating a rule of international law, states act as sovereign and equal subjects, and therefore their expression of will is legally equivalent. As subjects of international law, international organizations can adopt legally significant documents based on the relevant statute, which gives them certain rule-making powers. In any case, only subjects of international law can make certain rules of conduct legally binding.

All norms regulate only socially significant, internationally significant behavior. The norm is the legal system's primary element, which is only in this capacity have all its properties and can function. This pattern is inherent in international law. The American Professor O. Schechter emphasizes that "ideas and norms come into force when they become part of an interconnected system".[4]

International law can be defined as an ideal behavior model in certain typical circumstances. The norm reflects natural international relations. On the other hand, its function is to actively influence these relations to maintain them following the established model or bring them into line. Scholars note that "international legal norms are expressed in international treaties, international

[4] Verkhovna Rada of Ukraine, *Rome Statute of the International Criminal Court of 17 July 1998, as amended.* The current version of January 16, 2002. Document 995_588. http://zakon0.rada.gov.ua/laws/show/995_588.

customs, acts of international conferences and agreements, documents of international organizations. Norms of international law are created by subjects of international law based on the free will of equal participants in international relations".[5] Created in this way, the norm is a formally defined rule that regulates interstate relations by establishing rights and obligations for entities, provided by a legal mechanism of protection. The formal definition means a distinctive feature of international law, which consists of exceptional clarity and certainty in the accuracy of concepts and structures. The norm of international law is understood as a rule of conduct that is recognized by the subjects of international law as legally binding. In essence, such a legal prescription is a "coordinated will of states," which has a dispositive or imperative character.[6] The fact that the rules of international law are the result of coordination and interdependence of the will of states is different from the limitations of domestic law. Compliance is determined by membership in the world community and is ensured by the means at its disposal.

An international legal norm must meet the following requirements:

- Regulate relations between subjects of international law, which is familiar to all social (not only legal) norms;
- To be obligatory for the subjects of this right, which is understood as the existence of a particular legal force, as non-legal norms also have their binding force;
- Be of a general nature, which means: the legal norm must be calculated for a certain number of cases and not be an individual decision, i.e., have an impersonal nature;
- Contain the rights and obligations of the subjects of international relations.

The norm of international criminal law has the same properties but peculiarities. First, the rights and responsibilities conferred on states and other subjects of international criminal law are the content of the norms of international criminal law. Second, the norm of international criminal law defines the rights and obligations of issues in a more clearly defined form. The degree of generalization

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[5] LEGISLATIVE GUIDE TO THE UNIVERSAL LEGAL REGIME. AGAINST TERRORISM (New York: United Nations 2008)

[6] Filip Kozhevnikov, *Generally recognized principles and norms of international law,* 12 SSL 17 (1959)

is much lower than in the norms of general international law.[7] Third, the norm of international criminal law is recognized by states and other subjects of international law as legally binding. Fourth, international criminal law provides for the liability of the subjects of these relations for offenses.

A characteristic feature of the norm of international criminal law is its structure. According to the theory of law, the construction of a legal norm traditionally presupposes the presence of three elements in its structure: hypotheses, dispositions, and sanctions[8]. The rule of law must first list the conditions under which it is applicable (hypothesis); then the very rule of conduct (disposition) should be set out; finally, the norm should contain an indication of the consequences of violating this rule (sanction).

It should be borne in mind the characteristic feature that in the regulations of international criminal law, the definition of punishment is the exception rather than the rule. Most international criminal law operates through the provisions of national criminal law indirectly and under domestic law. Sanctions are contained in the national criminal laws of states after their incorporation into domestic law. In general, the application of sanctions is a very weak point in international public law, as in interstate relations, there are no such institutions (identical to the state) that could guarantee compliance with international norms adequate to the internal actions of states. According to the fair remark of Professor M.Sh. Bassiouni, "The question of punishment in the system of international criminal justice is not so much about what punishment to apply, excluding the death penalty and bodily harm, but rather the philosophical and political basis and purpose of punishment for international crimes".[9]

Most norms of international criminal law contain only a disposition and a hypothesis, i.e., they are definitive and regulatory (prohibitive). Indefinite sanctions contained in most international treaties aimed at combating crime are reference in nature, being a kind of element of sanctions of criminal law in

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[7] DANIEL O`CONNELL, INTERNATIONAL LAW, VOL. I 950 (London: Stevens and Sons 1970).

[8] Verkhovna Rada of Ukraine, *Vienna Convention on the Law of Treaties of May 23, 1969.* https://zakon.rada.gov.ua/laws/show/995_118#Text; Verkhovna Rada of Ukraine, Vienna *Convention on the Law of Treaties of March 21, 1986*. https://zakon.rada.gov.ua/laws/show/995_118#top.

[9] MICHAEL BASSIOUNI, PHILOSOPHY AND PRINCIPLES OF INTERNATIONAL CRIMINAL JUSTICE, INTERNATIONAL CRIMINAL JUSTICE: CONTEMPORARY ISSUES. In G.I. Bogusha, E.N. Tricosis. (Eds.) M.: Institute of Law and Public Policy, 15–23, 21 (2009).

national legal systems. Specific sanctions in case of violation of the disposition may be provided by the rules of special agreements, statutory documents of international courts (tribunals), and domestic law.

Norms of international criminal law provide for the application of sanctions by states individually or collectively and by international organizations – international courts (tribunals), which are endowed with increasing powers in this area. In particular, the Rome Statute of the International Criminal Court provides for the following measures of punishment: imprisonment for a definite term, calculated in the number of years and not exceeding the number of 30 years (Article 77, Part 1, paragraph A); life imprisonment in case of committing an exclusively serious crime and taking into account the individual circumstances of the person found guilty of committing such a crime (Article 77, Part 1, item b); fine (Article 77, part 2, item a); confiscation of income, property, and assets obtained directly or indirectly as a result of the crime, without prejudice to the bona fide rights of third parties (Article 77, Part 2, paragraph b).[10]

The Convention for the Suppression of Bribery of Foreign Public Officials in the Case of International Business Transactions of 1997[11] provides for two types of punishment – imprisonment and confiscation or confiscation. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988[12] obliges the Parties, taking into account the gravity of the offense, to apply the following types of punishment: imprisonment or other forms of imprisonment, penalties, and confiscation. CoE Convention on the Protection of the Environment through Criminal Law 1998[13] several coercive measures are envisaged: imprisonment, fines, confiscation, measures to restore the environment. The actions of states that violate imperative norms are qualified as a gross violation of international law, as aggression, which results in the most severe international

[10] Verkhovna Rada of Ukraine, *Rome Statute of the International Criminal Court of 17 July 1998, as amended.* The current version of January 16, 2002. Document 995_588. http://zakon0.rada.gov.ua/laws/show/995_588
[11] Verkhovna Rada of Ukraine, *Convention for the Suppression of Bribery of Foreign Public Officials in the Case of International Business Transactions of 21 November 1997.* https://zakon.rada.gov.ua/laws/show/998_154.
[12] Verkhovna Rada of Ukraine, *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988*. https://zakon.rada.gov.ua/laws/show/995_096
[13] Verkhovna Rada of Ukraine, *Convention for the Protection of the Environment using Criminal Law of 4 November 1998 (ECR № 172).* https://zakon.rada.gov.ua/laws/show/994_560

sanctions, up to the suppression of the aggressor by force under Art. 42 of the UN Charter.

A feature of international criminal law is the complex structure of the rule, in particular, the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988[14] contains obligations of states to criminalize certain types of transnational crime and more than previous conventions in the field of combating drug trafficking, the degree of specificity formulate the composition of crimes. In addition, the rules of international criminal law are present in several international treaties with a broader subject of legal regulation. Thus, the 1982 UN Convention on the Law of the Sea[15] provides for the obligation of member states to establish criminal liability for piracy, transportation of enslaved people and drugs, unauthorized radio and television broadcasting from the high seas, etc.

Norms of international criminal law are heterogeneous; their classification according to numerous criteria is complex, multifaceted, and not exhaustive. It is worth noting the type of norms in the context of these problems by the method (method) of legal regulation – dispositive and imperative. The bulk of norms in international law is dispositive norms, while in international criminal law, the share of imperative norms is growing significantly. Dispositive is a rule within which subjects of international law can independently determine the rules of their conduct and mutual rights and obligations in international relations, taking into account specific circumstances. For example, under Art. 5 paragraph 1 of the UN Convention against Corruption 2003, "Each State Party, by their principles of its legal system, develops and implements or implements an effective coordinated anti-corruption policy that promotes public participation and reflects the principles of law and order, proper management of public affairs and state property, honesty and integrity, transparency and accountability".[16] Dispositive norms have full legal force. Unless the subjects have agreed otherwise, they are

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[14] Verkhovna Rada of Ukraine, *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988*. https://zakon.rada.gov.ua/laws/show/995_096
[15] Verkhovna Rada of Ukraine, *UN Convention on the Law of the Sea of December 10, 1982.* https://zakon.rada.gov.ua/laws/show/995_057
[16] VSEVOLOD MYTSYK ET AL., INTERNATIONAL PUBLIC LAW: TEXTBOOK: IN 2 VOLUMES. VOL. 1: FUNDAMENTALS OF THEORY 91 (Kharkiv: Pravo 2019).

obliged to comply with the dispositive norm and are responsible in case of its violation.

One of the characteristic features of modern international criminal law is the presence in it of a set of imperative norms (jus cogens – imperative law), which have special legal force. The latter is the inadmissibility of deviations from the norms in the relations of individual states, even though their agreement.

IV. Imperative *Jus Cogens* Norms

Imperative norms set specific boundaries for certain behaviors; these are norms from which deviation from the interstate community recognizes as inadmissible.[17] Professor I.I. Lukashuk emphasizes: "one of the characteristic features of modern international law is a fairly large array of imperative norms, jus cogens, which are endowed with special legal force. In the doctrine and materials of the International Law Commission, the terms "imperative norms" and "jus cogens" are often used interchangeably. The same applies to the Vienna Convention on the Law of Treaties of 1969 (Article 53). Meanwhile, "jus cogens" means rather a set of imperative norms, imperative law".[18]

A custom or contract that contradicts the mandatory rule will be invalid. The new imperative norm invalidates the existing norms that contradict it. It is believed that imperative norms are a new phenomenon. I don't think so. International relations of the past could not do without imperative regulation. The principle of *pacta sunt servada* (treaties must be observed) was imperative, without which there is no international law. Prohibitions on piracy and the slave trade, as well as some rules of warfare, were imperative. The novelty is that today the imperative norms form a whole complex that determines the nature of international law, its goals and principles, the main content. In addition, the imperative norms have received official recognition.

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[17] EVGEN KOZIUBRY (ED.), GENERAL THEORY OF LAW 129, 392 (Waite 2015).
[18] IGOR LUKASHUK, NORMS OF INTERNATIONAL LAW IN THE INTERNATIONAL NORMATIVE SYSTEM. In Kachanov V.A. (Ed,) Spark, 322, 161 (1997)

Prerequisites for the formation of imperative law were created by the UN Charter.[19] It is often suggested that imperative norms emerged after the formation of the United Nations.[20] World War II showed that the current world order could put humanity on the brink of disaster. The need to change it became obvious. The UN Charter enshrines the overriding force of its obligations over the obligations of its members under some other international agreement (Article 103). It was also found that the UN respects the principles of the Organization even by non-member States, as this may be necessary to maintain international peace and security (Article 2, paragraph 6). All this was a significant contribution to the formation of imperative law. According to scholars, "the basic principles of international law have the highest legal force and are binding on all states."

Further development of mandatory law is associated with the adoption of the Vienna Conventions on the Law of Treaties of 1969 and 1986, according to which the mandatory rule is the one that is "accepted and recognized by the international community as a whole as a rule only the next norm of general international law, which would be of the same nature" (Article 53 "Obligations that have force under international law, regardless of the treaty").[21] Fifty-three states that a treaty is irrelevant if it contradicts the mandatory norm of general international law at its conclusion. If there is a new compulsory rule of general international law, then any existing treaty, which conflicts with this rule, becomes invalid and terminated (Article 64).

The nature of imperative norms has been thoroughly considered in the International Law Commission.[22] In the Commentary to Art. 37 of the draft articles on the law of international treaties, the International Law Commission noted that the emergence of norms that have the character of "jus cogens" is a

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[19] Verkhovna Rada of Ukraine, *The Charter of the United Nations and the Charter of the International Court of Justice.* International document dated on June 26, 1945. http://zakon5.rada.gov.ua/laws/show/995_010

[20] SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 19 (New York: Oceana Publications, Inc., 1984).

[21] Verkhovna Rada of Ukraine, *Vienna Convention on the Law of Treaties of May 23, 1969.* https://zakon.rada.gov.ua/laws/show/995_118#Text; Verkhovna Rada of Ukraine, Vienna *Convention on the Law of Treaties of March 21, 1986.* https://zakon.rada.gov.ua/laws/show/995_118#top.

[22] UN, *Yearbook of the International Law Commission.* DOCUMENTS OF THE FIFTEENTH SESSION INCLUDING THE REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY 1, 1963, 52

relatively new phenomenon.[23] In discussing this article, most participants pointed out that the imperative norms express the common interests of states and the world community as a whole.[24] The same view was emphasized in the responses of several governments and expressed during the discussion of the draft articles in the Sixth Committee of the General Assembly. This fact was noted by the Austrian scientist A. Ferdross, who said that it is about the interests of all humanity.[25] On this basis, it was concluded that the articles on the law of treaties should take into account the existence of certain norms and principles from which states cannot deviate on the basis of bilateral and regional treaties.[26] However, some participants in the discussion were skeptical about this idea. As a result, the article on imperative norms was adopted with 87 votes; against – 8; abstained – 12.[27] Over time, the application of mandatory rules has gained ground in the practice of international courts; in particular, the International Court of Justice was one of the first to refer to the mandatory law in deciding the case of US diplomatic and consular personnel in Tehran. In the Order on Preliminary Measures in the case, the Court qualified the violation of immunity as a violation of mandatory rules.[28]

An imperative norm is a norm that is expressed in categorical prescriptions and operates independently of the subjects of international law. International law issues are not entitled to voluntarily change the scope and content of rights and obligations established by mandatory rules. It can be assumed that imperative norms (jus cogens) form the basis of all international law and international relations in general, the base of the entire international legal order and world political stability. Imperative norms have the highest legal force; any other norms of international law must comply with the norms of jus cogens. The norms of jus cogens are the basic norms-principles of international law, including those enshrined in the UN Charter. Their content is disclosed and supplemented by the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation between States under the UN Charter of 24 October 1970 and

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[23] UN, Yearbook of the International Law Commission. SUMMARY RECORDS OF THE EIGHTEENTH SESSION 4 May – 19 July, 1966, Vol. 1, 39
[24] ANTONIO CASSESE, INTERNATIONAL LAW. (2ND ED.) (Oxford University Press 2003)
[25] Verkhovna Rada of Ukraine, *Vienna Convention on the Law of Treaties of May 23, 1969*
[26] UN, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION II (N.Y. 1967)
[27] Verkhovna Rada of Ukraine, *UN Conference on the Law of Treaties*. Second session 107 (2003)
[28] ICJ Reports 1993. 20

the Final Act of the Conference on Security and Cooperation in Europe (CSCE) of 1 August 1975; they also include the principles of observance of the laws and customs of war.

V. Legal Force of International Criminal Law Norms

Norms of international criminal law are created by its subjects, first of all by the states using the agreement in which maintenance is the agreed will of the parties. Arguments for this position are, first, the lack of supreme power in the international system as a source of rule-making.[29] Unlike national law, international law is not inherent in the supreme power; it is not associated with any higher authority than the state. Secondly, the number of subjects adopting an international normative act is limited; sometimes, it is a minimal number of states.

When creating a rule of international criminal law, two agreements are reached: one on the content of the rule, the other – on giving it legally binding force. Recognition of binding force under international law is determined by the needs of the life of the international community, the fundamental interests of states. Nevertheless, legal regulation of international relations is an absolute necessity, and, therefore, giving international law binding legal force is inevitable. There is no alternative to this.

The source of the legally binding force of international criminal law is states' agreement. The legal force of universally recognized norms of international criminal law is generated by the consent of states, the consent of the international community as a whole, which is embodied in the principle of conscientious fulfillment of obligations under international law. The provision according to which the agreement is a source of the binding force of international criminal law and international law, in general, is reflected in international practice, including judicial. Scholars note that "the objective social reality and the current state of development of the IP show that the source of the legally binding force of international law is the agreement, the will of the states, and the general agreement

[29] GRIGORII TUNKIN, INTERNATIONAL LAW 45-48 (M.: Legal literature 1982)

of the international community with the basic imperative principle of the ICJ. *Sunt servanda* is confirmed in international practice, including the judiciary".[30]

Recognition of binding force under international criminal law is determined by the needs of the life of the international community and, the fundamental interests of states, the need to combat international crime. Legal regulation of relations in the field of combating international crime is necessary. Consequently, the provision of binding legal force to the norms of international criminal law is inevitable and dictated by the needs of the international community.

Legal force can distinguish imperfect and dispositive norms of international criminal law. At once, we will make a reservation that here the first group of norms dominates over the second. For international criminal law, the category of "dispositiveness" is considered atypical and rarely used. Most of the provisions in international criminal law are imperative, and most often, they are rules of jus cogens, from which the subjects of international law cannot deviate even by mutual agreement. The provisions of the Vienna Conventions also apply to international criminal law in terms of the status of mandatory norms.

There is no hierarchy of rules of law in international criminal law, which is observed in national law, in particular in the law of the continental legal family. However, we note the status of the basic principles of international criminal law, which cannot be implemented without more specific treaties or customary rules, such as mandatory rules, jus cogens. The main distinctive qualities of mandatory norms in international criminal law are the highest legal force, which in some cases is retroactive, and a unique mechanism to ensure their implementation.[31]

By the nature of their action in international criminal law, mandatory rules of international law can be divided into those that have a direct effect. They may not be included in domestic law and those that have an indirect effect. Such rules must be included in the peculiarities of international criminal law in comparison with the rules of national law. They are intended to be applied in relations between two or more specific subjects. They cannot be extended to other participants in international communication except generally accepted principles and norms of

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[30] VSEVOLOD MYTSYK ET AL., INTERNATIONAL PUBLIC LAW: TEXTBOOK: IN 2 VOLUMES. VOL. 1: FUNDAMENTALS OF THEORY 91 (Kharkiv: Pravo 2019).
[31] OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 22 (Dordrecht, The Netherlands; Boston: M. Nijhoff Publishers; Norwell, MA, U.S.A.: Sold and distributed in the U.S.A. and Canada by Kluwer Academic Publishers 1991).

international law. Still, their share is small in the normative system of international law.

The statutes of international organizations (UN, International Court of Justice, International Criminal Court) and international tribunals (Nuremberg, Tokyo, International Tribunal for the Former Yugoslavia and Rwanda) are imperative in international criminal law. The creation of the last two tribunals by the UN Security Council has become a unique case of the direct creation of norms and institutions of international criminal law – and the peculiarity of such tribunals was not in the contractual nature but in "tacit recognition of their states".[32] "Of particular importance in the development of the legal force of international criminal law o law and international criminal law in general, has the establishment of the International Criminal Court in 1998 with the adoption of its Statute".[33] The legal force of the Rome Statute, which ensures the implementation of international criminal law, is beyond doubt. At the end of the twentieth century. Italian scholar A. Cassese wrote: "While national criminal law is based on the generally accepted principle of formal certainty, international criminal law contains numerous rules that do not detail the essential elements of the crime.[34] The Rome Statute largely overcame the shortcoming, and each definition is clearly articulated to reflect the current rules of international criminal law and meet the requirements of certainty in criminal law and developed by the Preparatory Commission of the International Criminal Court under Art. 9 of the Statute of the Elements of Crimes assist the Court in interpreting and applying the articles governing its substantive jurisdiction.[35]

The imperative norms of international criminal law include the main goals and principles of international criminal law; principles and norms that consolidate the achieved level of humanity (on the rights of human beings, peoples, national minorities, the protection of victims of war, on the prohibition of the use of certain

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[32] IGOR LUKASHUK, & ANATOLII NAUMOV, INTERNATIONAL CRIMINAL LAW 15-16 (Moscow: Spark 1999).
[33] Nataliia Zelinskaya & Nataliia Dremina-Volok, *The concept of crimes under general international law in the context of the problem of retroactive application of international criminal law* 189-210 ALM INT LAW 2 (2012).
[34] Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR J IL, 148–149 (1999)
[35] International Criminal Court. Assembly of States Parties to the Rome Statute of the International Criminal Court. First session. New York, September 3–10, 2002 Official Records elements of the crime. Doc. ICC-FSP/1/3/.

weapons, on the crime of piracy, slavery, etc.); norms prohibiting aggression, interference in internal affairs, colonial and other foreign domination; norms prohibiting crimes against humanity: genocide, apartheid, slavery, etc. Imperative norms are also contained in numerous anti-criminal conventions adopted to combat crimes of an international nature (transnational crimes): the UN Convention against Transnational Organized Crime of 15 November 2000, the Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime. 1990, Council of Europe Convention on Cybercrime of 23 November 2001, Council of Europe Convention on the Prevention of Terrorism of 16 May 2005

Thus, the highest legal force in international criminal law is endowed with norms-principles and imperative norms contained in treaties (conventions, agreements, statutes, declarations), and they are provided by implementation in public relations. At the same time, the question arises of recognizing the legal force of acts of international organizations in international criminal law. The significant increase in resolutions adopted annually by international organizations reaches many thousands; they can relate to various aspects of global life, depending on the subject of the Organization. Among them, there is the vast majority of resolutions-recommendations.

Legal acts of international organizations are a practical form of expression of the will of the states by which they are adopted and have a recommendatory character. Unlike a treaty, in which the intention of states is clear and definite, acts of international organizations are usually a step leading to the completion of forming a compact or custom. However, the international Organization may adopt resolutions binding on states.[36] This right is enshrined in the Organization's charter and does not arise from its own decisions. For the first time, this problem was most acute in connection with the adoption by the UN General Assembly in 1950 of the Resolution "Unity for Peace", and was resolved in favor of compliance with the statutory powers of the Organization. The statutes of international organizations usually contain severe restrictions on the adoption by its bodies of acts binding on states. For example, the UN Security Council may take such decisions only in the event of threats to peace, violations of peace, and

[36] Ruben Kalamkarian & Yuriy Migachev, *The international normative system as an institutional and legal component of the modern world order,* 6 STATE AND LAW, 62–70 (2015)

acts of aggression and in compliance with special procedural requirements (Chapter VII of the UN Charter).[37] The Security Council exercised this power by adopting Resolution 827 of 25 May 1993 to establish an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia since 1991. Later, on 8 November 1994, the Security Council Resolution 955 established the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in Rwanda and Rwanda Citizens Responsible for Genocide and Other Similar Violations. J. Brownlee and A. Cassese noted that the norms that provide for international criminal responsibility for genocide, crimes against humanity, and war crimes are imperative.[38]

Documents of the Security Council were adopted based on Chapter VII of the UN Charter, which empowers this body to adopt resolutions that are legally binding on all UN member states. Of particular importance are the Security Council's anti-terrorism resolutions, in particular those aimed at countering terrorist organizations such as the Taliban and Al Qaeda (Resolution 1267 (1999) of 15 October 1999, Resolution 1333 (2000) of 19 December 2000), Resolution 1363 (2001) of 30 July 2001, Resolution 1373 (2001) of 28 September 2001), which prohibited states from financing and providing any other support to terrorist organizations. Thus, UN Security Council Resolution 1373 (2001) of 28 September 2001[39] called on States to take several measures to strengthen their legal and institutional capacity in the fight against terrorism, including by establishing criminal liability for active and passive assistance, a specified illegal act. UN Security Council resolutions note the close link between international terrorism and drug trafficking, money laundering, arms trafficking, and other

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[37] UN GENERAL ASSEMBLY, *Resolution 377 (V) of 3 November 1950 gave the Assembly the right to take action in the event of the inability of the UN Security Council to act due to a vote against one of its permanent members if there are grounds for perceiving a threat to peace, peace or aggression* 1950The Assembly may immediately consider this matter in order to provide members with the necessary recommendations for collective action to maintain or restore international peace and security

[38] JOHN BROWNLLE, INTERNATIONAL LAW 489 (Oxford University Press 2005); JOHN BROWNLLE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 535 (Oxford 1966); ANTONIO CASSESE, INTERNATIONAL LAW. (2ND ED.) (Oxford University Press 2003)

[39] Verkhovna Rada of Ukraine, *Convention for the Protection of the Environment using Criminal Law of 4 November 1998 (ECR № 172).* https://zakon.rada.gov.ua/laws/show/994_560

transnational crime and oblige states to develop a national strategy to combat terrorism and other crimes and criminalize specific actions. The UN Security Council also adopted several unprecedented resolutions to combat piracy and robbery off the coast of Somalia ("anti-piracy resolutions"): Resolution 1816 (2008) on 2 June 2008, Resolution 1950 (2010) on 23 November 2010, Resolution 1976 (2011) on 11 April 2011.

Even though the binding nature of resolutions has been repeatedly emphasized in UN documents, Security Council resolutions are adopted in specific situations on certain aspects of criminal activity. In particular, the Guidelines for Legislators on the Universal Legal Regime against Terrorism, prepared by the United Nations Office on Drugs and Crime in 2008, stated that Security Council resolutions on terrorism, many of which were adopted under Chapter VII of the Charter of the United Nations "The United Nations, which gives the Security Council the right to adopt resolutions that are binding on all Member States of the United Nations, is considered one of the key components of the global legal framework for combating terrorism".[40]

Of great political and legal importance are the resolutions of the General Assembly on cooperation, security, and disarmament, adopted in full compliance with the UN Charter. Back in the middle of the last century, Professor F.I. Kozhevnikov wrote that "the establishment of the General Assembly, this UN body, adopted by him unanimously, goes beyond simple recommendations and acquires legal force".[41] General Assembly resolutions, like other provisions, extend the rules previously formulated by a limited number of States to other non-treaty States. However, as Brownlee noted, "whatever the political or moral force of the General Assembly's recommendations, they are not legally binding." O'Connell supported him. The recommendatory nature of the General Assembly resolutions is noted in Art. 10, 11, 14 of the UN Charter[42]; however, despite all this, we note the great role of the General Assembly in the law-making process and the progressive development of international law, as its establishment has

[40] Legislative Guide to the Universal Legal Regime. (2008) *Against Terrorism.* New York: United Nations

[41] Filip Kozhevnikov, *Generally recognized principles and norms of international law,* 12 SSL 17 (1959)

[42] Verkhovna Rada of Ukraine, *The Charter of the United Nations and the Charter of the International Court of Justice.* International document dated on June 26, 1945. http://zakon5.rada.gov.ua/laws/show/995_010

legal value. Resolutions and other acts of the General Assembly are an aid, certain stages in the general process of rule-making. Still, they do not lead to their completion, i.e., they are not direct sources, but only those ways that may ultimately lead to the rule of international law.

The rules on the criminalization of criminal acts of resolutions of both the UN General Assembly and the Security Council relate to specific situations, are advisory rather than binding, and do not serve as a criminal prohibition but are important in formulating mandatory rules of international criminal law.

VI. Discussion

Based on the study and theoretical generalization of the research topic, the following could be emphasized: the norms of international criminal law are the normative basis for the functioning of the mechanism of universal peace and security and the necessary basis for cooperation between states and international organizations.

The norm of international criminal law must meet specific requirements but has its characteristics, which are manifested in the content, formal definition, level of generalization, structure, and legal force. In modern international criminal law, there is a set of imperative norms (jus cogens – imperative law), which have a special legal power: the inadmissibility of deviations from the norms in the relations of individual states even using their agreement.

Dispositive norms are also legally binding. The source of their binding force is the agreement of the states, which gives legal force not only to a separate treaty but also to international law. Imperative nature is endowed with norms-principles, contractual norms, statutory provisions, and customary rules of conduct. Legally binding force in international criminal relations is determined by compliance with the regulations provided by the system of international legal sanctions.

VII. Conclusion

The norms of international criminal law contain a normative basis for creating a mechanism to maintain general peace and security, as well as comprehensive cooperation between states and international organizations on a universal basis.

A norm is a formally defined rule of conduct that regulates interstate relations by establishing rights and obligations for subjects; it is a legally binding rule recognized by the subjects of international law and provided by a legal mechanism of protection.

The norm of international criminal law must meet certain requirements (formal certainty, regulatory nature, binding nature, understood as the existence of a certain legal force; general, not personalized nature; contain the rights and obligations of subjects of international relations), but must its features. The rights and responsibilities conferred on the subjects of international criminal relations are the content of the norms of international criminal law. Their content is expressed in a more clearly defined form because the degree of generalization is much less than the rules of general international law. The norm of international criminal law is recognized by states and other subjects of international law as legally binding. International criminal law provides for the liability of the subjects of these relations for offenses.

Another feature of the norm of international criminal law is its structure, which provides for the presence of three elements: hypotheses, dispositions, and sanctions. The peculiarity is that in the normative legal acts of international criminal law, the definition of punishment is the exception rather than the rule. Most international criminal law operates indirectly through the provisions of national criminal law and follows domestic law. Sanctions are contained in the federal criminal laws of states after their incorporation into domestic law.

In modern international criminal law, there is a set of imperative norms (jus cogens – imperative law), which have a special legal force: the inadmissibility of deviations from the norms in the relations of individual states using their agreement. Dispositive norms are also legally binding. The source of their binding force is the agreement of the states, which gives legal force not only to a separate treaty but also to international law as a whole. Imperative nature is endowed with norms-principles, contractual norms, statutory provisions, and customary rules of conduct. However, in certain cases, international organizations may adopt resolutions binding on states, such as those of the UN General Assembly and the UN Security Council on peace, cooperation, security, and disarmament, adopted in full compliance with the UN Charter.

Taking into account the peculiarities of international criminal law, its sources, and methods of their formation, the legally binding force of norms in the field of illegal international relations is determined by compliance with the norms provided by the system of international legal sanctions.

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An Examination of Legal Framework for Solid Waste Disposal and Management in the United Kingdom and South Africa: Lesson for Nigeria

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Abstract

One of the most pervasive environmental threats in the world is solid waste, which includes trash, refuse, garbage, and rubbish from residential and business operations. The threat is present in many nations, including Nigeria. Despite the existence of the necessary legal frameworks (rules and institutions), the inefficiency for the control and management of solid waste in Nigeria is very frightening. This article looks at the legislative frameworks for solid waste in South Africa, the United Kingdom, and Nigeria in an effort to learn from them for Nigeria. To obtain data for a comparative comparison, the doctrinal approach of legal research was used. The analysis found that in order to manage and control the threat in accordance with the standard for best practices around the world, the existing legislative frameworks is insufficient. However, this paper came to the conclusion that the problem is not solely due to the inadequate legal framework; it is also due to the general lack of concern individuals have for solid waste management and control, which makes it impossible to achieve success despite significant effort. Lessons were drawn for a better control and management of solid waste in Nigeria as a way ahead.

Keywords: Environment, Solid Waste, Solid Waste Management, Legal Framework, Nigeria

I. Introduction

The problem of solid waste is a long-standing one since human activity is inextricably linked to the production of solid waste, which makes its production

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unavoidable[3]. Solid waste is currently one of the most serious environmental threats facing Nigeria, as well as the rest of the world. This is likely because many Nigerians have fallen behind in the pace of urbanization and the waste generation that comes along with it as a result of people's shifting lifestyles and consumption habits.[4]

There seem to be ignorance and negligence of the danger associated with indiscriminate waste disposal among some residents in Nigeria despite the legal frameworks (laws and institutions) in place to curb criminality in that regard. Yet, these set of residents continue to litter the environment.[5]

However, some jurisdictions[6] today are keeping pace with the solid waste generation in proportion to its growth and management in line with other socio-economic parameters[7] which guaranty a sustainable healthy environment. [8] Therefore, it is so pertinent to examine the spirit of commitment in those jurisdictions so that Nigerian can learn from them. These jurisdictions are not absolutely solid waste free though. But, the level of efficacy is at high side. It is against the backdrop that this paper set out to examine legal framework (law, policy and practice) in Nigeria, South Africa (SA) and United Kingdom (UK) in a bid to pinpointing and drawing out lessons for Nigeria to emulate.

II. Research Methodology

The paper makes use of the doctrinal research approach. It is library research that uses both primary and secondary sources. Statutes, the Constitution, Acts, and Laws are the primary sources, whereas books, articles, and other materials are

[3] Napoleon S. Momodu, Kingsley O. Dimuna and Joan E. Dimuna, 'Mitigating the Impact of Solid Wastes in Urban Centres in Nigeria' [2011] 34(2) *J Hum Ecol* 126.

[4] *Ibid*.

[5] Afangideh A. I, Joseph K. U and Atu J. E, 'Attitude of Urban Dwellers To Waste Disposal And Management in Calabar, Nigeria' [2012] 1 (1) *Europian Journal of Sustainable Development* 23.

[6] Developed and developing countries like UK and South Africa respectively.

[7] Sakurai K, 'Improvement of solid waste management in developing countries' [1990] 1 *Institute for International Cooperation Japan, JICA Technical Handbook Series* 7; Achankeng E, 'Globalization, urbanization and municipal solid waste management in Africa' In African Studies Association of Australasia and the Pacific, 26th Annual Conference Proceedings: Africa on a global stage (University of Adelaide, Australia 2003).

[8] Such as population, personal income and consumption patterns.

secondary sources. The 1999 Constitution of the Federal Republic of Nigeria (as amended), the Environmental Impact Assessment Act (EIA Act), and others are some of the key sources examined in this article. Books, articles, and journals that are pertinent to the topic of this research are among the secondary sources. The world has become a worldwide room as well as a global village thanks to the internet. It is quite beneficial for several studies of various kinds; nothing that is required for knowledge cannot be found online. So, while getting this piece together, the internet has been a huge assistance.

III. Conceptual Framework

A. Solid Waste

Solid waste is of the common environmental pollution[9] around human inhabitant which includes; air pollution, water pollution and land or surface pollution. It is pertinent to note that, solid waste is a common form of land or surface area pollution. Thus, Solid waste is any discarded material which is abandoned, unwanted and considered inherently waste-like.[10] Solid waste such as garbage, trash, refuse, slug or rubbish is disposed of or expected to be disposed of in line with national law.[11] Solid waste consists primarily of materials that have been abandoned or are no longer needed as a result of human activity on different types of property, including residential, commercial, and industrial uses[12]

Therefore, solid waste may not generally be regarded as useless and unwanted unless it is not adequately disposed of and managed in accordance with the current legislative rules. [13]

B. Solid Waste Management

Solid waste management is a professional and technical one which goes beyond the physical aspects of handling waste as it involves; preparing policies,

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[9] NESREA Act S 37, where pollution is defined as man-made or man-aided alteration of chemical, physical or biological quality of the environment to the extent that it is detrimental to that environment or beyond acceptable limits.
[10] The U.S RCRA,1986, s 261.
[11] Hakeem Ijaiya, 'The Legal Framework for Solid Waste Disposal and Management in Kwara State, Nigeria' [2013] 4 *Journal of Environmental Protection*, 1240-1244 < http://www.scirp.org/journal/jep> accessed 24 April, 2022.
[12] Yahaya Ganiyu and Kehinde Adeola Olufunke, 'An Appraisal of the Legal Framework of Solid Waste Control in Nigeria' [2020] 2 *FUOYELJ*, 34.
[13] *Ibid*.

determining the environmental standards, involvement of experts, enforcing regulatory mechanisms and etcetera[14]. Waste management entails a wide range performance of various functions. Ikoni[15] asserts that solid waste management is the collection and careful processing of solid wastes from the point of generation to the point of disposal in order to attain the highest level of environmental safety.

From Ikoni's assertion, Therefore, managing solid waste involves a variety of functions, including gathering, storing, transferring, handling, transporting, processing, and final disposal in accordance with global best practices, public health standards, and current legal and regulatory frameworks. So, managing solid waste is both a procedural and administrative duty. In order to ensure that sustainable development is achieved, there is a need to ensure that solid wastes are properly managed.[16]

C. Solid Waste Management Approach

In all jurisdictions, currently no single waste management strategy is suitable for solid waste. For instance, The United States (U.S) Environmental Protection Agency (EPA) developed a strategy for managing and controlling municipal solid waste which is ranked as the most environmentally sound method.[17] The strategy emphasizes waste reduction, reuse, and recycling and highlights the essential elements of the EPA's Sustainable Materials Management (SMM) Program. In the same line, the United Kingdom's (U.K.) strategy is comparable to that of the U.S., with the exception that Recovery and Treatment prior to final disposal are the responsibility of local governments rather than people for the 3Rs (also known as the 3Rs). It is important to emphasize at this point that the majority of ecologically friendly methods for managing solid waste revolve around Source Reduction and Reuse, Recycling/Composting, Energy Recovery/Treatment, and Final Disposal.

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[14] *Ibid*.

[15] U.D. Ikoni, *An Introduction to Nigerian Environmental Law* (Malthouse Press Limited, Lagos 2010) 87.

[16] Kehinde A.O, "Legal Control of impro per and effect of improper solid waste management in Nigeria" Novena Law Journal Vol.6, 2.

[17] United State Environmental Protection Agency 'Municipal Solid Waste - Basic Facts' [2007] 1 accessed 05 June 2022., <https://www.nrc.gov/docs/ML0720/ML072040338.pdf > .

IV. Nigeria's Legal Framework (Laws and Institutions)

A. The 1999 Constitution of Nigeria[18]

By virtue of Chapter II, the Constitution of the Federal Republic of Nigeria (CFRN), 1999 (as amended), acknowledges the necessity of enhancing and safeguarding the environment. The Constitution's Chapter II focused primarily on the Fundamental Goals and Direct Principles of State Policy. According to Section 20 of that document, the State is required to safeguard Nigeria's water, air, land, forest, and wildlife as well as to maintain and improve the environment. Therefore, section 20 deals with improving and safeguarding the air and atmosphere, land and surface area, water and aquatic environments, and animals from all kinds of pollution and deterioration. The Declaration on Environment and Development states that "Human beings are at the centre of concerns for sustainable development," which is consistent with this. They have the right to live a healthy, fulfilling existence in balance with the natural world.[19] But, the ability to challenge the States' failure to improve and protect the environment cannot be judicially enforceable due to the provision of section 6(6)(c) of the same constitution. Thus, the Constitution contains a vast collection of rights[20] which are sacrosanct among which a right to healthful environment can be derived.[21]

Today, the citizens can seek environmental justice and protection of their rights to healthful environment through the three key alternatives available notwithstanding the non-justifiability of the provision of section 20 of the constitution. These alternatives are: the African Charter on Human and Peoples' Rights (also known as Banjul charter)[22], the provisions of chapter IV of the

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[18] Cap C23, LFN 2004.

[19] Principle 1 of the 1992 Rio Declaration; CFRN, 1999 (as amended) s12, which impliedly establishes that international treaties (including environmental treaties) ratified by the National Assembly should be implemented as law in Nigeria.

[20] The rights including; the right to life, the right to fair trial, the right to protection from discrimination, the right to equality to mention a few.

[21] B. A. Abdulkadir, 'The Right to a Healthful Environment in Nigeria: A Review of Alternative Pathways To Environmental Justice in Nigeria' [2014] 3(1) *Afe Babalola University: Journal of Sustainable Development Law and Policy* 118-131.

[22] See Article 24 of The African Charter on Human and Peoples' Rights (adopted 27 June, 1981 and entered into force 21 October,1986) which recognizes the right of all people to a generally satisfactory environment favourable to their development. See also,

Nigerian Constitution and the Common law principles in *Ryland v. Fletcher*[23] (although remedies awarded either in the form of damages, redress and compensation under the principles are majorly to benefit claimants rather than focusing on restoring the environment).

Through the *Gbemre v. Shell Petroleum Development Company of Nigeria Limited*[24] case, a new era of access to environmental justice and protection of the right to a healthy environment in Nigeria officially began in 2005. For the first time, the court was able to incorporate the right to be free from pollution or actions that harm life into the right to life. In that case, the court made a ground-breaking and bold ruling that demonstrates the willingness of the Nigerian judiciary to interpret the right to life broadly to encompass the right to a healthy environment. As the first court body to declare gas flaring illegal, unconstitutional, and a violation of the basic human right to life, this case set a precedent in Nigeria.

In this article it is observed that the Nigerian Constitution has not adequately captured all area of environmental justice and protection of rights to healthy/clean environment. Thus, right to healthy/clean environment can be best sought by anchoring it on Fundamental Human Right[25] and the African Charter on Human and Peoples' Rights[26].

B. The National Environmental Standards and Regulation Enforcement Agency (NESREA) Act

The NESREA Act[27] replaced the defunct Federal Environmental Protection Agency (FEPA) Act[28] own to poor environmental compliance and enforcement

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Fawehinmi v Abacha [2001] 51 WRN 2where Ejiwumi JSC asserted that 'the Africa Charter on Human and Peoples' Rights, having been passed into our municipal law, our domestic courts have certainly has the jurisdiction to construe or apply the treaty. It follows then that anyone who felt that his rights as guaranteed or protected by the Charter, have been violated could well resort to its provisions to obtain redress in our domestic courts.'

[23] (1865) 3 H. & C. 774.

[24] Suit No: FHC/B/CS53/05.

[25] Chapter IV CFRN, 1999 (as amended).

[26] Articles 2 (non-discriminatory enjoyment of rights), 4 (right to life), 14 (right to property), 16 (right to health), 18 (family rights), 21 (right of peoples to freely dispose of their wealth and natural resources) and 24 (right of peoples to a satisfactory environment).

[27] Cap E146 LFN 2007.

[28] Cap F 10 LFN 2004.

regimes due to subsequent adverse impacts on the environment and human health in Nigeria.[29] The NESREA is now the main agency mandated to; enforce compliance with both local and international environmental laws on environmental sanitation, pollution prevention and control via monitoring and regulatory measures; and to make regulations on air and water quality, effluent limitations, control of harmful substances and other forms of environmental pollution and sanitation as contained in sections 7 and 8 of the Act. Thus, the NESREA Act enjoys the unsurpassed role of the flagship legislation on environmental law in Nigeria.

The chief enforcer, as enshrined in the Act, is an "officer" of the Agency.[30] In addition to the Agency official, any Police officer not below the rank of Inspector of Police or any Custom officer can enforce the Act.[31] Not often than not, obstruction of an officer under the provision of the Act carries a stiff penalty.[32] If the obstruction is caused by an individual, upon conviction, such individual shall be sentenced to a minimum fine of ₦200,000 or a maximum imprisonment of one year or to both fine and imprisonment, and an additional fine of ₦20,000 for each day the offence continues[33]. If the obstructer is a corporate body, it shall, upon conviction, be liable for a fine of ₦2,000,000 with an additional fine of ₦200,000 for each day the offence continues.[34]

Nevertheless, it is consequential to note that the powers of the Agency do not extend to environmental issues arising from the oil and gas sector.[35] In other words, the Agency lacks jurisdiction over environmental matters emanating from the oil and gas sector.[36]

In the opinion of this paper, the NESREA Act is yet to part away with those shortcomings ascribed to the defunct FEPA as the defunct FEPA Act had

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[29] M. Ayo Ajomo and Omobolji Adewale, *Environmental Law and Sustainable development in Nigeria* (Institute of Advanced Legal Studies Lagos, Nigerian 1994) 67-80.
[30] NESREA Act, Cap E146 LFN 2007, s 30 (1).
[31] *Ibid*, s. 37.
[32] *Ibid*, s .31.
[33] *Ibid*.
[34] *Ibid*.
[35] *Ibid*, s. 8 (g) (k), (n), (s).
[36] The Petroleum Industry Bill (PIB) that will regulate the oil and gas sector is before the National Assembly.

impliedly accommodated the "polluter pays principle" (by dealing with environmental issues arising from the oil and gas sector) as enshrined in the FEPA Act[37]. Similarly, a lot of the Agency's mandates are targeted towards compliance with provisions of various environmental laws/regulations and prevention of environmental devastation without proactive measures on restoration of environmental devastation.

C. The Harmful Waste (Special Criminal Provisions) Act

The Harmful Waste (Special Criminal Provisions) Act[38] was the first legislative intervention in Nigeria following the Koko dumping incident[39]. The Act was originally promulgated as a decree and later metamorphosis into an Act. It is important to note that the Koko incident is not a coincidence, but a reason or reasons for emergence of environmental law for healthy environment in Nigeria. The Act prohibits illegal carrying, dumping, importing, or causing to import or negotiation for the purpose of importing or depositing of harmful waste on any land or territorial water of Nigeria.[40]

Moreover, the Act contains offence and penalty provisions which include life imprisonment on conviction. On this note, carrier or aircraft used or any land on which the harmful waste was deposited shall be forfeited to the Government of the Federal Republic of Nigeria.[41] The Act, also, provides for a categories of the offenders (such as; one who aids, one who counsels or procures, as well as offenders with a common intention) in connection with the violation of the Act, who are to be all liable to the same extent on conviction as the major offender.[42] Also, where the offender is a corporate body, and it can be proved that an officer

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[37] FEPA Act, Cap F 10 LFN 2004, s. 21 & 22.

[38] Harmful Waste (Special Criminal Provisions) Act, CapH1 LFN 2004.

[39] Koko incident of 1988 came to live when toxic waste dumped by Italian company in Koko, a remote part of the then Bendel State (now Edo State), Nigeria was discovered.

[40] Harmful Waste (Special Criminal Provisions) Act, Cap H1 LFN 2004, s.1.

[41] *Ibid* id, s. 6.

[42] *Ibid*, s 2 and 3. Although, these provisions of section 2 and 3 are seemed to be uncalled for, because Nigerian criminal laws are quite explicit on the point of accomplish, abetment and the likes in their various provisions. Therefore, both sections are saying nothing new.

or director therein had contributed act or omission to the crime, such officer or director is liable, on conviction, to life imprisonment under the Act.[43]

The Act also accommodate civil liability as the Act makes an offender liable to compensate anyone who claims to suffer damages (in form of death, physical or mental injury) subsequent to the dumping.[44] It is consequential to note that there is no liability where damage is suffered by any person who has voluntarily assumed the risk of dumping or has fault for the dumping which caused the damage suffered.[45]

This paper opines that the Act depicts that Nigerian government is prima facie committed to a zero tolerance to offences under the act as the act has neither, in any way, made provision(s) for precautionary measures or surveillance nor does it prescribe penalty for failure to abide by those measures, which would have stood against perpetration of the environmental offences.

D. **The Criminal Code Act**

The Criminal Code Act[46] contains provisions centred on prevention of public health hazards which has direct link with environmental protection in Nigeria.

The relevant provisions are Sections 245 and 247 of the Act. Section 245 provides that, 'Any person who corrupt or fouls the spring, stream, well tank, reservoir, or place so as to render it less fit for the purpose for which it is ordinarily used, is guilty of a misdemeanour, and is liable to imprisonment for six months'.

Section 247 provides that:

Any person who;

> (a) vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighborhood, or passing along a public way is guilty of misdemeanour; or
>
> (b) does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life,

[43] *Ibid* s. 7.
[44] *Ibid* s. 12.
[45] *Ibid*, s. 12 (1) (a) & (b).
[46] Cap C39, Laws of the Federal Republic of Nigeria, 2004.

> whether human or animal; is guilty of a misdemeanor, and is liable to imprisonment for six months

By implication, dumping of solid waste at local sources of water (spring, stream, well, tank, reservoir) so as to render it less fit for ordinary use is a punishable offence.

E. Environmental Impact Assessment (EIA) Act

Environmental Impact Assessment is a process tailoring towards predicting, evaluating, identifying, and mitigating the negative effects of developmental project prior to the commencement of the project.[47] This mandate is in alliance with the principle 17 of the Rio Declaration provides to the effect that Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

Consequently, EIA Act[48] makes it so mandatory for any developmental project to undergo an environmental impact assessment before commencement. It further prohibits the commencement of any project which may significantly have negative effects on the environment. Nevertheless, where a project may likely result in significant adverse effects on the environment, the project shall not be permitted to fly.[49] The Act specifically states the assessment minimum content of EIA and stipulates that assessment should be as detail as the severity of the impact requires. The act vests on the NESREA, the duty to consider Environmental Impact Assessment. Section 4 of the Act required that mandatory Evaluation Assessment Report be made whenever the extent, nature or location of a proposed project or activity is such that it is likely to have adverse effect.[50]

This paper opines that the EIA Act has implied relevance to the control and management of solid waste, because the core mandate of the Act strictly focuses

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[47] International Association for Impact Assessment, '*Principle of Environmental Impact Assessment Best Practice*' (1999) 2. <http://www.jsia.net/6_assessment/fastips/Principles%20of%20IA.pdf> accessed June 2022.
[48] EIA Act, CAP E12, LFN 2004.
[49] *Ibid*, s. 30.
[50] *bid*, s. 14.

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on general principle of the procedures, reports and penalties[51] for non compliance, notwithstanding that the effect of any project may cause solid waste generation that required to be carefully disposed of. Be that as it may, there are little or hidden provisions for solid waste treatment and disposal under the Act as solid waste is categorized under the mandatory study activities. Therefore, the concept of solid waste treatment and disposal deserved a "Section" in the Act because "Solid Waste" is the reason for the first statute in Nigeria on environmental protection; hence justice is not done to solid waste under the Act.

V. Solid Waste Management Approach in Nigeria

The focus of Nigeria's solid waste management strategy is on the storage, collection, and transportation of solid waste as well as on resource recovery, recycling, waste treatment, and disposal.

Any solid garbage that is produced is either stored in a bag, a container, or a plastic waste bin. As an illustration, the Lagos State Waste Management Authority (LAWMA) in 2009 gave homeowners 240-liter containers in exchange for an annual Land Use fee paid to the Land Records Company.[52]

According to reports, the cost of solid waste management in Nigeria is largely accounted for by the operations of garbage collection and transportation, which account for around 80% of the overall cost.[53] This enormous expense of transportation and collecting alone prevents adequate waste control and management because other phases will undoubtedly have financial consequences. It is important to note that although informal collectors attend the event, they are formally prohibited from doing so in some areas of Nigeria, and violations are subject to punishment.[54]

Recovery and recycling are often carried out by separation from mixed garbage in Nigeria. The informal waste collectors also handle the majority of these sorting responsibilities. A low of 24,000 tonnes and a high of 42,000 tonnes of compost were produced in Lagos State's Ikorodu informal composting facility for the treatment of market garbage in the second half of 2011. Comparably, the waste-

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[51] *Ibid*, s. 60.
[52] *Ibid*.
[53] *Ibid*.
[54] *Ibid*.

to-energy facility at Ikosi Market produced biogas from market garbage that was utilized to power a 2KVA generator there.[55]

Solid waste treatment and disposal in Nigeria, not often than not, carried out through disposal in illegal dumpsites and finally treated by burning.[56]So, landfill option is not common in Nigeria. in the meantime, Nigeria has landfills in most of the states, managed by the local council subject to various rules as provided by NESREA[57], but not adequately utilised.

Since the Koko tragedy, Nigeria's solid waste management has undoubtedly improved under the guidance of the aforementioned regulatory frameworks. This emphasized the undeniable reality that the 1980 Koko Incident did not occur by chance, but rather as a result of Nigeria's need to dramatically flourish for a healthy environment. The fight for a healthy environment does, however, face several obstacles, such as insufficient funding, inadequate laws, the carelessness with which Nigerians dispose of their solid waste, the belief that the government should handle everything, inadequate modern technology, and others.[58]

VI. South African Legal Framework

A. The Constitution

Just like Nigeria and so many other jurisdictions, the grundnorm statute of South Africa is the Constitution[59]. According to Section 24 of the Constitution, everyone has the right to an environment that guarantees a certain level of unharmed health and well-being. In a same spirit, the constitution requires the government to take legislative and other steps to avoid all types of pollution, ecological degradation, encourage protection of environment, guarantee sustainable development, etc.

B. The National Environmental Management Act (NEMA)

The South African laws that are in place to control pollution and other environmental waste heavily rely on NEMA[60]. In South Africa, the provinces' cooperative environmental governance is greatly aided by NEMA. The crucial

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[55] *Ibid*, 53.
[56] *Ibid*. Note that largest dumpsite available in Nigeria is the Olusohun dumpsite in Lagos.
[57] National Environmental (Sanitation and Wastes Control) Regulations 2009, Pt 6, s 105.
[58] *Supra* note11.
[59] The constitution of the Republic of South Africa 1996.
[60] NEMA No. 107 of 1998.

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role is carried out through the establishment of principles that govern decisions involving environmental pollution and degradation, the creation of institutional frameworks that support collaborative governance, and the development of procedures for orderliness in environmental functions.

C. National Environmental Management: Waste Act (NEM:WA)

NEM:WA[61], another ascertained legislation for managing Waste in South Africa. The goals of NEM:WA include dramatically reducing the quantity of waste produced while also making sure that, in cases when waste generation is unavoidable, strategies like recycling, reusing, and treating trash in an environmentally friendly way should be taken into consideration for implementation. It is crucial to keep in mind that the government must fulfill the requirements of the instrument in order to achieve these goals.[62] It is so consequential to understand that NEM:WA's provisions must be interpreted along side with the provisions of NEMA and particularly the provision under section 2 of NEMA.[63] Moreover, Schedule one of NEM:WA contains a list of waste management operations requiring a licence. From the schedule, these operations are divided into category A and B. Category A are those which required certain basic assessment process similar to a provision of the EIA Regulation as contained in the NEMA, and it hierarchically include; the storage/transfer of waste, the recycling/recovery of waste, treatment of waste, disposal of waste on land, treatment/processing of animal waste and so on, while Category B focuses mainly on hazardous waste and are equivalent to those operations which required an EIA processes under the Environmental Impact Assessment Regulations.

D. Environmental Tax Regime

The applicable environmental tax scheme in South Africa includes the plastic bag levy, which makers of plastic carrier and flat bags must pay at a rate over 8 cents per bag. Once more, producers are required to pay a levy on luminescent light bulbs at a rate of 600 cents per bulb (if the bulbs are manufactured for use in South Africa)[64]

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[61] NEM:WA No. 59 of 2008.
[62] *Ibid*, s 3.
[63] *Ibid*, s 5.
[64] Ryan Brothwell, 'Lightbulbs, plastic bags and vehicles – under the radar taxes South Africans should know about', BusinessTech (South Africa 20 august 2018),

E. The Environmental Management Inspectorate (EMI)

Environmental enforcement employees from national, provincial, and municipal government ministries make up the EMI or inspectorate. They are classified as either:[65]

a. Environmental Management Inspectors (EMIs) by the Minister in charge Environmental Affairs, and in the case of Mining, the EMIs is designated by the Minister in charge Mineral Resources).

b. A Member of a Provincial Executive Council.

The EMIs have access to a broad variety of administrative, disciplinary, and enforcement authorities. The authority included the ability to look for and seize any evidence and associated goods connected to any illegal activity. An officer of the South African Police Service has the authority to take action in relation to any NEMA-related offense. EMIs collaborate closely with the Police Services as a result.

F. Environmental NGOs

The South African environmental regime accepts NGOs[66]. All stakeholders, including industry, trade unions, communities, and NGOs, must provide enough support for her legislative goals and policy plans. The National Framework for Sustainable Development (NFSD), established by South Africa, brings together the business community, the government, NGOs, civil society, academia, and other significant role players involved in sustainability and development-related issues. To emphasize, local environmental NGOs typically focus on topics that are most pertinent to the South African and Sub-Saharan setting. International environmental NGOs, however, play a crucial role in South Africa. The Federation for a Sustainable Environment, Birdlife South Africa, The Endangered Wildlife Trust, and The Centre for Environmental Rights are some of the

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<wwwbusinesstech.co.za/news/finance/37629/lightbulbs-plastic-bags-and-vehicles-under-the-radar-taxes-south-africans-should-know-about/amp/>accessed on 21 July 2022.

[65] National Environmental Management Act No. 107 of 1998 (NEMA), cha.7.

[66] See, *Director: Mineral Development Gauteng Region & Sasol Mining v. Save* (1999) 2 SA 709 (SCA) where the court held that inclusion of environmental right in the set of fundamental human rights indicated that environmental considerations must be given appropriates recognition and respect in the administrative process.

environmental NGOs that are most active in South Africa. Other key regulatory and institutional frameworks in South Africa include:[67]

i. Department of Environmental Affairs (DEA).

ii. Department of Mineral Resources (DMR).

iii. Department of Water and Sanitation (DWS).

It is pertinent to emphasise that, all levels of government and all organs of state are co-operating, consulting and supporting one another on matters affecting the environment.

VII. Solid Waste Management Approach in South Africa

South Africa, a developing country like Nigeria, has a policy document[68] on integrated pollution and waste management. This official document encapsulated the general waste objectives and management in the country.[69] By implication, prior to the adoption of this document for implementation, the South Africa's waste policy framework was scattered among several agencies and legislations with so many conflicting interests.[70] Hence, a bit-by-bit implementation strategy available at that time had been often proved imperfect.

Subsequently, a new policy[71] came to live for a coordinated waste management measure for the purpose of simplifying waste legislation and implementation. The policy reformed the ministry of Environment to establish a sub-department to be dealing with all forms of pollution[72]. The policy, also, committed the country to the implementation of integrated municipal waste management programme using the Polokwane Declaration of September, 2001.[73]

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[67] *Ibid*.

[68] The document is by means of Government Gazette Staatkoerant Vol. 417 No. 20978, Pretoria 17 March, 2000. It is also called 'White Paper on Integrated Pollution and Waste Management for South Africa'.

[69] *Ibid*.

[70] *Supra* n70.

[71] *Supra* n 72.

[72] Including controlling of waste and waste related issues.

[73] Polokwane, Northern Province, South Africa Declaration on Waste, signed in September, 2001. The declaration is to address the problems of waste in the country of South Africa. The declaration set targets of reduction to landfills of 50% by 2012 and zero waste to landfills by 2022, though recently reversed to 70% by 2022.

For effective solid waste control and management practice in South Africa, the National Waste Management Strategy (NWMS) was, therefore, introduced to meet the world best practice.[74] In prompt response, the Department of Environmental Affairs and Tourism [DEAT], 1999 emphasizes the need for integrated waste management, which implies coordination of functions within the waste management hierarchy.[75] Accordingly, the diversion of waste from landfill through waste minimization and recycling is a national policy objective and priority under the White Paper on Integrated Pollution and Waste Management by the Department of Environmental Affairs and Tourism [DEAT], 2000, the NWMS and the Waste Act, which recognize and emphasize the importance of moving waste management up the waste hierarchy (greater emphasis on waste avoidance, minimization and recycling rather than committing waste to landfill in a bid to reducing further adverse impacts on downstream).[76]

Waste minimization encompasses of a many of processes, mechanisms and stakeholders in the production, packaging, marketing, selling and consumption of goods that produce waste at all stages of the consumption.[77] Accordingly, it requires a conscious, comprehensive decision and effort by all stakeholders to ensure that waste be minimized to reduced waste committed to landfill site lifecycles and the environment. Therefore, this processes that include; Improving product and packaging designs to reduce resource consumption; Changing marketing and sales approaches to influence consumer perceptions and behaviour; "Extended Producer Responsibilities" (EPR) of producers of products, which may require producers to accept their used products back for recycling; Changing procurement policies and practices in large organizations that should encourage environmentally-aware production and manufacturing; Encouraging waste separation, streaming and diversion practices; Creating infrastructure to enable waste to be diverted from landfill sites; Developing infrastructure for

[74] Mosidi M., 'Key Areas in Waste Management: A South African Perspective' in Nigeria' in Sunil Kumar (eds), *Integrated Waste Management* (Intech Open, Rijeka 2011) 71.
[75] *Ibid*.
[76] *Ibid*.
[77] *Ibid*, 76.

processing waste for reuse/recycling; and Developing markets for recycled materials and products;[78]

Similarly, NWMS invokes the Polluter Pays Principle (PPP) as enshrined under principle 17, Rio Declaration of 1992 to deal with the issue of insufficient of funding associated with management of solid waste. The PPP implies that all waste generators, that is households and companies are responsible for paying all costs[79] associated with the waste they generate.

In a nutshell, south African solid waste management practice emphasizes that the National, Provincial and Local Authorities, as well as society and industry at large be aligned with policy implementation measures and means by which waste generation and disposal rates can be economically minimized. This is including the adoption of cleaner technologies, separation and recycling of wastes in view to minimizing waste.[80]

A. Offences and Penalties

For discussion, NEM:WA provides that no waste management activity can be undertaken except; in compliance with the required standard required and must be approved by the Minister in charge of Environmental Affairs for such activity, or a required licence has been issued in respect of that activity, if required.[81] Also, certain activities, such as unauthorised disposal, throwing, dropping, depositing, spilling of waste, y discarding any litter into or onto any public place, land, vacant place, stream, watercourse, street or road, or on any place to which the general public has access, except in a container or a place specifically provided for that are prohibited.[82] However, a person commits an offence if that person contravenes or fails to comply with the provision of section 26(1) and section 27.

Similarly, section 67 contains offences under NEM:WA. Additional offence is outlined in subsection 2 which provides that, a person controlling a vehicle or in a position to control a vehicle transporting waste to be offloaded, commits an offence if the person(s); fail to prevent, or intentionally or negligently cause,

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[78] *Ibid*.
[79]These include all direct costs associated with the safe collection, treatment and final disposal of waste, health and environmental damages.
[80] *Supra* note78.
[81] NEM:WA, No 59 of 2008, s. 19 (3) & *20.*
[82] *Ibid*, s. 26 & 27.

spillage or littering from the vehicle, dispose of waste at an unauthorised facility, fail to determine whether a facility is authorised to accept waste and fail to comply with a duty[83] assigned to the person transporting waste. [84]

On the issues of penalty, various penalties may include, but not limited to the followings:[85]

i. A person who commits an offence mentioned under section 26 of NEM:WA is liable to a fine of ZAR10,000,000[86] or to a jail term of 10 years, or both. Also, any other penalty or award may be imposed in addition.
ii. A person convicted of an offence referred to under section 27(2) is liable to a fine of ZAR5,000,000[87] or to a jail term of 5 years, or both, in addition to any other penalty or award as case the may be.
iii. A fine of a relevant court's determination and/or imprisonment for a period not exceeding six months.
iv. If a convicted person persists with an act or omission that constituted an offence, or commits a continuing offence, he/she may be liable for a fine not more than ZAR 1,000[88] and/or imprisonment not exceeding 20 days, in respect of each day they persist with the offending conduct.

For emphasis, the court considers the following when considering the quantum of a fine:[89]

- The gravity and the effect of the offence on the environment.
- Any benefits the offender received in connection with the contravention.

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[83] *Ibid*, s. 25 (4).
[84] *Ibid*, s. 67 (2).
[85] Rendani Kutama 'NEM: Waste Act Sections on Litter and Illegal Dumping ' [2013] Litter and Illegal Dumping Meeting, <http://www.gdard.gpg.gov.za/Services/Documents/Presentation%20RK%20NEM%20Waste%20Act%20sections%20on%20litter%20and%20illegal%20dumping%2012%20April%202013.pdf> accessed on 21 July 2022.
[86] Equivalent to $596,954.34 which equivalent to ₦249,043,381.10k.
[87] Equivalent to $298,599.63, which equivalent to ₦114,72,779.64k.
[88] Equivalent to $59.71, which equivalent to ₦24,910.41k.
[89] Section 26 (3) & *27* of NEM:WA N0. 59 of 2008.

VIII. United Kingdom's Legal Framework

The legal framework in United Kingdom (UK) covers laws, institutions and programmes for sustainability in waste management.[90] Nevertheless, the essential driving force remains the same, because national and local waste policies and strategies are targeted towards achieving the EU Framework Directives[91] on waste. On this note, waste laws, policies, strategies and practices in UK (England, Wales, Scotland and Ireland) are based concurrently on three separate levels, that is, the European Legislation, National Legislation and Regional/local Legislation.[92] Emphases here are on the European legislation and National legislation. Thus:

(i) European Legislations: these include; the Waste Framework Directive 75/442/EEC as amended[93]. This Directive lays out broad guidelines on waste management which is aimed at protecting the environment against harmful and subsequent effects caused by improper collection, transportation, storage and disposal methods.[94] The Directive, on the whole, is aimed at encouraging member states in the use of waste recovery strategy to get wealth from waste in other to conserve natural resources. It also establishes requirements for licensing, regulation of carriers and the polluter pays principle. This Directive has since been amended by EU Directives 91/156/EEC and 91/92/EEC. The provisions contained in the Framework Directive were domesticated in the Law of England and Wales via the Environmental Protection Act of 1990 which was amended by

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[90] Department for Environment Food and Rural Affairs (DEFRA), *Waste Strategy for England* (London, United Kingdom 2007) <http://www.defra.gov.uk/defrasearch> accessed 21 July 2022.

[91] See the following EU Framework Directives; Directive 89/369/EEC-Prevention of air pollution from waste incinerators, Directive 89/429/EEC- Prevention of air pollution from waste incinerators, Directive 90/425/EEC-Animal Waste. Directive 99/31/EEC-Landfill etc.

[92] Chukwunonye Ezeah and Clive Roberts, 'Analysis of Barriers and Success Factors Affecting the Adoption of Sustainable Management of Municipal Solid Waste in Abuja, Nigeria' [2012] 93 (1) *Journal of Environmental Management* 34.

[93] Directive 75/442/EEC was again amended In April 2006, by the European Parliament and Council to further consolidate, clarify and rationalize the legislation. The amended legislation, Directive 2006/12/EC do not however change existing rules in the member states.

[94] Europa (2006) Framework Directive on Waste (91/156/EEC). <http://eur-lex.europa.eu> 21 July 2022.

the Environment Act (1995), together with a number of regulations on various aspects of waste management.[95] Other applicable European Legislation on Solid Waste matters in England include; Directive 89/369/EEC-Prevention of air pollution from waste incinerators, Directive 99/31/EEC-Landfill[96], the Environmental Liability Directive 2004/35/EEC[97] and so on.[98]

(ii) National Legislation: under this heading, an emphasis is on waste legislation in England. According to Waste Strategy 2000, 'Legislation and policies governing waste handling and disposal in England have developed extraordinarily in the past 30 years. The principal aim is to constantly bring prevailing legislation in the country in agreement with governing European Union laws and policy directives. The following are major and auxiliary legislations currently regulate waste in England; Control of Pollution Act, 1974; Environment Protection Act (EPA), 1990[99]; Environment Act, 1995; Environmental Protection (duty of care) Regulations, 1991 etc.[100]

A. Department for Environment Food and Rural Affairs (DEFRA)

The Department for Environment Food and Rural Affairs (DEFRA) is the apex of all available Government Department responsible for waste and related environmental issues in the UK. DEFRA discharges its responsibilities through two avenues viz; the internal structures such as Waste Implementation

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[95] Department of the Environment Transport and Regions, DETR *A waste strategy for England and Wales* (London, UK 2000) 34.

[96] The EU Landfill Directive requires the UK to reduce the biodegradable waste sent to landfill to 35% of the 1995 level by 2020.

[97] The Directive establishes a framework based on the 'polluter pays principle' to prevent and remediate environmental damage. This framework aims at ensuring that the economic operator bears the financial consequences from harm or damage caused to the environment.

[98] A waste strategy for England and Wales.

[99] In the United Kingdom, one of the sources of waste management is the Environmental Protection Act of 1990. S. 35 of the Act made provision for waste disposal authorities which are responsible for awarding contracts to various waste disposal contractors who may be private sector companies, or companies set up by local authority. This body issues licenses to waste management contractors and wastes cannot be deposited without a license. Section 37 of the Act made it an offence to treat, keep or dispose of waste in such a manner likely to cause pollution the environment and harmful to human health.

[100] A waste strategy for England and Wales.

Programme (WIP); and external organizations such as Waste and Resources Action Programme (WRAP), together with Business Resource Efficiency and Waste (BREW) and other third sector organizations[101]. DEFRA co-ordinates efforts aimed at achieving the overall objectives of government's waste strategy as encapsulated in the Waste Strategy (2007).[102]

B. Waste and Resources Action Programme (WRAP).

The English government founded the WRAP, a nonprofit organization, in the year 2000. The program collaborates with other trash organizations and companies to implement a regular recycling process that will increase material and resource efficiency.[103]

C. Business Resource Efficiency and Waste (BREW)

The BREW is a support program[104] that consists of several initiatives created by DEFRA in partnership with other businesses and stakeholders to increase resource efficiency. The BREW was implemented in response to Her Majesty's Treasury raising the landfill tax by £3 per tonne for the 2005–2006 fiscal year. The landfill tax was later raised to £48 per tonne in 2010 because it had become so important to use the extra funds raised as a result of the increase needed to fund environmental programs that could increase resource efficiency and, more importantly, reduce waste while also diverting it from landfill. It is crucial to highlight that businesses are urged to reduce the amount of waste prepared for landfills through this program. In addition, projects funded by BREW are delivered through another established programmes and institutions such as; WRAP, Resource Efficiency and Knowledge Transfer Network (KTN), Regional Development Agencies, (RDAs) etc.[105]

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[101] Non-Governmental Organisation (NGO).

[102] Department of Environment Transport and Rural Affairs, DEFRA *Waste Strategy for England 2007*. London: Her Majesty's Stationery Office.

[103] Waste and Resource Action Programme, WRAP (2008) <http://www.wrap.org.uk/wrap_corporate> accessed on 10 July 2022.

[104] Department for Environment Food and Rural Affairs, Defra *Recycling and waste* (London, United Kingdom 2008a) <http://www.defra.gov.uk/environment/waste/index.htm > 12 July 2022.

[105] *Ibid*.

D. Waste Implementation Programme (WIP)

The WIP was established in June 2003 by the DEFRA.[106] WIP was pictured at that particular period of time to have, among others, the responsibility to lessen waste in the municipality, especially Biodegradable Municipal Waste (BMW) and send same to the landfill with key intents to providing adequate aid which facilitates waste reduction, reuse and recycling as well as helping England to meet the targets[107] highlighted under Article 5 of the EU Landfill Directives.[108]

The channel designed by WIP to realise the foregoing objectives include: Local Authority support, Local Authority funding, research funding for new technologies, data and information management, waste infrastructure delivery programme, efficiency initiatives, waste minimization programme, and waste awareness programme et cetera .[109]

E. Third Sector Organizations

The 'Third Sector' is a term used to represent a wide range of laudable NGOs working in connection with waste England, in line with waste regulation. The NGOs include; Community Based Organizations (CBOs), Voluntary Organizations (VOs), charities, co-operatives, social enterprises et cetera.[110] However, record has shown that over 1000 third sector had been estimated for serious participation in the management of waste in England alone, apart from other jurisdictions in the UK.[111]

In all, the above mentioned programmes and institutional framework had recorded excellent performance which is making UK to standout in the area of solid waste.

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[106] *Ibid*.

[107] The targets prescribed by the EU Landfill Directives include; by 2010 to reduce biodegradable municipal waste landfilled to 75% of that produced in 1995; by 2013 to reduce biodegradable municipal waste. landfilled to 50% of that produced in 1995; and by 2020 to reduce biodegradable municipal waste landfilled to 35% of that produced in 1995.

[108] *Supra* n108.

[109] Waste and Resource Action Programme, WRAP (2008) <http://www.wrap.org.uk/wrap_corporate> accessed on 12 July 2022.

[110] *Ibid*.

[111] *Ibid*.

F. Offences and Penalties

It is in the interest of this paper to shed light on offence and penalty provisions under the EPA, 1990, it is provided that whenever a controlled waste is deposited on land, authorities are under responsibilities to give notice to the occupier in order to remove it. It is, therefore, a crime to disturb the removal of waste deposited for collection, and if such crime is perpetrated a Magistrates' Court, on summary conviction, can fine an offender up to level 5[112] on the standard scale[113]. In the same vein, breach of sections 33[114] and 34[115] are criminal offence with serious penalty. So, for offence of this nature to be committed by businesses, it attracts unlimited fines, jail term, seizures of vehicles and payment of clean-up costs. Similarly, if the offence is committed by the occupier of the premises of business, the maximum fine is £40,000.[116] Moreover, having given notice, but not complied with, the local authority may abate the nuisance and recover the expenses from the occupier, though a court action. It is more importantly to note that, recovery of response may be by instalments or making a charge on the property of the business.[117] Section 87of the Act also makes leaving litter of any kind a criminal offence. Accordingly, any person who throws down or deposits

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[112] Under the UK Standard Level, Level 1= £200, Level 2= £55, Level 3 = £1,000, Level 4= £2,500 and Level 5= above £2,500 and unlimited. Thus, the Level 5 referred to is equivalent to over ₦1m.

[113] Section 60 of the UK Environmental protection Agency Act, 1990. Note that the Standard Scale is system whereby financial crime penalty i.e fines under legislations have maximum levels set against a standard scale. So, during inflation, the level of such fine increases by modifying the scale by the legislator.

[114] No person may treat, keep or dispose of controlled waste in a manner likely to cause pollution of the environment or harm to human health, except in the case of domestic household waste treated or kept or disposed of on the premises.

[115] Section 34(1) imposes a duty on 'any person who imports, produces, carries, keeps, treats or disposes of controlled waste or, as a broker, has control of such waste, to take all such measures applicable to him in that capacity as are reasonable in the circumstances': To prevent any contravention by any other person of section 33; To prevent any contravention of certain (i.e. specific) provisions of the Pollution Prevention and Control Regulations; To prevent the escape of the waste from his control or that of any other person; and On the transfer of the waste, to secure that the transfer is only to an authorised person or to a person for authorised transport purposes and there is transferred such a written description of the waste as will enable other persons to avoid a contravention section 33 or the Pollution Prevention and Control Regulations.

[116] UK Environmental protection Agency Act, 1990, s. 80 (6).

[117] *Ibid*, s. 81 (3-4).

into or from any place stated under this section or leaves anything whatsoever in such circumstances which causes or contributes to, or able to lead to the defacement of any place to which this section applies, such a person shall be guilty of an offence during conviction.[118] Nevertheless, there are certain exceptions to this provision by virtue of section 87 (2) that, where the person has lawful permission or consent to do so. Offenders under the section of the Act can, on summary conviction in the Magistrates' Court, be sentenced to a fine of up to level 4 on the standard scale.[119] Similarly, under the Environmental Protection (duty of care) Regulations of 1991, breach of the duty of care or under the Regulations is a criminal offence as EPA provides that any person who violates the duty of shall be summary convicted to a fine of the statutory maximum and to a fine in the case indictment.[120]

IX. Solid Waste Management Practice in United Kingdom

The primary responsibility for creating and carrying out legislation rests with the government of the United Kingdom (UK). However, recent legislation has given the Scottish parliament, the national assembly for Wales, and the Northern Ireland government responsibility for some aspects of environmental protection, including waste management.[121] The legal frameworks for managing Solid Waste are at three separate levels; European legislation, National legislation and Regional/local legislation.[122] Peradventure, this is why the legal framework in the U.K seems sophisticated.

Sustainability in Municipal Solid Waste Management (MSWM) has become a key concern in the UK as a result of the 1992 Earth Summit. Given the intolerable conditions of historical system inefficiencies, a radical transition towards

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118 *Ibid*, s. 87 (1).
119 *Ibid*, s. 87 (5).
120 *Ibid*. s. 34 (6) (a & b).
121 Stephen B, 'The impact of the European Landfill Directive on Waste Management in the United Kingdom' [2006] 32 (3-4) (*the Open University, Milton Keynes, Mk7 6AA, United Kingdom*) 349-358.
122 Department for Environment Food and Rural Affairs, Defra *Waste Strategy for England* (London, United Kingdom 2007) <http://www.defra.gov.uk/defrasearch> 12 July 2022.

sustainability in waste management became unavoidable[123]. Therefore, the essential practices consist of:

i. Best Practicable Environmental Option (BPEO). The BPEO procedure established for a particular set of goals. In both the short and long terms, the approach offers the most advantages and causes the least environmental harm at a reasonable cost.

ii. The Waste Hierarchy which is the second one is linked to conceptual and regulatory frameworks that provide direction for the activities to be taken into account when evaluating the BPEO.

iii. The Proximity Principle, according to this notion, garbage should be possibly disposed of around where it was generated. According to this approach, the possibilities include:

(a) ***Waste Minimization/Prevention System***

Waste minimization and prevention are terms that deal with reducing waste generation and enhancing its quality, according to Read et al[124]. As a result, the minimization and prevention system encourages reusing, recycling, and recovering as best practices and lessens the risk in waste generated. The UK's MSWM hierarchy places waste minimization at the top as the most preventive approach.

(b) Recycling and Composting System

The UK is required by the EU Landfill Directive, along with the other EU member states, to reduce the amount of municipal solid waste that is landfilled, starting from the levels in 1995 and decreasing to 75% by 2010, 50% by 2013, and 35% by 2020. However, failing to fulfill these goals exposes the UK to a maximum penalties of £500,000 per day for non-compliance after 2010, which will

[123] Paul S. Phillips, Adam D. Read, Enne A. Green & Margret P. Bates, 'UK waste minimisation clubs: a contribution to sustainable waste management' (1999) 27(3) Resources, Conservation and Recycling 217-247.

[124] Read A. D, Phillips P. S & Murphy A, 'English County Councils and Their Agenda for Waste Minimisation' (1997) 20(4) Resources, Conservation and Recycling 277-294

ultimately fall on Local Authorities.[125] . As a result, some of the best-performing Local Authorities had been using both recycling and composting systems to dispose of over 58% (instead of the national objective of 40% by 2010) of their municipal garbage in accordance with the Directive.[126]

(c) Energy Recovery System

An additional preferred practice option in the hierarchy is energy recovery, which is accomplished by the cremation of solid waste. According to DEFRA[127], waste incineration treats about 10% of the total volume of MSW produced in England in 2007/08 for energy recovery, or roughly 2.8 million tonnes annually. The UK as a whole operates approximately 55 incinerators that treat MSW, with each facility's annual operating capacity for trash consumption ranging from 23,000 tonnes to 600,000 tonnes. It is important to note that the UK still uses less incineration as an MSW management option than other EU countries like France, Sweden, and Denmark, with 32%, 52%, and 55%, respectively.[128]

(d) Disposal

Final Disposal through an approved sanitary landfill system is the next most desirable option in the hierarchy. Due to the fact that a sanitary landfill is more of an engineering, planning, and administrative norm than an open dumping system

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[125] Karousakis K & Birol E, 'Investigating household preferences for kerbside recycling services in London: A choice experiment approach' (2008) 88(4) Journal of Environmental Management 1099-1108.

[126] McDonald S & Oates C, 'Reasons for non-participation in a kerbside recycling scheme' (2003) 39 (4) Resources, Conservation and Recycling 369-385; Tonglet M., Phillips P. S & Read A. D, 'Using the Theory of Planned Behaviour to investigate the determinants of recycling behaviour: a case study from Brixworth, UK' (2004) 41 (3) *Resources, Conservation and Recycling* 191-214; Tonglet M, Phillips P. S & Bates M. P, 'Determining the drivers for householder pro-environmental behaviour: waste minimisation compared to recycling' (2004) 42(1) *Resources, Conservation and Recycling* 27-48.

[127] Department for Environment Food and Rural Affairs, Defra *Incineration of municipal solid waste in the UK* (London, United Kingdom 2008b) accessed on 21 July, 2016. <http://www.defra.gov.uk/environment/waste>.

[128] Incineration plant is defined by the Waste Incineration Directive to mean any mobile or stationary equipment unit committed for thermal treatment of all sorts of wastes for the purpose of either recovery or non recovery of heat combust generated. Co-incineration plant is any mobile or stationary unit for the purpose of energy recovery.

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or practice, this method is slightly more logically superior to an open dumping system.[129]

From the foregoing, it is pertinent to pinpoint that the MSWM Best Practice in the UK is functioning well due to certain supports and programmes in place. In light of this, Phillips et al. recognized the key support programs for MSWM Best Practice in the UK as comprising a number of legislative frameworks that have been built through time at both the government and non-governmental levels.[130]

X. Lessons for Nigeria

A. South Africa

The Environmental Tax Regime in South Africa levies a type of tax that is applied to producers of plastic carrier bags, flat bags, and fluorescent light bulbs at a rate of 8 cents per bag and 600 cents per lamp, respectively, if the bulbs are produced for use in South Africa. The tax system helps to minimize all forms of unreasonable and unmanageable solid waste output while also providing the government with a source of cash. The tax due under the scheme is determined by the number of plastic bags and light bulbs produced. If Nigeria implements the same or a comparable tax regime in the field of waste management, it will likely reduce impure and illogical solid waste in addition to acting as another internal revenue source. Furthermore, integrated pollution and waste prevention system, which aligned with the UK's waste strategy in the Hierarchy, is in practice in South Africa.[131] Additionally, South Africa has unique waste laws that address solid waste management in its entirety. To assure a stronger focus on solid waste, along with its prevention and reduction, the Nigerian government may, like her South African counterpart, develop particular trash laws.[132] Polluters Pays

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[129] O. Zerbock, 'Urban Solid Waste Management: Waste Reduction in Developing Nations' [2003] Michigan TechnologicalUniversity *265-279,* Accessed on 20 May 2014. <http://www.cee.mtu.edu/peacecorps/documents/Waste_reduction_and_incinerationFINAL.pdf>

[130] Phillips P. S, Holley K, Bates M. P & Freestone N. P, 'Corby Waste Not: an appraisal of the UK's largest holistic waste minimisation project' (2002) 36(1) Resources, Conservation and Recycling 1-31.

[131] See the South Africa Government Gazette Staatkoerant Vol. 417 No. 20978 March, 2000.

[132] NEM:WA No. 59 of 2008.

Principle (PPP)[133]is in South African management strategies, so adopting the ideology in the PPP would assist Nigeria to mitigate solid waste generation, hence it imposes minimization of waste generation as obtainable in South Africa.

Last but not least, South Africa has implemented draconian measures, such as harsh fines and jail terms. For instance, a person found guilty of the crime listed in section 26 of the NEM:WA is subject to a fine of ZAR10,000,000 (equivalent to N249,043,381.10k in Nigeria) or to a term of imprisonment of not more than 10 years, or to both, in addition to any other punishment or award that may be imposed as provided by the NEMA. In order to make the punishment provisions strong enough to act as a deterrent, Nigeria can reconsider and evaluate the laws that apply to waste management.[134]

B. United Kingdom

In the UK, the management of solid waste is a shared responsibility between County Councils, which serve as trash disposal authorities, and the Environment Agency, which is in charge of overall environmental control. All Districts or Borough Councils function as Waste Collection Authorities within a County. In contrast to the typical two-tier system, unitary authorities consolidate the disposal and collection authority's responsibilities under a single layer of local government. This calls attention to the study's understanding of the UK's approach to managing solid waste, which takes the shape of a division of labor and responsibility. Therefore, in order to lessen the burdensome obligation placed on one level of government over the others, the Nigerian government can adopt this developed approach.

In line with the philosophy of the EU Directive[135] on waste reduction, the Federal Government of Nigeria can set a policy direction that will set a target of waste

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[133] Principle 1 of the 1992 Rio Declaration

[134] The section prohibits certain activities, such as unauthorised disposal, throwing, dropping, depositing, spilling of waste or in any other way discarding any litter into or onto any public place, land, vacant place, stream, watercourse, street or road, or on any place to which the general public has access, except in a container or a place specifically provided for that.

[135] The directive set a target to reduce waste by 2010 biodegradable municipal waste landfill to 75% of the waste produced in 1995; by 2013 to reduce same waste land filled to 50% of the waste produce in 1995; and finally to reduce same waste land filled to 35% of that produced in 1995.

reduction level for every State as this will go a long way to assist Ilorin metropolis of Kwara State to reduce the volume of waste generation at all cost. The anticipated policy can be subject to periodic review, perhaps in every 4 years

Additionally, the 3R philosophy, which is the cornerstone of the United Kingdom's waste strategy, can be incorporated into Nigeria's systems and practices because it will significantly boost the country's economy. For instance, "Reuse" lowers the volume of garbage at the source, which lowers the volume of waste that needs to be treated or disposed of[136].

Similarly, penalty on environment related offences are so severe in most of developed countries like UK. Thus any severe penalty, be it jail term, fine or both, will definitely serve as deterrence in Nigeria. For instance, penalty on conviction for breach of 'Duty of Care' imposed on any person violating the provision under the U.K Environmental Protection Act [137] is £40, 000 which is equivalent to about ₦15,968,000.00k in Nigeria, if such a huge amount of money can be fixed as a penalty in Nigeria, deterrence will be assured.

XI. Conclusion

Overall, the concept of managing solid waste is no longer novel in Nigeria due to the numerous institutions and laws already in place that were designed specifically for this purpose in accordance with the constitution. According to the Constitution's provision, it is the duty of the State authorities to protect the environment, particularly in the area of solid waste. All of these have been tailored to ensure a safe and clean atmosphere.

In contrast, this article demonstrates that the Nigerian legislative framework for solid waste is insufficient, the general public's attitude toward solid waste management is carefree, and there are overlaps across legislation in terms of their provisions and mandates. In the interim, a particular act with a primary focus on solid waste may have better addressed the requirement under the applicable statutes than the current arrangement that combines several statutes.

In conclusion, considering lessons from South Africa and the United Kingdom, it is recommended that there is a need for separate laws on solid waste in Nigeria, introduction of an environmental tax regime, and change in penalty sections in

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[136] In terms of industrialization, employment and revenue generation.
[137] UK Environmental Protection Act, 1990, s 33 and 34.

the existing laws in an effort to ensure that the prescribed penalties are heavy so as to guarantee deterrence.

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South- Asian Economic Constitutionalism and the (Re) Building of Constitutional Order in South Asia

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Abstract

The appellation 'South Asia' represents a vibrant set of post-colonial geographies that are witnessing transformative constitutional churning in their socio-economic and political structures. Constitutional law studies about South Asian societies have generated interest in South Asian constitutionalism and how the region is tackling unstable democratic patterns. In this context, South Asian States have changed, amended and replaced their existing constitutional structures and forms of governance. In the recent past, the deeply divided region has witnessed two important crises, the 2021 Taliban offensive in Afghanistan and the 2022 Sri Lankan political crisis. Both crises despite their structural dissimilarities trace some parallelism in the factors that incited the democratic and non-democratic responses, i.e., lack of political consensus on economic governance and economic mismanagement by democratically elected governments. Besides its economic impact, the lack of constitutional order in managing the economy has also trickled down political repercussions. The crisis reflects the role that an accountable government should play in the market. Despite constitutional structures for economic governance and the establishment of government institutions, South Asian states are witnessing the withering of institutional mechanisms and delegitimization of rule of law.

The paper argues for a need for the South Asian States to develop formative practices that focus on accountable constitutional governance of the economy and strengthening financial institutions. While South Asian constitutions have kept economic actions by the states outside the purview of judicial and public scrutiny, the lack of accountability and cynical manipulation of independence of economic institutions by the authoritarian leaders raises questions on the constitutional

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limits of the unbridled power and domination by the elected leaders. In this context, the paper explores how strengthening the pillars of Economic Constitutionalism can lead to the creation of a stable constitutional order in South Asia.

Keywords: South Asia, Economic Constitutionalism, Constitutional Order, Democracy, Constitutional Crisis

I. Introduction

The discourse of comparative constitutional law is an academic discipline that focuses on the patterns and institutions of democracy. To a great extent scholars who are developing this project in their geographies and contextualizing their historiographies are "transforming comparative constitutional law by analyzing the way constitutional courts have engaged with issues concerning the very structure of democratic institutions and processes."[1] The politics and pedagogy of comparative constitutional law in South Asia are not limited to analyzing the patterns of interpretations and decisions by courts. It is more about studying societies, public institutions, the content and context of rule of law and people-

[1] Richard H Pildes, *Courts and Democracies in Asia*, 16 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 682–685 (2018). Sujit Choudhry, *How to Do Constitutional Law and Politics in South Asia*, *in* UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA 18–42 (Mark Tushnet & Madhav Khosla eds., 2015); Mitra Sharafi, *in* LAW AND IDENTITY IN COLONIAL SOUTH ASIA: PARSI LEGAL CULTURE, 1772–1947 (2014); Dian A H SHAH, *The Law and Politics of Religion and Constitutional Practices in Asia*, 13 ASIAN JOURNAL OF COMPARATIVE LAW 207–218 (2018); Joya Chatterji, *Secularization and Constitutive Moments: Insights from Partition Diplomacy in South Asia*, *in* TOLERANCE, SECULARIZATION AND DEMOCRATIC POLITICS IN SOUTH ASIA 108–133 (Humeira Iqtidar & Tanika Sarkar eds., 2018); Mara Malagodi, *'The Oriental Jennings': An Archival Investigation into Sir Ivor Jennings' Constitutional Legacy in South Asia*, 14 LEGAL INFORMATION MANAGEMENT 33–37 (2014); Diane A. Desierto, *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia*, 36 INTERNATIONAL JOURNAL OF LEGAL INFORMATION 387–431 (2008); Javaid Rehman, *Institutions of International Law and the Development of Regional Forum for Peaceful Dialogue in South Asia*, 1 ASIAN JOURNAL OF COMPARATIVE LAW 1–18 (2006).

government relations and a lot more. However, the role of the courts has been pivotal in this discourse.[2]

The constitutional courts have played a very important role in protecting and developing the foundations of democratic politics and institutions in the South Asian region. Scholars also argue that constitutional courts have a social responsibility "to invalidate legislative acts that seek to undermine the structural foundations of meaningful democratic self-governance and political competition."[3] The role of courts and public institutions have been crucial

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[2] See Albert H. Y. Chen, *Constitutional Courts in Asia: Western Origins and Asian Practice*, *in* CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE PERSPECTIVE 1–31 (Albert H. Y. Chen & Andrew Harding eds., 2018); PO JEN YAP, COURTS AND DEMOCRACIES IN ASIA (2017); Cheryl Saunders, *Constitutional Review in Asia: A Comparative Perspective*, *in* CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE PERSPECTIVE 32–59 (Albert H. Y. Chen & Andrew Harding eds., 2018); Helen Irving, *The Constitutional Court*, *in* GENDER AND THE CONSTITUTION: EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN 134–161 (2008); See also Theunis Roux, *The Constitutional Court: A Levian Take on Its Place in the Reformasi*, *in* THE POLITICS OF COURT REFORM: JUDICIAL CHANGE AND LEGAL CULTURE IN INDONESIA 245–264 (Melissa Crouch ed., 2019); DIAN A. H. SHAH, CONSTITUTIONS, RELIGION AND POLITICS IN ASIA: INDONESIA, MALAYSIA AND SRI LANKA (2017); K. J. Keith, *The Courts and the Conventions of the Constitution*, 16 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 542–549 (1967); Samuel Issacharoff, *The Era of Constitutional Courts*, *in* FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 189–213 (2015); Po Jen Yap, *Democracy, courts and proportionality analysis in Asia*, 9 GLOBAL CONSTITUTIONALISM 531–542 (2020); Mattias Kumm, *On the Representativeness of Constitutional Courts: How to Strengthen the Legitimacy of Rights Adjudicating Courts without Undermining Their Independence*, *in* JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS 281–291 (Christine Landfried ed., 2019); Cheryl Saunders, *Courts with Constitutional Jurisdiction*, *in* THE CAMBRIDGE COMPANION TO COMPARATIVE CONSTITUTIONAL LAW 414–440 (Roger Masterman & Robert Schütze eds., 2019); Sidharth Luthra & Nivedita Mukhija, *The Need for Reinventing the Supreme Court as a Constitutional Court*, *in* JUDICIAL REVIEW: PROCESS, POWERS, AND PROBLEMS (ESSAYS IN HONOUR OF UPENDRA BAXI) 225–235 (Salman Khurshid et al. eds., 2020); Björn Dressel, *The Informal Dimension of Constitutional Politics in Asia: Insights from the Philippines and Indonesia*, *in* CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE PERSPECTIVE 60–86 (Albert H. Y. Chen & Andrew Harding eds., 2018).

[3] See Jamal Greene & Madhav Khosla, *Constitutional rights in South Asia: Introduction*, 16(2) *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 470 (2018); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91(2) THE AMERICAN POLITICAL SCIENCE REVIEW 245-263 (1997)

considering how political actors, often democratically elected, have regularly attempted to outgrow beyond the boundaries of constitutions. Democratically elected leaders in the region have time and again mismanaged the economic structures and financial institutions which also reflects a lack of an effective constitutional design for strengthening constitutional designs.

The overpowering of constitutional structures by political actors is not something peculiar to South Asia. Political actors have abused constitutional structures and public institutions across the world. While constitutions often represent an aspiration of the society to protect the constitutional order, this trend of the rise of authoritarianism also means the rise of abusive constitutionalism.[4] As David Landau writes about 'abusive constitutionalism' as "the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before."[5] In referring to manoeuvres that "make a regime significantly less democratic", he conceptualized the norms of democracy on a spectrum that "there are various kinds of hybrid or competitive authoritarian regimes between full authoritarianism and full democracy."[6] This also calls for constitutionally fragile states to bring in substantive limitations on the constitutional amendment power. While the larger issue is to strengthen the nature and quality of politics and political actors, however, these are beyond the capacity of legal regulations.

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[4] See also Frank Pasquale, *Authoritarianism*, *in* TIPPING POINTS IN INTERNATIONAL LAW: COMMITMENT AND CRITIQUE 37–51 (Jean d'Aspremont & John Haskell eds., 2021); AUTHORITARIAN LEGALITY IN ASIA: FORMATION, DEVELOPMENT AND TRANSITION, (Weitseng Chen & Hualing Fu eds., 2020); AUTHORITARIAN LEGALITY IN ASIA: FORMATION, DEVELOPMENT AND TRANSITION, (Weitseng Chen & Hualing Fu eds., 2020); LEE MORGENBESSER, THE RISE OF SOPHISTICATED AUTHORITARIANISM IN SOUTHEAST ASIA (2020); Maya Tudor & Dan Slater, *Nationalism, Authoritarianism, and Democracy: Historical Lessons from South and Southeast Asia*, 19 PERSPECTIVES ON POLITICS 706–722 (2021); William Case et al., *Low-Quality Democracy and Varied Authoritarianism: Elites and Regimes in Southeast Asia Today*, *in* THE 3RD ASEAN READER 107–111 (2015); Thomas B. Pepinsky, *Capital Mobility and Coalitional Politics: Authoritarian Regimes and Economic Adjustment in Southeast Asia*, 60 WORLD POLITICS 438–474 (2008); Jeffrey C. Isaac, *Contesting Authoritarianism*, 12 PERSPECTIVES ON POLITICS 305–309 (2014); Jeffrey C. Isaac, *Authoritarianism, Elections, Democracy?*, 10 PERSPECTIVES ON POLITICS 863–866 (2012); Yonatan L. Morse, *The Era of Electoral Authoritarianism*, 64 WORLD POLITICS 161–198 (2012); Tom Ginsburg, *Authoritarian International Law?*, 114 AMERICAN JOURNAL OF INTERNATIONAL LAW 221–260 (2020).
[5] David Landau, *Abusive Constitutionalism*, 47 *U.C. DAVIS L. REV.* 189 (2013)
[6] *Id.*

II. Contextualizing the Role of India's Constitutionalism

The story of Asian constitutionalism in its true sense is the story of constitutionalizing democratic politics. India has an important role in the region with respect to it influencing constitutional understanding across the region. Indian constitutionalism can influence other South Asian states to bring in changes within the constitutional structure to control political authority. Although India is struggling to deal with rampant government corruption, religious tensions and low levels of development, Indian constitutional ideas of building substructures within the constitution like the 'basic structure' or 'constitutional morality' have been successful experiments.[7] The role that constitutional courts play in striking down unconstitutional amendments and strengthening the implied limits on constitutional change has been crucial for the success of constitutional accountability. However, courts do not possess the same powers to in different constitutional systems within South Asia.

The most fundamental of this is the use of the "unconstitutional constitutional amendments doctrine" that can help in limiting the authoritarian powers and the evolution of democracy and constitutional order.[8] In India, the courts started

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[7] See Andreas Buss, *Dual Legal systems and the Basic Structure Doctrine or Constitutions: The Case of India*, 19 CANADIAN JOURNAL OF LAW AND SOCIETY 23–49 (2004); Claire B. Wofford, *The Structure of Legal Doctrine in a Judicial Hierarchy*, 7 JOURNAL OF LAW AND COURTS 263–280 (2019); Salman Khurshid, *Constitutional Morality and Judges of the Supreme Court*, *in* JUDICIAL REVIEW: PROCESS, POWERS, AND PROBLEMS (ESSAYS IN HONOUR OF UPENDRA BAXI) 384–410 (Salman Khurshid et al. eds., 2020); Sotirios Barber, *The Role of Moral Philosophy in Constitutional Law*, 19 PS 858–860 (1986); Achyut Chetan, *Writing the Rights: Inscribing Constitutional Morality*, *in* FOUNDING MOTHERS OF THE INDIAN REPUBLIC: GENDER POLITICS OF THE FRAMING OF THE CONSTITUTION 167–212 (2023); MICHAEL J. PERRY, CONSTITUTIONAL RIGHTS, MORAL CONTROVERSY, AND THE SUPREME COURT (2008); Howard Schweber, *The Question of Substance: Morality, Law, and Constitutional Legitimacy*, *in* THE LANGUAGE OF LIBERAL CONSTITUTIONALISM 260–318 (2007); Michael J. Perry, *Human Rights: From Morality to Constitutional Law*, *in* CONSTITUTIONAL RIGHTS, MORAL CONTROVERSY, AND THE SUPREME COURT 9–34 (2008); Larry Alexander, *Constitutions, Judicial Review, Moral Rights, and Democracy: Disentangling the Issues*, *in* EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 119–137 (Grant Huscroft ed., 2008).

[8] Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISRAEL LAW REVIEW 321–341 (2011); Po Jen Yap, *The conundrum of unconstitutional constitutional amendments*, 4 GLOBAL CONSTITUTIONALISM 114–136 (2015); David E Landau,

active engagement with the political institutions and political processes, especially after the imposition of the emergency. It is safe to assume that this change was seen after the decisions like *ADM Jabalpur v. Shivkant Shukla*,[9] the Court wanted to regain the trust of the Indian society. The Supreme Court of India also witnessed the collapse of public institutions to abusive power politics. This vulnerability to be a victim of manipulation of democratic processes sent a strong signal to the courts that it has to play a larger role in the Indian political context. Over the last few years, South Asia has been the centre of this discussion with respect to the undemocratic control of public institutions. This has also resulted in some advancements in the way South Asia is studied from a lens of comparative constitutional law. In South Asia, the narrative of constitutional law is the narrative of crisis. For example, in the case of India, it could be how constitutional systems are responding to the protection of civil liberties or democratic values. In Pakistan, the focus could be the judicialization of politics and the militarization of governance.[10] In Nepal, the sub-continent witnessed the politics behind constitution-making.[11]

This article discusses two important events that marked a fundamental shift in reading constitutional law and democracy in South Asia: the 2021 Taliban offensive in Afghanistan and the 2022 Sri Lankan political crisis. This article also explores three important themes, first, how political actors use democracy as a mechanism to enforce their undemocratic objectives. Second, the idea of economic constitutionalism and third, the role of courts in strengthening the constitutional order in South Asia.

Rosalind Dixon & Yaniv Roznai, *From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras*, 8 GLOBAL CONSTITUTIONALISM 40–70 (2019); Joel Colón-Ríos, *Deliberative Democracy and the Doctrine of Unconstitutional Constitutional Amendments*, *in* THE CAMBRIDGE HANDBOOK OF DELIBERATIVE CONSTITUTIONALISM 271–281 (Ron Levy et al. eds., 2018); Po Jen Yap, *Democratic Values and the Conundrum of Unconstitutional Constitutional Amendments*, *in* COURTS AND DEMOCRACIES IN ASIA 181–200 (2017).

[9] Additional District Magistrate, Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207 (1976)

[10] See Osama Siddique, *The Judicialization of Politics in Pakistan: The Supreme Court after the Lawyers' Movement*, *in* UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA 159–191 (Mark Tushnet & Madhav Khosla eds., 2015).

[11] See Mara Malagodi, *Constitutional History and Constitutional Migration: Nepal*, *in* CONSTITUTIONALISM IN CONTEXT 113–135 (David S. Law ed., 2022);

III. South -Asian Economic Constitutionalism and Constitutional Order

Constitutional economics emerged as an academic sub-discipline from the public choice theory. While the history of constitutionalism can be traced back to the *Federalist Papers*, it has been noted that "the Federalist Papers have increasingly been recognized not only as a political manifesto but also as a theory of the constitution whose central assumption is almost identical with that made in economics".[12] It is clear that political changes can have economic ramifications and political changes often have a close link with constitutional designs.

Since political decisions and constitutional changes are closely read in economic constitutionalism, the idea of reading the constitution as a social contract becomes very important.[13] In this respect, commenting on the work of James M. Buchanan, one of the prominent scholars of the field, Stefan Voigt writes:

> "Buchanan has not reinvented social philosophy but has made extensive use of Hobbes and others. The situation out of which the social contract emerges is the 'equilibrium of anarchy' in which marginal costs and returns for producing, stealing and protecting goods are equally high. The individuals realize that they could all be better off if they could agree on a disarmament contract which would allow them to reduce the resources used for protecting and stealing goods. Since the

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[12] Stefan Voigt, *Positive Constitutional Economics: A Survey*, 90 (1) PUBLIC CHOICE (1997). See Brian Z. Tamanaha, *Locke, Montesquieu, the Federalist Papers*, *in* ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 47–59 (2004); Colleen A. Sheehan, *The Federalist Agenda*, *in* JAMES MADISON AND THE SPIRIT OF REPUBLICAN SELF-GOVERNMENT 31–56 (2009); THE CAMBRIDGE COMPANION TO THE FEDERALIST, (Jack N. Rakove & Colleen A. Sheehan eds., 2020); Martin Diamond, *Democracy and The Federalist: A Reconsideration of the Framers' Intent*, 53 AMERICAN POLITICAL SCIENCE REVIEW 52–68 (1959).

[13] See also Pamela A. Mason, *Rhetorics of "the People": The Supreme Court, the Social Contract, and the Constitution*, 61 THE REVIEW OF POLITICS 275–302 (1999); B. Dan Wood & Soren Jordan, *Establishing the Founders' Social Contract from the Constitutional Convention through George Washington*, *in* PARTY POLARIZATION IN AMERICA: THE WAR OVER TWO SOCIAL CONTRACTS 17–47 (2017); Dennis C. Mueller, *The constitution as a utilitarian contract*, *in* PUBLIC CHOICE III 615–642 (3 ed. 2003); Jean-Jacques Rousseau, *Of the Social Contract*, *in* ROUSSEAU: THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 39–155 (Victor Gourevitch ed., 2 ed. 2018);

> individuals find themselves in a prisoner's dilemma situation, they all have the incentive to sign a disarmament contract and to break it subsequently. As they all foresee this, they create a protective state to protect the individuals' private spheres. Additionally, they create the productive state which is to provide society with those (collective) goods whose private production would not be profitable. The idea that individuals create a state by way of a contract is not meant to be a historically correct description but simply a heuristic means."[14]

"The liberty to organize national life at will" shapes constitutional democracies. The constitutional crisis in South Asia also reflects a larger issue of the trembling of the social contract. The non-accountability of political actors that are hijacked

[14] Stefan Voigt, *Positive Constitutional Economics: A Survey*, 90 (1) PUBLIC CHOICE (1997): "It has been argued that the 'lived' constitution will not only be determined by the written document but also by judicial interpretation as well as the 'constitutional system' which comprises values, norms, attitudes and the like of elites as well as the populace at large. If the constitutional system is indeed a crucial factor for the 'real' constitution under which a society lives, it should also be relevant for the formal procedure as well as the substantive rules a group of persons chooses when agreeing on a constitution." See John Considine, *James M. Buchanan and Edmund Burke: Opposite Sides of the Same Fiscal Constitution Coin*, 28 JOURNAL OF THE HISTORY OF ECONOMIC THOUGHT 243–257 (2006); David M. Levy & Sandra J. Peart, *James Buchanan and the Return to an Economics of Natural Equals*, *in* TOWARDS AN ECONOMICS OF NATURAL EQUALS: A DOCUMENTARY HISTORY OF THE EARLY VIRGINIA SCHOOL 22–40 (2020); See also T.E. Flanagan, *James M. Buchanan, The Limits of Liberty: Between Anarchy And Leviathan. Chicago: The University of Chicago Press, 1975, Pp. xi, 210*, 9 CANADIAN JOURNAL OF POLITICAL SCIENCE 508–509 (1976); STEFAN VOIGT, CONSTITUTIONAL ECONOMICS: A PRIMER (2020); Stefan Voigt, *Positive Constitutional Economics*, *in* CONSTITUTIONAL ECONOMICS: A PRIMER 43–88 (2020); John M. Carey, *The Economic Effects of Constitutions*, 3 PERSPECTIVES ON POLITICS 193–194 (2005); Knut Wolfgang Nörr, *"Economic Constitution": On the Roots of a Legal Concept*, 11 JOURNAL OF LAW AND RELIGION 343–354 (1983); Gabriel L. Negretto, *Economic Crises, Political Fragmentation, and Constitutional Choice: The Agenda-Setting Power of Presidents in Latin America*, *in* CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS 285–304 (Tom Ginsburg, Mark D. Rosen, & Georg Vanberg eds., 2019); Pamela A. Mason, *Rhetorics of "the People": The Supreme Court, the Social Contract, and the Constitution*, 61 THE REVIEW OF POLITICS 275–302 (1999); Tom Ginsburg, *Constitutions as Contract, Constitutions as Charters*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 182–204 (Denis J. Galligan & Mila Versteeg eds., 2013).

by political actors through the political process has created a sense of distrust among the people towards the institutions. Popular mandates are not sufficient to call a political system democracy. The 'mandate' of elections in itself has been/will be manipulated. The idea of constitutionalism is about creating a political framework for a rule-oriented society. However, elections can create undemocratic power structures in society.[15] Political actors have misused the process of 'mandate' to legitimize several undemocratic decisions. South Asia has seen several similar phases in its post-colonial history. The success of any society in this respect will be based on how effective the constitutional designs are shaped to manage these extra-constitutional powers.

A. Militant Democracy and Taliban Unwritten Constitution

The takeover of Afghanistan by the Taliban was an event that witnessed the breakdown of the legal and political order of a society developed under the Constitution of Afghanistan in 2004.[16] The legal order was replaced by an alternative legal order based on the *Hanafi* school of law. The new unwritten constitutional order can be termed as 'Taliban constitutionalism' or a form of 'militant democracy'.[17] Jan-Werner Müller in his work the 'Militant Democracy'

[15] See Garrett Wallace Brown, *The constitutionalization of what?*, 1 GLOBAL CONSTITUTIONALISM 201–228 (2012); Thio Li-ann, *Varieties of Constitutionalism in Asia*, 16 ASIAN JOURNAL OF COMPARATIVE LAW 285–310 (2021). See also Adam Czarnota, *Sources of Constitutional Populism – Democracy, Identity and Economic Exclusion*, *in* ANTI-CONSTITUTIONAL POPULISM 495–505 (Martin Krygier, Adam Czarnota, & Wojciech Sadurski eds., 2022); Andrew R. Rutten, *The Supreme Court and the Search for an Economic Constitution, 1870–1990*, 53 THE JOURNAL OF ECONOMIC HISTORY 391–393 (1993).

[16] See Clark B. Lombardi & Shamshad Pasarlay, *Constitution-Making for Divided Societies: Afghanistan*, *in* CONSTITUTIONALISM IN CONTEXT 89–112 (David S. Law ed., 2022).

[17] See Ulrich Wagrandl, *Transnational militant democracy*, 7 GLOBAL CONSTITUTIONALISM 143–172 (2018); THE MILITANT FACE OF DEMOCRACY: LIBERAL FORCES FOR GOOD, (Anna Geis, Harald Müller, & Niklas Schörnig eds., 2013); Paulien de Morree, *The Concept of Militant Democracy*, *in* RIGHTS AND WRONGS UNDER THE ECHR: THE PROHIBITION OF ABUSE OF RIGHTS IN ARTICLE 17 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 147–184 (2016); Samuel Issacharoff, *Judging Militant Democracy*, *in* FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 100–124 (2015); Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AMERICAN POLITICAL SCIENCE REVIEW 417–432 (1937); Anna

defines "'Militant democracy' or 'defensive democracy' or 'fighting democracy'" as an idea of "a democratic regime which is willing to adopt pre-emptive, prima facie illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime."[18] In September 2021, the militant group said that "they would implement the 1964 Constitution of Afghanistan as an interim charter."[19] The interim charter and the presence of a religion-centered constitutional order create a socially complex legal order. In the context of the legal perplexity that the Taliban is facing, Shamshad Pasarlay writes:

> "To make matters even more confusing, the Taliban have in many places suggested that they reject the values and rules that are enshrined in both the 1964 and the 2004 constitutions. Taliban official conduct is also obviously and unapologetically inconsistent with the democratic and liberal values enshrined in both the 1964 and the 2004 basic laws. In public statements the Taliban have made no secret of their hatred and animus towards the 2004 Constitution, decrying the document as a foreign imposition. The Taliban have re-

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Geis, Harald Müller & Niklas Schörnig, *Liberal democracies as militant 'forces for good':: a comparative perspective*, *in* THE MILITANT FACE OF DEMOCRACY: LIBERAL FORCES FOR GOOD 307–344 (Anna Geis, Harald Müller, & Niklas Schörnig eds., 2013); Angela K. Bourne & Bastiaan Rijpkema, *Militant Democracy, Populism, Illiberalism: New Challengers and New Challenges*, 18 EUROPEAN CONSTITUTIONAL LAW REVIEW 375–384 (2022); Tom van der Meer & Bastiaan Rijpkema, *Militant Democracy and the Minority to Majority Effect: on the Importance of Electoral System Design*, 18 EUROPEAN CONSTITUTIONAL LAW REVIEW 511–532 (2022); Malthe Hilal-Harvald, *Islam as a Civilizational Threat: Constitutional Identity, Militant Democracy, and Judicial Review in Western Europe*, 21 GERMAN LAW JOURNAL 1228–1256 (2020); Michael Tomz, Jessica L.P. Weeks & Keren Yarhi-Milo, *Public Opinion and Decisions About Military Force in Democracies*, 74 INTERNATIONAL ORGANIZATION 119–143 (2020); Aurel Croissant & David Kuehn, *Patterns of Civilian Control of the Military in East Asia's New Democracies*, 9 JOURNAL OF EAST ASIAN STUDIES 187–217 (2009).

[18] Jan-Werner Müller, *Militant Democracy*, in Michel Rosenfeld & András Sajó (eds), THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (2012)

[19] Mira Patel, *Explained: The Taliban plan to 'temporarily' adopt parts of the 1964 constitution; what it could mean*, INDIAN EXPRESS (Jan. 12, 2022, 6:15 PM), https://www.scconline.com/blog/wp-content/uploads/2020/07/20th-Harvard-bluebook.pdf

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> established the unitary, highly centralized, autocratic "Islamic Emirate" (1998 charter) and have revived a number of laws they adopted in the mid-1990s."[20]

Taliban has consistently vouched for creating "law" that is based on the Taliban 'Islamic Emirate'. For example, the "Law of the General Principles of the Organization and Jurisdiction of the Ministries of the Islamic Emirate", defines "the structure of the Taliban's executive branch which includes a prime minister, deputy prime ministers and several other ministries."[21] This law empowers the ministry with extensive power to enforce public morals. The new unwritten constitutional order is based on *Hanafi fiqh*. Shamshad Pasarlay writes that "this change marks, one must stress, a significant departure from the Afghan constitutional tradition, as previous Afghan constitutions adopted provisions requiring that state law must not be repugnant to the 'basics of Islam' and none required that state law must be consistent with the rulings of the *Hanafi fiqh*."[22]

One of the most important reasons that facilitated the takeover of the constitutional government was the fact that the public institutions failed to create a stable society. The constitutional institutions have played along with the uprising and acted as a support system to facilitate a smooth takeover by militant groups. The Afghanistan crisis also showed the world that if constitutional bodies fail to work towards progressive development, then the society can show collective support even to militant government provided they offer an alternative form of governance.

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[20] Shamshad Pasarlay, Afghanistan's Unwritten Constitution under the Taliban, Int'l J. Const. L. Blog, May 17, 2022, at: http://www.iconnectblog.com/2022/05/afghanistans-unwritten-constitution-under-the-taliban/; See also Shamshad Pasarlay, *Constitutional Incrementalism in a Religiously Divided Society: A Case Study of Afghanistan*, 13 ASIAN JOURNAL OF COMPARATIVE LAW 255–281 (2018).

[21] Official Gazette No. 797: 1996

[22] Shamshad Pasarlay, Afghanistan's Unwritten Constitution under the Taliban, Int'l J. Const. L. Blog, May 17, 2022, at: http://www.iconnectblog.com/2022/05/afghanistans-unwritten-constitution-under-the-taliban/

B. The 2022 Sri Lankan Constitutional Crisis and Economic Breakdown

Protests in Sri Lanka and changes in the political order are not unprecedented.[23] On 31 March 2022, the demonstrators stormed the President's private residence in the State's capital which ultimately led to mass resignations. While the government tried to quell the protesters, the people's movement was uncontainable. The appeasement steps by the government that included resignations by Central Bank Governor and Treasury Secretary also failed. While this led to the fall of the elected government, the underlying reason was the mismanagement of the economy. The Government failed to meet the demands and aspirations of the people who elected them. The collapse of the Government also marked some changes in the constitutional order of Sri Lanka.[24]

In the case of Afghanistan and Sri Lanka, one dealing with a militant coup and the other dealing with a democratic people's coup, there are some commonalities. Both states had an unlimited government with unlimited sovereignty. Both events had the failure of elected governments to hold public institutions accountable and political actors accountable. A lack of strong constitutional order focused on structures defining the limits of, government power or authority led to the breakdown of the state machinery. These events mark the beginning of a new phase of constitutional governance that South Asia aspires for. There is a need to build strong independent financial institutions and hold the political actors who manage them within constitutional limits.

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[23] Sujit Choudhry, *Constitutional Politics and Crisis in Sri Lanka*, *in* MULTINATION STATES IN ASIA: ACCOMMODATION OR RESISTANCE 103–135 (Jacques Bertrand & Andre Laliberte eds., 2010); Asanga Welikala, *Constitutional Form and Reform in Postwar Sri Lanka: Towards a Plurinational Understanding*, *in* UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA 320–354 (Mark Tushnet & Madhav Khosla eds., 2015); Gehan Gunatilleke, *The Constitutional Practice of Ethno-Religious Violence in Sri Lanka*, 13 ASIAN JOURNAL OF COMPARATIVE LAW 359–387 (2018); Asanga Welikala, *Constitutional Form and Reform in Postwar Sri Lanka: Towards a Plurinational Understanding*, *in* UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA 320–354 (Mark Tushnet & Madhav Khosla eds., 2015).

[24] Uditha Jayasinghe, *Sri Lanka passes constitutional amendment aimed at trimming presidential powers*, REUTERS (Jan. 12, 2022, 6:15 PM), https://www.reuters.com/world/asia-pacific/sri-lanka-passes-constitutional-amendment-trim-presidential-powers-2022-10-21/

IV. Abusive Constitutionalism in South Asia and the Role of the Judiciary in Protecting Constitutional Rights

While democracy has been an interesting subject for constitutional scholars, the tensions in South Asia are distinct from western constitutional democracies. In South Asia, the fundamentals of democracy and constitutional institutions are declining.[25] Stability in the South Asian region requires ensuring constitutional compliance, ensuring human rights and safeguarding democracy. However, these four major issues plague the order of the region: 'Dysfunctional politics'; 'Lack of Constitutional order'; 'Low levels of development'; and 'Susceptibility to panics and populist pressures'.

The role of courts in dealing with these four major problems is crucial for the success of South Asian constitutions.[26] The most powerful weapon used by the judiciary in this respect is the power of judicial review. It is also interesting to note that this power is unwritten in the text of the South Asian constitutions. As Raeesa Vakil argues "Powers of judicial review are generally accepted as a fait accompli, and are sometimes understood to inhere in the constitution or, alternatively, as deriving from a reading of several constitutional provisions together."[27] In India, article 13 prohibits the state from making "any law which takes away or abridges the rights conferred by part III" and any law made against this "to the extent of such contravention is void." This gives the power to Indian Supreme Court to exercise judicial review. Such patterns are also visible in other

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[25] See also AYESHA JALAL, DEMOCRACY AND AUTHORITARIANISM IN SOUTH ASIA: A COMPARATIVE AND HISTORICAL PERSPECTIVE (1995); Emmanuel Teitelbaum, *Response to Erik Kuhonta's review of Mobilizing Restraint: Democracy and Industrial Conflict in Post-Reform South Asia*, 10 PERSPECTIVES ON POLITICS 811–812 (2012); PO JEN YAP, *Democracy, courts and proportionality analysis in Asia*, 9 GLOBAL CONSTITUTIONALISM 531–542 (2020); Rosalind Dixon & Mark Tushnet, *Constitutional Democracy and Electoral Commissions: A Reflection from Asia*, 16 ASIAN JOURNAL OF COMPARATIVE LAW S1–S9 (2021); U.C. Jha, *The reform of military justice in South Asia*, *in* MILITARY JUSTICE IN THE MODERN AGE 178–195 (Alison Duxbury & Matthew Groves eds., 2016).

[26] Sujit Choudhry, *How to Do Constitutional Law and Politics in South Asia*, *in* UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA 18–42 (Mark Tushnet & Madhav Khosla eds., 2015).

[27] Raeesa Vakil, *Constitutionalizing administrative law in the Indian Supreme Court: Natural justice and fundamental rights*, 16(2) *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 475–502 (2018).

South Asian constitutions. Raeesa further argues that "When it comes to the judicial review over administrative action, on the other hand, the Indian Supreme Court has developed its jurisprudence by borrowing selectively from British common law to exercise two broad groups of control. The first group of controls consists of judicial, institutional, and private law remedies, such as appeals from Indian regulatory and administrative bodies to constitutional courts and injunctive relief in civil courts."[28]

The South Asian courts have used various common law doctrines to review administrative actions. Considering the kind of issues that South Asia faces, the role of constitutional courts becomes more crucial to deal with issues related to the review of constitutional amendments, adjudication of disputes relating to elections and dissolution of political parties. Constitutional Courts often succumb to the pressure of political actors who with popular support dictate extra-constitutional norms. In this context, the Indian Constitution and its unwritten elements have been an important model for constitutional development in the region. The success of Indian political structure is based on the values of social democracy.[29] In his closing speech to the Constituent Assembly, Dr. B.R. Ambedkar said:

> "Political democracy cannot last unless there lies at the base of its social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality, and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of the trinity. Liberty cannot be

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[28] Raeesa Vakil, *Constitutionalizing administrative law in the Indian Supreme Court: Natural justice and fundamental rights*, 16(2) *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 475–502 (2018).

[29] See also Bryan Fanning, *The case for social democracy*, *in* THREE ROADS TO THE WELFARE STATE: LIBERALISM, SOCIAL DEMOCRACY AND CHRISTIAN DEMOCRACY 99–134 (2021); THE FUTURE OF SOCIAL DEMOCRACY: ESSAYS TO MARK THE 40TH ANNIVERSARY OF THE LIMEHOUSE DECLARATION, (Colin McDougall, George Kendall, & Wendy Chamberlain eds., 2021); Paul Wapner, *Democracy and Social Movements*, 97 PROCEEDINGS OF THE ASIL ANNUAL MEETING 305–308 (2003); Robert Page, *Social Democracy Then and Now*, 1 SOCIAL POLICY AND SOCIETY 77–80 (2002); David Miller, *Democracy and Social Justice*, 8 BRITISH JOURNAL OF POLITICAL SCIENCE 1–19 (1978).

> divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become the natural course of things. It would require a constable to enforce them."[30]

In this context, Jamal Greene and Madhav Khosla argue "the reasons for India's influence may partly be its political authority within South Asia, but it may also be a function of similar circumstances, namely, political corruption, widespread illiteracy, and low education levels coupled with the presence of civil society activism and non-governmental organizations."[31] A further reason according to Jamal Greene and Madhav Khosla for the influence of Indian constitutional ideas is the perception that "the Indian experiment has been successful and to the extent that India remains, in whatever imperfect form, a functioning constitutional democracy, the tools that it has developed may be seen as worthy of replication."[32] However, scholars have pointed out that "as established democracies such as Poland, Hungary, Turkey, Brazil, South Africa, and Israel witness democratic deconsolidation, the world's largest democracy has sadly not been an exception."[33] Indian constitutional interpretations and the ideas of basic structure

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[30] SPEECH BY DR. B.R. AMBEDKAR ON 25 NOVEMBER 1949, CONSTITUENT ASSEMBLY DEBATES 979 (1949).

[31] Jamal Greene & Madhav Khosla, *Constitutional rights in South Asia: Introduction*, 16(2) *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 470 (2018).

[32] *Id.* See also HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION (2000); Democracy and Constitution Making, *in* RATIONALITY, DEMOCRACY, AND JUSTICE: THE LEGACY OF JON ELSTER 143–188 (Claudio López-Guerra & Julia Maskivker eds., 2015); James S. Fishkin, *Deliberative Democracy and Constitutions*, *in* WHAT SHOULD CONSTITUTIONS DO? 242–260 (Ellen Frankel Paul, Fred D. Miller, Jr, & Jeffrey Paul eds., 2011); Samuel Issacharoff, *The Promise of Constitutional Democracy*, *in* FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 137–165 (2015); Pasquale Pasquino, *Majority rules in constitutional democracies: Some remarks about theory and practice*, *in* MAJORITY DECISIONS: PRINCIPLES AND PRACTICES 219–235 (Stéphanie Novak & Jon Elster eds., 2014).

[33] T. Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, 14(1) LAW & ETHICS OF HUMAN RIGHTS 49-95 (2018).

doctrine can influence its neighbouring states to regulate their political actors through comparative constitutional engagement.

V. South Asian Regionalism and Constitutional Rights in South Asia

The South Asian subcontinent and its constitutional crisis often have repercussions on its neighbouring states. The geopolitical reading of the democratic deficit in the region also demands regional cooperation to find political solutions. Regionalism in constitutional studies is the process of building cooperative inter-state relations.[34] It includes building inter-governmental economic linkages and a common regional identity. The region has commonalities to strengthen common identities which are largely based on shared history, experience, norms and values. It would involve the process of creating institutions through collective action. However, the problem with South Asia is the presence of many South Asia(s) within the region.

While there is a growing need for interdependence, the region is deeply divided due to antagonism and mistrust. Due to this fragmentation, South Asia has historically failed to develop a sense of regional identity.[35] The economies of all South Asian states also face an internal crisis due to political problems. This calls for re-looking at how regionalism can play a role in bringing stability to the

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See also CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

[34] BHUMITRA CHAKMA, SOUTH ASIAN REGIONALISM: THE LIMITS OF COOPERATION (2020); Kripa Sridharan, *SAARC and the Evolving Asian Regionalism*, *in* THE EMERGING DIMENSIONS OF SAARC 201–228 (S. D. Muni ed., 2010); Baogang He & Takashi Inoguchi, *Introduction to Ideas of Asian Regionalism*, 12 JAPANESE JOURNAL OF POLITICAL SCIENCE 165–177 (2011); Bhumitra Chakma, *International Relations Theory and South Asian Regionalism*, *in* SOUTH ASIAN REGIONALISM: THE LIMITS OF COOPERATION 155–168 (2020); PASHA L. HSIEH, NEW ASIAN REGIONALISM IN INTERNATIONAL ECONOMIC LAW (2021); Rajendra K. Jain, *From Idealism to Pragmatism: India and Asian Regional Integration*, 12 JAPANESE JOURNAL OF POLITICAL SCIENCE 213–231 (2011).

[35] Bryce Harland, *Regionalism in Asia*, *in* COLLISION COURSE: AMERICA AND EAST ASIA IN THE PAST AND THE FUTURE 182–193 (1986); Diana Panke, Sören Stapel & Anna Starkmann, *Regional Organizations in Asia*, *in* COMPARING REGIONAL ORGANIZATIONS: GLOBAL DYNAMICS AND REGIONAL PARTICULARITIES 83–100 (2020); Kym Anderson, *Asia and Other Emerging Regions*, *in* WINE GLOBALIZATION: A NEW COMPARATIVE HISTORY 466–490 (Kym Anderson & Vicente Pinilla eds., 2018).

region. Regionalism is "the role and interpretation of geography, identity, culture, institutionalization and the role of actors, including hegemons, major regional powers and other actors from within a region, both state and societal".[36] Regionalism requires harmony, interdependence and identity. However, the region lacks harmony due to which common platforms like South Asian Association for Regional Cooperation (SAARC) have failed in case of constitutional breakdowns.[37] In 1987 before the creation of SAARC, then Indian Prime Minister Narasimha Rao stated the problems of regionalism at the 1981 United Nations General Assembly. Quoting him:

> "There is an increasing tendency to tackle economic problems through political means. Obviously, this will not work in the new context of a world composed of states having sovereign equality but steeped in gaping economic inequalities, the pursuit of such strategy can at best be described as misguided and unfortunate and can lead to confusion and anarchy in economic relations."[38]

As the author has argued elsewhere, "Writings of early political philosophers indicate that the word 'democracy' was endorsed as an approach entrusted with the task stabilizing social order through people's participation and creating structured mechanisms for social existence."[39] Regionalism is constructed on the

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[36] GLOBALISING THE REGIONAL, REGIONALISING THE GLOBAL, 35 (Rick Fawn ed., 2009).
[37] Faizal Yahya et al., *Pakistan, SAARC and ASEAN Relations*, *in* THE 3RD ASEAN READER 328–333 (2015); S. Narayan, *SAARC and South Asian Economic Integration*, *in* THE EMERGING DIMENSIONS OF SAARC 32–50 (S. D. Muni ed., 2010); Kripa Sridharan, *SAARC and the Evolving Asian Regionalism*, *in* THE EMERGING DIMENSIONS OF SAARC 201–228 (S. D. Muni ed., 2010); Bhumitra Chakma, *SAARC After 1992: Disagreements and Differences*, *in* SOUTH ASIAN REGIONALISM: THE LIMITS OF COOPERATION 99–120 (2020); Bhumitra Chakma, *SAARC and the Limits of Cooperation in South Asia*, *in* SOUTH ASIAN REGIONALISM: THE LIMITS OF COOPERATION 137–154 (2020); Bhumitra Chakma, *Beyond SAARC: Sub-Regional and Trans-Regional Cooperation*, *in* SOUTH ASIAN REGIONALISM: THE LIMITS OF COOPERATION 121–136 (2020); Javaid Rehman, *Institutions of International Law and the Development of Regional Forum for Peaceful Dialogue in South Asia*, 1 ASIAN JOURNAL OF COMPARATIVE LAW 1–18 (2006).
[38] See N. Rao, *15th Plenary Meeting*, General Debate, 28 September 1981.
[39] Adithya Variath, *Analysing the working of the Indian Democracy through the prism of Natural Law Philosophy: A Subaltern View*, ILI LAW REVIEW, 30-46 (2021); See alo James M. Buchanan & Roger D. Congleton, *The political shape of constitutional*

idea of building a stabilizing social order in regions with commonalities. The discourse begins with the understanding that 'regions' are socially constructed. As Hettne put it "all regions are 'socially constructed' and hence 'politically contested.' Because regions are constructed, the most important aspect to understand region depends on 'how political actors perceive and interpret the idea of a region and notions of 'regionness'".[40] Transnational economic relations in the region can be bolstered if constitutional designs are strengthened. States in the region have to cooperate and respond to institutional irregularities. Nation-building in South Asia will not happen unless political, social and economic conditions are stabilized. Issues related to dysfunctional politics and lack of constitutional order have to be prioritized in the region. The task begins with strengthening the institutions of democracy. Countries like India can play a proactive geopolitical role in regional constitutional dynamics in South Asia and beyond.

VI. Conclusion

South Asian region has faced systematic and ongoing violations of social order and rule of law. Countries like Afghanistan have not created transitional justice mechanisms that promote political stability. There is an imbalance of power between the branches of government and extra-constitutional actors. Sri Lanka

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order, *in* POLITICS BY PRINCIPLE, NOT INTEREST: TOWARDS NONDISCRIMINATORY DEMOCRACY 147–154 (1998); Tom Ginsburg, Terence C. Halliday & Gregory Shaffer, *Constitution-Making as Transnational Legal Ordering*, *in* CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 1–25 (Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday eds., 2019); Robert W. Gordon, *The Constitution of Liberal Order at the Troubled Beginnings of the Modern State*, *in* TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 156–180 (2017); MOHAMED S HELAL, *Anarchy, ordering principles and the constitutive regime of the international system*, 8 GLOBAL CONSTITUTIONALISM 470–505 (2019); Ralph Ketcham, *Constitutional Democracy: Creating and Maintaining a Just Political Order*, 6 PERSPECTIVES ON POLITICS 164–165 (2008); Jaakko Heiskanen, *Found in translation: the global constitution of the modern international order*, 13 INTERNATIONAL THEORY 231–259 (2021); Jacco Bomhoff, *Constitutionalism and Mobility: Expulsion and Escape among Partial Constitutional Orders*, *in* THE DOUBLE-FACING CONSTITUTION 211–242 (Jacco Bomhoff, David Dyzenhaus, & Thomas Poole eds., 2020).

[40] Hettne Björn & Söderbaum Fredrik, *The New Regionalism Approach*, 17 (3) POLITEIA 6-21 (1998)

has to build strong financial institutions and it is crucial to maintaining rule of law, good governance and political order within a legal system. Strong constitutional designs can safeguard society from the arbitrary use of power by militant democratic forces. Democracy in the region has suffered due to military interference in the politicization of constitutional order and politics of intimidation. Most importantly, the region has witnessed political executives breaking the pillars of democratic constitutionalism. The fundamental challenge is to position economic constitutionalism to protect the independence of constitutional designs. The idea is to develop strong constitutional norms, empower judicial review and promote unwritten constitutional norms like basic structure to review arbitrary actions by administrative actors. Tarunabh Khaitan argues in his paper 'Killing a Constitution with a Thousand Cuts', "Liberal democratic constitutions typically adopt three ways of making accountability demands on the political executive: vertically, by demanding electoral accountability to the people; horizontally, by subjecting it to accountability demands of other state institutions like the judiciary and fourth branch institutions; and diagonally, by requiring discursive accountability by the media, the academy, and civil society."[41] The idea of economic constitutionalism is an idea of accountability that political actors have in dealing with financial institutions. Judicial review, respect for rule of law, democratic accountability and economic justice form the pillars of South Asian economic constitutionalism. This would require the South Asian states to adopt fundamental changes in their constitutional designs. Courts have to engage in key litigation in constitutional courts by adopting principles like basic structure and constitutional morality.

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[41] T. Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, 14(1) LAW & ETHICS OF HUMAN RIGHTS 49-95 (2018)

A Study of "Common but Differentiated Responsibility" and Paris Agreement

***Arup Poddar*[1]**

Abstract

The present article makes a study of the Paris agreement and the sound principle of common but differentiated responsibility and tries to provide a discussion that how the developing nation will be benefited from such principle. Paris agreement is different from any previous international documents on the goal of climate change including the main convention of 1992 in the name of United Nations framework Convention on climate change and subsequently 1997 Kyoto protocol. The present article analyses the situation of the countries and provides efficacy of the principle common but differentiated responsibility to meet with the goal of climate change.

Keywords: UNFCCC, sustainable development, precautionary principle, Paris agreement, Kyoto protocol, differentiated responsibility, self-differentiation

I. Introduction

The Paris agreement[2] got signed by 187 countries and came into effect from 4 November 2016.[3] This Paris agreement is in continuation of the United Nations Framework Convention on Climate Change (UNFCCC) and will be working on focusing the issues connected with changing climate[4] conditions.[5] The purpose of

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[2] Jorge E. Vinuales, *The Paris Agreement on Climate Change*, 59 GERMAN Y.B. INT'l L. 11 (2016).

[3] Theodore Okonkwo, *Reshaping the Global Climate Change Regime through the Paris Agreement*, 6 Christ U. L.J. 1 (2017).

[4] Tom Daschle, *Changing the Political Climate on Climate Change*, 9 GEO. J. INT'l AFF. 93 (2008).

[5] *United Nations Framework Convention on Climate Change*, 22 ENVTL. POL'y & L. 258 (1992). *See also* Noelle Higgins, *Changing Climate; Changing Life - Climate Change and Indigenous Intangible Cultural Heritage*, 11 Laws 1 (2022).

this agreement is to inform all the nation that the risk which is associated with the climate change and global warming[6] in the 21st century and how to control the global warming[7]. Section 1 of the Article 2 of this agreement clearly states that there should be minimum revision of the rise of temperature.[8] The agreement has another unique feature that it enables the state to be more fit for combating the climate change issues.[9] The agreement had the proposal to provide proper financial support to combat this global warming[10] issue, similarly, to improve the technology and develop the capacity building structure.[11]

The Paris agreement makes such provisions by which the obligation will be binding in nature for proper enforcement.[12] The agreement more emphasis on the common but differentiated responsibility and capacity building.[13] In the first part of this article introduction to the Paris agreement will be discussed. In the second part of the article there will be discussion on the common but differentiated responsibility. The present article will focus on the inception of the international climate framework principle and how it has been inserted in the international instruments The article will also focus on how the principles of may change has been inserted in the Paris agreement. The article is trying to focus on the principle of the Paris agreement and also the earlier documents on the same issue that which one is the best to be followed. Accordingly, the article asserts that the previous framework for combating climate change issue was not sufficient and needs property nothing so that countries complaints can be established well.

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[6] Arnold W. Reitze Jr., *Global Warming*, 31 ENVTL. L. REP. News & Analysis 10253 (2001).

[7] William F. Pedersen, *Adapting Environmental Law to Global Warming Control*, 17 N.Y.U. ENVTL. L.J. 256 (2008).

[8] Jennifer Huang, *Climate Justice: Climate Justice and the Paris Agreement*, 9 J. ANIMAL & ENVTL. L. 23 (2017).

[9] Paul B. Lewis & Giovanni Coinu, *Climate Change, the Paris Agreement, and Subsidiarity*, 52 UIC L. REV. 257 (2019).

[10] *United States Joins Consensus on Paris Climate Agreement*, 110 AM. J. INT'l L. 374 (2016).

[11] Neil Craik & William C. G. Burns, *Climate Engineering under the Paris Agreement*, 49 ENVTL. L. REP. News & Analysis 11113 (2019).

[12] Christina Voigt & Felipe Ferreira, *Differentiation in the Paris Agreement*, 6 CLIMATE L. 58 (2016).

[13] Paul G. Harris, *Common But Differentiated Responsibility: The Kyoto Protocol and United States Policy*, 7 N.Y.U. ENVTL. L.J. 27 (1999).

II. Understanding the Paris Agreement

It is true that the nations are quite serious nowadays to combat the global warming because of climate change and therefore they have enacted national laws so address this crisis as per the UNFCCC.[14] It seems Paris agreement comes in a difference folder than any of the previous international instruments dealing with and climate change issues. The agreement is not providing any stringent application of this provision rather flexible but there are provisions which are not taxable and accordingly the agreement provides a balance between the two. Therefore, the different countries established different strategies for combating climate change issues.[15] The signatories to the Paris agreement made it very clear that they will implement the mandates through the national laws. The fundamental principles of the Paris agreement to be implemented by all the nations without the flexibility but other principles are to be followed as per the need of the respective nations so there is a difference from the Kyoto protocol, because the emission reduction was applicable only to develop nation.[16]

It is also true that the obligations mentioned under the agreement was running binding force because of superpower countries the obligations to meet with the climate change became flexible. The countries will be failing to meet with the obligation of the agreement no sanction or remedial measures under the agreement has been mentioned. It is important to mention here that there is a transparency mechanism mentioned under Articles 13 and 15 of the agreement that the compliance mechanism directed by the states will have to submit the progress report in consonance with global standard.[17] The financially weak nation will be given support of the finance by the developed nations who are parties to the agreement.[18] The global investment will be placed in the climate finance and being utilised for the reduction of greenhouse gas emissions in various countries.

[14] Aruna B. Venkat, *Global Warming and Refugees of Climate Change*, 4 ENVTL. L. & PRAC. REV. 116 (2015).

[15] Anatole Boute, *Combating Climate Change through Investment Arbitration*, 35 FORDHAM INT'l L.J. 613 (2012).

[16] Matthew CM Hill, *Keeping Commitments: Examining the New Principles in the Paris Agreement*, 21 N.Z. J. ENVTL. L. 53 (2017).

[17] Jorge E. Vinuales, *See Supra Note 1*.

[18] Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope*, 110 AM. J. INT'l L. 288 (2016).

The Paris the agreement works more on procedural part than that of substantive issues. The common but differentiated responsibility is one of the sound principles available under this Paris agreement.[19] The article discusses on this principle in its next part.

III. A Study of the Principle Relating to "Common but Differentiated Responsibility"

The principle of differentiated responsibility is based on the principle of equity that the states will have common goal to reduce the greenhouse gas emission but the threshold of reducing the greenhouse gas will be depending on the capabilities of the respective states.[20] The second world conference on climate change in the year 1993 introduced this in 20 principle of common but differentiated responsibility and the same is also found under principle 7 of the Rio declaration of 1992. The same principle has found its place in many international instruments including under the world trade organisation.[21]

The 1992 United Nations framework Convention on climate change mentions the climate change and global warming as a common concern.[22] With regard to earth and outer space the expression 'common concern' has been used heavily in environmental conservation policy.[23] Common heritage of the mankind and common concern, both are different. Common right over the property is the main objective of common heritage of the mankind, whereas common goal to meet with the target by all the nations is common concern.[24] Since climate change affects all the nations, therefore, the common concern demands cooperation among the

[19] Temitope Tunbi Onifade, *Climate Justice under the Paris Agreement: Framework and Substance*, 2021 CCLR 233 (2021).

[20] Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'l L. 276 (2004).

[21] Anagha Sharankumar Limbale, *Study of Environmental Principle with Reference to Rio Declaration*, 2 INT'l J.L. MGMT. & HUMAN. 48 (2019).

[22] Philippe Sands, *The United Nations Framework Convention on Climate Change*, 1 REV. EUR. COMP. & INT'l ENVTL. L. 270 (1992).

[23] Alan Boyle, *Climate Change, the Paris Agreement and Human Rights*, 67 INT'l & COMP. L.Q. 759 (2018).

[24] Michael W. Lodge, *The Common Heritage of Mankind*, 27 INT'l J. MARINE & Coastal L. 733 (2012).

states. Because of inequalities prevailing among the nations in terms of finance and resources, therefore, the new principle has been developed in the name of 'common but differentiated responsibility and respective abilities and capabilities'. The individual nation will have same obligation, but the implementation will depend upon their respective ability is the main concern of 'individual responsibility' and 'common concern'.[25]

The article 3 of the United Nations framework Convention on climate change for the first time introduced the principle of differentiated responsibility.[26] Later on, the same principle was directed in the year 1997 in Kyoto protocol and in 2009 in Copenhagen Accord.[27] Generally, there will be seen obligation for all the signatory countries, this is the principle which is different from the same practice.

There reflects the same principle in other international instruments favouring deviation from the same obligation of the state.[28] The scholars are bit confused about the principle's application and its content, though the principle has found its place in many international instruments dealing with climate change.[29] Accordingly, the principle needs proper interpretation. It seems that the difference of understanding about this principle between developed and developing nation's mind set up. Thus, the meaning of differentiated responsibilities has been understood differently.[30]

The past emissions report of the countries including history of industrialisation should be considered with regard to the imposing burden as stated by developing countries.[31] Therefore, the Industrial Revolution faced by the developed nation are having more responsibilities under climate change because they have

[25] Susan S. Kuo & Benjamin Means, *Climate Change Compliance*, 107 IOWA L. REV. 2135 (2022).
[26] Daniel Bodansky, *See Supra Note 17*.
[27] *Copenhagen Accord*, 2009 ROMANIAN J. ENVTL. L. 116 (2009).
[28] Siddharth Singh, *Analyzing CBDR Principle under the Paris Agreement*, 12 GNLU J.L. DEV. & POL. 1 (2022).
[29] Neha Kurien, *Dealing with Climate Change Migration: Adaptation as the Potential Solution*, 4 ENV't L. & Soc'y J. 1 (2018).
[30] Rachel Boyte, *Common but Differentiated Responsibilities: Adjusting the Developing/Developed Dichotomy in International Environmental Law*, 14 N.Z. J. ENVTL. L. 63 (2010).
[31] Jodie Moffat, *Arranging Deckchairs on the Titanic: Climate Change, Greenhouse Gas Emissions and International Shipping*, 24 Austl. & N.Z. MAR. L.J. 104 (2010).

progressed at the cost of global environment.[32] The United States have given the expression responsibility based on the ability of various countries. The principle of differentiated responsibilities is having economic understanding that is advanced by developed countries.[33] Accordingly, the ability of the nation on the industrialised policy will decide that what sort of obligation towards climate change the concerned nation should have. Therefore, the interpretation of the principle between the developed nation and developing nation morphs the basic understanding of the principle from one place to another. Many countries taking that the interpretation given by the developed country is more oriented towards achieving good result, but the Paris agreement worked on balancing the views from both the sides.[34]

The different international instruments have given different interpretation and meaning of this principle and from different interpretation provided by different countries The Montréal protocol of 1987, for instance, has provided different for developed and developing nations.[35] A different annex has been prepared by the United Nations framework Convention on climate change based on the different obligation and capabilities of various nations.[36] At the same time the emission restriction has been provided differently to different countries listed in annex I and at the Kyoto protocol.[37] Regarding compliance timelines, enforcement and consequence of non-compliance there are differences between United Nations framework Convention on climate change and Kyoto protocol. This inequality in

[32] Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE L. 345 (2011).

[33] Maureen F. Irish, *Least Developed Countries, Climate Change and Trade*, 5 LAW & DEV. REV. 2 (2012).

[34] Cinnamon P. Carlarne & J.D. Colavecchio, *Balancing Equity and Effectiveness: The Paris Agreement & the Future of International Climate Change Law*, 27 N.Y.U. ENVTL. L.J. 107 (2019).

[35] *Montreal Protocol on Substances That Deplete the Ozone Layer 1987*, 2014 GLOB. ENVTL. L. ANN. 102 (2014).

[36] Uma Outka, *The Obama Administration's Clean Air Act Legacy and the UNFCCC*, 48 Case W. Res. J. INT'l L. 109 (2016).

[37] Glenn Wiser & Donald Goldberg, *Hybrid Liability under Kyoto Protocol (continued)*, 1 INT'l & COMP. ENVTL. L. 10 (2000).

application by different countries has been found mainly because of no proper interpretation available in the relevant primary international legal instrument.[38]

The Paris agreement is different in its working capabilities because of the fact that it can learn from the experience and mould the principle of differentiated responsibility.[39] The agreement moves out from the working pattern of Kyoto protocol and provides a comprehensive mechanism for its working pattern.[40] Self-differentiation[41] is one of the important expressions, this can be found only under Paris agreement. This principle allows the nation to adopt its own policy how to reduce the greenhouse gas emission depending on its capabilities.[42] Therefore, the agreement gives liberty to the countries to decide that how the obligation to fulfil and classification of different countries will be done. The principle of self-differentiation allows the countries to take steps in the entire field of climate change, technology transfer and enhancement of capabilities.[43] The principle of equality, sustainable development, et cetera have been widely accepted under the Paris agreement.[44]

It is very innovative that the Paris agreement has conducted with his other principles of other relevant international environmental law documents. the principle of constructively provides objective for mediation, adaptation, finance, technology, capacity building and transparency making the agreement feasible for implementation.[45] The article discusses other relevant parts of the agreement in the next phase.

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[38] Eva Miskolczi-Bodnar, *Requirements for the Successor to Kyoto - The Shortcomings of the Current Protocol*, 8 J. AGRIC. ENVTL. L. 53 (2013).
[39] Christina Voigt & Felipe Ferreira, *See Supra Note 11*.
[40] Edward A. Smeloff, *Global Warming: The Kyoto Protocol and beyond*, 28 ENVTL. POL'y & L. 63 (1998).
[41] Meinhard Doelle, *The Paris Agreement: Historic Breakthrough or High Stakes Experiment*, 6 CLIMATE L. 1 (2016).
[42] Daniel Bodansky, *See Supra Note 17.*
[43] Elizabeth Burleson, *Energy Policy, intellectual Property, and Technology Transfer to Address Climate Change*, 18 Transnat'l L. & CONTEMP. Probs. 69 (2009).
[44] Francesco Sindico, *Paris, Climate Change, and Sustainable Development*, 6 CLIMATE L. 130 (2016).
[45] Jobodwana Z. Ntozintle, *Africa, Global Warming and Climate Change Environmental Court*, 8 US-CHINA LAW REVIEW 217 (2011).

IV. Mitigation

The Paris agreement works on nationally determined contributions.[46] One nation with the help of self-differentiation to fix its own obligation and timeline than that of other state parties. The provision of mitigation do not allow the principle of self-differentiation to be followed by the state parties.[47] Under the Paris agreement the state parties are having obligation to report to the international platform about meeting with the duty of obligation.[48] The principles such as sustainable development, precautionary principle example of soft laws and accordingly, the Paris agreement considered has guideline rather binding in nature.[49] Though, the Paris agreement gives flexibility to meet with the differentiated responsibilities, hence, slight deviation from the original thinking.[50] The developing countries, for example, can inform about the reduction of greenhouse gas emission depending on the circumstances of the conservation. Which means, they are slowly the agreement they fall under the provisions of primary document of UNFCCC. The agreement can be implemented provided the self-differentiation is adopted by the countries.[51] Therefore, the common ground of mitigation is that the greenhouse gas emission should be reduced but to what extent it should be reduced there is flexibility.

V. Monetary Support

The economic responsibility is also different in different countries, primarily between developed and developing nations. The Paris agreement makes a statement that financial support to the providing from the developed nation

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[46] Athanasios P. Mihalakas & Emilee Hyde, *Implementation of Nationally Determined Contributions under the Paris Agreement - Comparing the Approach of China and the EU*, 6 Athens J.L. 407 (2020).

[47] Nilufer Oral, *Ocean Acidification: Falling between the Legal Cracks of UNCLOS and the UNFCCC*, 45 ECOLOGY L.Q. 9 (2018).

[48] Wang Ruibin, *Implementing the Paris Agreement: Achievements and Constraints*, 63 CHINA INT'l Stud. 83 (2017).

[49] Marie-Claire Cordonier Segger, *Advancing the Paris Agreement on Climate Change for Sustainable Development*, 5 CAMBRIDGE J. INT'l & COMP. L. 202 (2016).

[50] Duncan French, *Developing States and International Environmental Law: The Importance of Differentiated Responsibilities*, 49 INT'l & COMP. L.Q. 35 (2000).

[51] Jennifer Huang, *See Supra Note 7*.

towards developing nation.[52] It is presumed that for developing nation it is not possible to meet with the goals of climate change because the burden of financing the entire project is shouldered by few developed nations who are financially very strong.[53] There is a view that the developed nations have started the program for climate financing, where the international investment will be done and will meet with the goal of climate change.[54] It is because the developed nations are capable of financing the project to meet with the goal of climate change.[55] There is flexibility for the developing nation to contribute to the climate financing fund.[56] The Katowice conference of the United Nations provides further mechanism to provide financial support to developing countries. The funding available in the climate financing is basically to help the developing nations to meet with the goal of climate change.[57]

VI. Transparency and Accountability

For climate change the transparency mechanism is the fundamental aspect to be followed.[58] This allows free flow of data and between the developed and developing nations and that encourages nations to fulfil the goals of climate change.[59] It is fixed that every after five years the nations will be the determining their own obligation that how far they have fulfil to reach the goal of climate

[52] Paul B. Lewis & Giovanni Coinu, *See Supra Note 8*.
[53] Ambuj D. Sagar, Hongyan H. Oliver & Ananth P. Chikkatur, *Climate Change, Energy, and Developing Countries*, 7 VT. J. ENVTL. L. 71 (2006).
[54] Charles Di Leva, *Financing Climate Mitigation and Adaption*, 2017 CCLR 314 (2017).
[55] Britta Horstmann & Achala Chandani Abeysinghe, *The Adaptation Fund of the Kyoto Protocol: A Model for Financing Adaptation to Climate Change*, 2 CLIMATE L. 415 (2011).
[56] Ujjwal Kacker, *Technology Transfer and Financing: Issues for Long Term Climate Policy in Developing Countries*, 2009 CARBON & CLIMATE L. REV. 292 (2009).
[57] Christopher Campbell-Durufle, *Clouds Or Sunshine in Katowice: Transparency in the Paris Agreement Rulebook*, 2018 CCLR 209 (2018).
[58] Xueman Wang, *Towards a System of Compliance: Designing a Mechanism for the Climate Change Convention*, 7 REV. EUR. COMP. & INT'l ENVTL. L. 176 (1998).
[59] Ved P. Nanda, *Climate Change and Developing Countries: The International Law Perspective*, 16 ILSA J. INT'l & COMP. L. 539 (2010).

change.[60] The common but differentiated responsibility can best be understood through the transparency mechanism that how the developed and developing nations have taken steps to meet with the goal of climate change.[61] The review of the data to be submitted in every interval is one of the necessary requirement under the transparency mechanism.[62] The developing countries can mould their responsibility as per the mandates of the agreement and also as per the requirement of UNFCCC.[63]

It is interesting to note here that under the Paris agreement there are no annexes which defines that who are the developed and developing nations.[64] This is surprising that those who drafted the Paris agreement did not pay any attention to category and classification of the developed and developing nations.[65]

VII. Conclusion

The origin of Paris agreement is depending on the previous international instruments dealing goals of climate change. The researchers consider that the right time there was emergence of Paris agreement and that was the need of the hour to put things in flexible as well as in binding in nature. The very ecosystem is highly threatened now because of climate change issues and global warming. There is enhancement of the global mean temperature, and all the countries are facing hardship of this. The competition between and the nations are so high in terms of showing who is the progress one that such progress is being done at the cost of environmental resources. Therefore, the Paris agreement and in particular

[60] Michael A. Mehling, Gilbert E. Metcalf & Robert N. Stavins, *Linking Heterogeneous Climate Policies (Consistent with the Paris Agreement)*, 48 ENVTL. L. 647 (2018).
[61] Stellina Jolly & Abhishek Trivedi, *Principle of CBDR-RC: Its Interpretation and Implementation through NDCS in the Context of Sustainable Development*, 11 Wash. J. ENV't L. & POL'y 309 (2021).
[62] Benoit Mayer, *A Review of the International Law Commission's Guidelines on the Protection of the Atmosphere*, 20 MELB. J. INT'l L. 453 (2019).
[63] Margaretha Wewerinke-Singh & Curtis Doebbler, *The Paris Agreement: Some Critical Reflections on Process and Substance*, 39 U.N.S.W.L.J. 1486 (2016).
[64] Andras Huszar, *Preliminary Legal Issues in the Historic Paris Climate Agreement*, 2016 HUNGARIAN Y.B. INT'l L. & EUR. L. 195 (2016).
[65] Ian Fry, *The Paris Agreement: An Insider's Perspective - The Role of Small Island Developing States*, 46 ENVTL. POL'y & L. 105 (2016).

the principle of differentiated responsibilities with the flexible nature of the nation stands towards the goal of climate change will play vital role in achieving such goals. The Paris agreement also works on categorisation of countries based on their capabilities, which seems to be a bit complicated. When the principle of differentiated responsibility is not applicable in a uniform manner, the implementation in a uniform way is also difficult. The mitigation aspect as mentioned under Paris agreement and also regarding the emission reduction policy, there are unwillingness to implement such goals have been found because of flexible nature of its obligation. Now, it is applicable to both developed and developing nations to reduce the greenhouse gas emission to a considerable level to save the earth from the global mean temperature enhancement.

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The Doctrine of Repugnancy the Constitutional Governance and Judicial Interpretation with Reference to Farm Laws in India

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Abstract

Federalism implies the system of division of powers between the Central and State Governments. India is a Quazi-Federal country with strong Centre with 97 subject matters of legislation. The framers of the Indian Constitution gave residuary matters in the hands of the Central Legislature. The States are subordinate to Central Government in co-ordinating the administration. Co-operative federalism is a pre-requisite of Indian administration through the creation of various administrative agencies. The doctrine of repugnancy will arise in matters relating to Concurrent list. If the law made by the State Legislature is in conflict with the law made by the Parliament, the Central Law will prevail over State law. The state law becomes void in view of the doctrine of Repugnancy.

Keywords: Federalism, Division of powers, residuary powers, Repugnancy.

I. Introduction

The Constitution of India has divided the legislative powers between Centre and State Governments under Seventh Schedule of the Indian Constitution. The Hon'ble Supreme Court of India have developed the various doctrine in interpretation of lists as enumerated in the Schedule to the Constitution. The doctrine of Repugnancy as evolved by the judiciary denotes the inconsistency between the Centre and State laws. The legislative power of the Central and State governments should run in compliance with each other. If the State law is

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inconsistent with Central law, then the Central law will prevails over the State law. The term repugnancy denotes adverse, hostile, repulsive and disagreeable.

II. Indian Constitution and Doctrine of Repugnancy

India is a federal country with strong Centre which has the power of overriding the State government's administration. The framers of the Constitution thought that, the sovereign power in matters of legislation lies in the hands of the Central Government. The States are not entrusted with Sovereign power to override the Central law in case of the Concurrent subject matters.

A. Law inconsistent with the law made by Parliament

Article 254(1) provides that, if any provision of a state law is repugnant to a provision in a law made by Parliament which it is competent to enact or to any existing law with respect to one of the matters in the Concurrent List, then the Parliamentary or the existing law prevails over the State law. To the extent of Repugnancy, the State law is void.

In K T Plantation Pvt. Ltd v. State of Karnataka[2] , the Court has opined that, the repugnancy between two statutes arises if there is a direct conflict between the two laws. These laws are fully inconsistent and have absolutely irreconcilable provisions and if the laws made by Parliament and the State legislature occupy the same field. Therefore, every effort should be made to reconcile the two enactments and construe both to avoid repugnancy.

In Bharat Hydro Power Corporation Ltd v. State of Assam[3] , court has held that, if the two enactments operate in different fields without encroaching upon each other, then there would be no repugnancy. Therefore the repugnancy has to exist in fact and it must be shown clearly and sufficiently.

In State of Maharashtra v. Bharat Shantilal Shah[4] the court held that, there was no such repugnancy between Sections 13 to 16 of the State Act (The Maharashtra Control of Organised Crime Act 1999) and provisions of the Central Act i.e- The Telegraph Act,1885, and Section 5(2) read with Telegraph Rules,1951.

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[2] AIR 2011 SC 3430.

[3] AIR 2004 SC 31 73.

[4] (2008) 13 SCC 5.

In Srinivasa Raghavachar v. State of Karnataka[5], the Advocates Act,1961 has enacted under entries 77 and 78[6] of List –I.[7] Section-48(8) of the Karnataka Land Reforms Act, 1961 prohibited the legal practitioners from appearing before land Tribunal. The question of inconsistency between the Central and State law had arrived in this case. The court held that, the State law was invalid as repugnant to Central Law.

For example, **The Indian Medical Council Act, 1965** has been enacted by Parliament under entry 26 of list-III.[8] Section-27 of the Act provides that, every person who is enrolled as a medical practitioner on the Indian Medical Register shall be entitled according to his qualifications to practise in any part of the country.

The West Bengal Act was enacted under Entry 41[9] of List-II had prohibited members of the State Health service from carrying on any private practise. It was considered as there is no conflict between the two enactments.

Article 254(2)[10] is an exception to article 254(1), as it lays down the general rule by providing an expedient to save a state law repugnant to a Central law on a matter in the Concurrent List and thus relaxes the rigidity of the rule of

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[5] AIR 1987 SC 1518.
[6] Inserted by the Constitution (Fifteenth Amendment) Act,1963 with retrospective effect.
[7] *Entry 77 of list –I* says that, constitution, organization, jurisdiction and powers of the Supreme Court (including contempt of such court), and servants of High Courts, persons entitled to practice before the Supreme Court.
Entry 78 of List-I provides for the constitution and organizations (including vacations) of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practice before the High Courts.
[8] Entry 26 of List-III provides for, Legal medical and other Professions
[9] Entry 41 provides for, State Public Services, State Public Service Commission
[10] *Article 254(2)* provides that, where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall , if it has been reserved for the consideration of the President and has received his assent, prevails in that State. Provided that, nothing in this clause shall prevent the Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

repugnancy contained in Article 254(1). The reasons for such exceptions are as follows; -

a) Due to some peculiar local circumstances prevailing in a State
b) To make some special provision
c) To introduce the element of flexibility
d) To make the law suitable to local circumstances

Where a State law with respect to a matter in the Concurrent List contains any provision repugnant to the provisions of a previous Central law with respect to that matter, the State law prevails in the State concerned if, having been reserved for the consideration of the President and if it received the President assent then, it prevails in the State and overrule the Central Law.

In Karunanidhi v. Union of India[11], the Tamil Nadu Legislature had passed the, 'Public Men (Criminal Misconduct) Act, 1974 which received the Presidential assent under Article 254(2). Action was initiated under the Act against M. Karunanidi. The question before the court was that, another action can be taken against him under Central Law[12]?. But the State law was prevailed over the Central law because the State law has received the President assent.

III. Judicial interpretation of the Doctrine of Repugnancy

The Apex court has reiterated the doctrine of repugnancy in a broader manner in keeping the Constitutional ambition of Federalism. It is the duty of the Supreme Court of India to ensure co-operative federalism as compared to competitive federalism in United States of America.

In Deep Chand v. The State of Uttar Pradesh[13], the repugnancy between Uttar Pradesh Transport Service (Development) Act,1955 and Section-11 of the Motor Vehicles (Amendment) Act,1956[14] and Chapter- IV A of the General Clauses

[11] AIR 1979 SC 898.
[12] Section- 5(5) (d) of the Prevention of Corruption Act,1988.
[13] 1959 AIR 648.
[14] Section 11 in The Motor Vehicles Act, 1988 : Additions to driving licence.—
(1) Any person holding a driving licence to drive any class or description of motor vehicles, who is not for the time being disqualified for holding or obtaining a driving licence to drive any other class or description of motor vehicles, may apply to the licensing authority having jurisdiction in the area in which he resides or carries on his business in such form and accompanied by such, documents and with such fees as may be prescribed

Act,1897[15] has been involved. The question before the Court was the Constitutional validity of the enactments.[16] The State Legislature has passed the said law after obtaining the assent of the President of India. The validity of scheme of nationalisation has framed and the notifications issued by the State government under the Act.[17]

> The court has held that, the State law did not become wholly void under Article 254(1) of the Indian Constitution but, continued to be valid and subsisting law supporting the scheme already framed under the State Act. Justices Bhagwati, Subba Rao and Wanchoo had expressed that, the power of Parliament and relevancy lists in the Seventh Schedule were subject to the provisions of the Constitution including Article 13. There was a clear distinction between the two clauses of article 13.[18]The State

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by the Central Government for the addition of such other class or description of motor vehicles to the licence.
(2) Subject to such rules as may be prescribed by the Central Government, the provisions of section 9 shall apply to an application under this section as if the said application was for the grant of a licence under that section to drive the class or description of motor vehicles which the applicant desires to be added to his licence.

[15] Section 4A in The General Clauses Act, 1897: Application of certain definitions to Indian Laws. —
(1) The definitions in section 3 of the expressions "British India", "Central Act", "Central Government", "Chief Controlling Revenue Authority", "Chief Revenue Authority", "Constitution", "Gazette", "Government", "Government securities", "High Court", "India", "Indian Law", "Indian State", "merged territories", "Official Gazette", "Part A State", "Part B State", "Part C State", Provincial Government", "State" and "State Government" shall apply, unless there is anything repugnant in the subject or context, to all Indian laws.
(2) In any Indian law, references, by whatever form of words, to revenues of the Central Government or of any State Government shall, on and from the first day of April, 1950, be construed as references to the Consolidated Fund of India or the Consolidated Fund of the State, as the case may be.

[16] Article 13, 31,245,246 and 254 referred.

[17] Chapter –IV A inserted by the Motor Vehicles (Amendment Act of 1956 which provided for nationalization of transport services.

[18] Article 13 in The Constitution Of India 1949: Laws inconsistent with or in derogation of the fundamental rights
(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void

law passed in spite of the prohibition contained therein, and did not pre-suppose that, the law made was not a nullity. In construing the Constitutional provisions relating to the powers of the legislature embodied in Articles 245 and 13(2) of the Constitution, no distinction should be made as between an affirmative and a negative provision for both are limitations on that power.

A. The Supreme Court of India on Validity of new Farm Laws

Rakesh Vaishnav v. Union of India, W.P 1118/2020

The writ petition was filed by more than 85 farmers union by challenging the new farm laws enacted by the Central Government on September, 2020. the Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020, the Farmers (Empowerment and Protection) Agreement of Price Assurance, Farm Services Act, 2020, and the Essential Commodities (Amendment) Act, 2020.[19]

The court was hearing three 'categories' of petitions: those opposing the laws; those in favour of the laws; and those by residents of Delhi and its surrounding areas which said the protesters were infringing their rights by blocking the roads.

B. Farmers (Empowerment and Protection) Agreement of Price Assurance and Farm Services Act, 2020

The Acts seeks to provide farmers with a framework to engage in contract farming, where farmers can enter into a direct agreement with a buyer (before sowing season) to sell the produce to them at pre-determined prices. Entities that may strike agreements with farmers to buy agricultural produce are defined as

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(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void
(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas
(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality.

[19] During its monsoon session culminating on 23 September, 2020.

"sponsors'' and can include individuals, companies, partnership firms, limited liability groups, and societies.

The act provides for setting up farming agreements between farmers and sponsors. Any third parties involved in the transaction (like aggregators) will have to be explicitly mentioned in the agreement. Registration authorities can be established by state governments to provide for electronic registry of farming agreements.

Agreements can cover mutually agreed terms between farmers and sponsors, and the terms can cover supply, quality, standards, price, as well as farm services. These include supply of seeds, feed, fodder, agro-chemicals, machinery and technology, non-chemical agro-inputs, and other farming inputs.

Agreements must have a minimum duration of one cropping season, or one production cycle of livestock. The maximum duration can be five years. For production cycles beyond five years, the period of agreement can be mutually decided by the farmer and sponsor.

Purchase price of the farming produce—including the methods of determining price—may be added in the agreement. In case the price is subject to variations, the agreement must include a guaranteed price to be paid as well as clear references for any additional amounts the farmer may receive, like bonus or premium.

There is no mention of minimum support price (MSP) that buyers need to offer to farmers.

Delivery of farmers' produce may be undertaken by either parties within the agreed time frame. Sponsors are liable to inspect the quality of products as per the agreement, otherwise they will be deemed to have inspected the produce and have to accept the delivery within the agreed time frame.

In case of seed production, sponsors are required to pay at least two-thirds of the agreed amount at the time of delivery, and the remaining amount to be paid after due certification within 30 days of date of delivery. Regarding all other cases, the entire amount must be paid at the time of delivery and a receipt slip must be issued with the details of the sale.

Produce generated under farming agreements are exempt from any state acts aimed at regulating the sale and purchase of farming produce, therefore leaving no room for states to impose MSPs on such produce. Such agreements also exempt the sponsor from any stock-limit obligations applicable under the Essential Commodities Act, 1955. Stock-limits are a method of preventing hoarding of agricultural produce.

Provides for a three-level dispute settlement mechanisms like, the conciliation board—comprising representatives of parties to the agreement, the sub-divisional magistrate, and appellate authority.

C. **Essential Commodities (Amendment) Act, 2020**

An amendment to the Essential Commodities Act, 1955, this act seeks to restrict the powers of the government with respect to production, supply, and distribution of certain key commodities. The act removes cereals, pulses, oilseeds, edible oils, onion, and potatoes from the list of essential commodities.

Government can impose stock holding limits and regulate the prices for the above commodities—under the Essential Commodities, 1955—only under exceptional circumstances. These include war, famine, extraordinary price rise, and natural calamity of grave nature.

Stock limits on farming produce to be based on price rise in the market. They may be imposed only if there is: (i) a 100 percent increase in retail price of horticultural produce, and (ii) a 50 percent increase in the retail price of non-perishable agricultural food items. The increase is to be calculated over the price prevailing during the preceding twelve months, or the average retail price over the last five years, whichever is lower.

The act aims at removing fears of private investors of regulatory influence in their business operations. Gives freedom to produce, hold, move, distribute, and supply produce, leading to harnessing private sector/foreign direct investment in agricultural infrastructure.

D. **Committee appointed by the Supreme Court on 11th January, 2021**

According to the committee's website, the panel held 12 rounds of consultations with various stakeholders, including nearly 85 farmers groups, farmer producers' organisations (FPOs), procurement agencies, professionals, academicians, private

as well as state agriculture marketing boards. It also sought comments, views, and suggestions of the public.

The committee originally comprised four members including agricultural economists Anil Ghanvat, Ashok Gulati, Pramod Joshi, and Bhupinder Singh Mann. Mann, who is the president of Bharatiya Kisan Union, and All India Kisan Coordination Committee, recused himself from the panel after receiving flak from protesting farmers.

The Supreme Court in its order said that, the Committee should submit its recommendations to the court within two months from the date of its first sitting. The bench comprised of Chief Justice of India and justices A.S.Bopanna and V.Ramasubramanian had sought the co-operation of farmers who were protested at Delhi's border and said that, no power can prevent the court for setting up a committee to resolve the impasse.[20]

Supreme Court opined in the following ways

1. No power can prevent the court from appointing a committee to resolve the dispute on new farm laws.
2. The apex court has powers to suspend the legislation in order to solve the problem
3. Those who wants the genuine resolution will go to the committee as constituted by the court
4. There is a difference between judiciary and politics. Farmers to co-operate with the judiciary

Due to widespread strike against the New Farm laws, the Prime Minister of India has announced to take back the three legislations in the month of November, 2021. This may be due to pressure on the government to farmer's agitation against the implementation of the laws.

[20] Earlier, attorney general K.K. Venugopal informed the court that 'Khalistanis' had 'infiltrated' the protests. This came after an intervenor in the hearing alleged that the banned group 'Sikhs for Justice' are involved in the protests. When CJI Bobde asked the AG to confirm the allegation, Venugopal said, "We have said that Khalistanis have infiltrated the protests."

IV. Conclusion

Thus, it can be concluded that the power of legislation is prescribed under seventh schedule of the Indian Constitution. The powers should be exercised in a broader manner in compliance with each entry as listed in three lists. The Parliament has power to override the State legislature in making the law in any subject matters of the three lists. Subject matters like land and agriculture should have universal application in making the legislation. Since India is a Quasi-Federal country, the co-operation between the Central and State governments in compliance with the power of legislation is in need of an hour.

Legal Framework of Single Member Company in UK vis-à-vis One Person Company in India: A Conceptual Analysis

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Priya Gupta[2]

Abstract

One of the ideal vehicles for a start-up venture can be a company formed by single person with the benefit of limited liability. In this article, an attempt has been made to trace the journey of this vehicle in United Kingdom and India. In this paper the researcher intends to undertake a conceptual study of One Person Company in India and United Kingdom. In United Kingdom, it exists by the nomenclature of Single Member Company. The researchers by virtue of this paper attempts to trace the existing legal framework in both the countries and finally intends to conclude by suggesting the changes required in One Person Company in India as its necessary legal structure is still in nascent stage in India.

Keywords: Corporate, India, One Person Company, Single Member Company, United Kingdom.

I. Introduction

Indian Company law has much in common with United Kingdom (*hereinafter* referred to as the UK) law as it owes its basic *progeny* from British law, it being a colonial state for almost a century. The Company law of UK has acted as a foundation for the Indian Company law for a long time. On analysing the history of 1850's, it becomes amply clear that the Indian company law was enacted with an endorsement of the Companies Act of UK, 1844 on it. Even the later amendments to the Indian Company's Act, 1913 were made in consequence of the changes brought to the UK Companies Act, 1908.[3] It is pertinent to note here

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3 L.C.B. Gower, *The English Private Company*, 18 LAW CONTEMP PROBL J, 535-545 (1953).

that as a sequence of this amendment only the concept of Private companies was brought in India for the first time.

Though after independence, things changed as India became a sovereign country and started reengineering of its corporate regulatory framework to meet up and stay updated with the changing pace of national and international economic environment. But attitude of proneness towards the British nevertheless continued as can be testified from the report of the Bhabha committee[4] (leading to the Companies Act, 1956) which included the recommendations of the Cohen committee to a large extent which was set up in UK to amend the UK's Company law.[5]

Now after 57 years the new Companies Act of 2013 (*hereinafter* referred to as the Act of 2013) is made applicable in India bringing new business techniques committed to harness its entrepreneurial and economic resources effectively. But how be it, the colonial meekness still reflects. A close scrutiny of it seems to be a mimeograph in some sense as it recognizes certain analogues of the UK Company law like Single Member Company (*hereinafter* referred to as the SMC) by the nomenclature of One Person Company (*hereinafter* referred to as the OPC). So, in this paper the researchers intend to undertake a conceptual study of this model of OPC in India vis-à-vis UK. The researcher attempts to trace its meaning, origin, existing legal framework in both the countries and finally intends to suggest the changes required in OPC as its necessary legal structure is still in nascent stage in India. For the purpose of convenience this research paper is prorated into three parts. First part is concerned with the law as applicable to UK, second part deals with Indian law and last part deals with the epilogue.

II. Concept of Single Member Company in United Kingdom

Prior to the passing of Brexit deal, UK had a primary place amidst the 28th Member states of the European Union (*hereinafter* referred to as the EU) and was

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4 Report: *Bhabha Committee Report on Company Law Committee* 1952, Ministry of Law.

5 LAW TEACHER, (last visited on Jan 21, 2021), https://www.lawteacher.net/free-law-essays/business-law/uk-companies-act-2006-an-appropriatemodel-businesslaw-essay.php.

subject to EU laws.[6] The EU[7] made laws for UK by two methods *i.e.*, by passing regulations (*hereinafter* referred to as the EU Regulations) and directives (*hereinafter* referred to as the EU Directives). These EU Directives were like the Directive Principles of State Policy in India as they just set out the aims for a member state to achieve, they don't specify the method of achieving it, so they require specific implementation by UK Parliament to take effect while EU Regulations enjoyed a superior status as they apply directly without the need for any legislative mandate from UK Parliament. Apart from it, the decisions of the EU nodal agency *i.e.*, the Court of Justice equivalently applied to UK, the subject matter of which only pertains to the interpretation of EU Laws.[8]

On analyzing the official data from the House of Commons Library, one can find that approximately 62% laws in UK are of EU. This figure is not exactly quantitative keeping in view of the fact that the House of Common itself explicitly states that there doesn't exist any appropriate way to make these calculations.[9] But since the end of withdrawal agreement transition period only the companies

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[6] The United Kingdom joined the European Economic Community on Jan. 1, 1973 with Denmark and Ireland. For details see: *UK IN CHANGING EUROPE*, http://ukandeu.ac.uk/fact-figures/when-did-britain-decideto-join-the-european-union/ (last visited on Jan. 10, 2021).

[7] European Union began after World War II to foster economic co-operation, with the idea that countries which trade together were more likely to avoid going to war with each other. It has since grown to become a "single market" allowing goods and people to move around, basically as if the member states were one country. It has its own currency, the euro, its own parliament and it now sets rules in a wide range of areas - including on the environment, transport, consumer rights and even things such as mobile phone charges. For details see: BBC NEWS, (last visited on Feb. 12, 2021), https://www.bbc.com/news/uk politics-32810887.

[8] *NORTON ROSE FULBRIGHT*, (last visited on Mar. 10, 2021), http://www.nortonrosefulbright.com/knowledge/publications/136975/brexit-uk-and-eulegal-framework.

[9] As per the records available between 1993 and 2014, the Parliament of UK passed 945 Acts of which 231 implemented EU obligations of some sort. It also passed 33,160 statutory instruments out of which 4,283 Implemented EU obligations." These figures only reveal the status of EU directives. But as far as the status of EU regulations is concerned, they get implemented directly. So, as per the data available (1993-2014) in the House of Commons library about 62% of laws of EU applies in UK. For details see: Report: *Report on how much of legislation come from Europe,* House of Lords, 2014.

registered in UK itself will continue others will automatically become overseas registered companies and will be dealt accordingly. Similarly, the companies registered in UK will become third country companies for UK.[10]

III. Legal framework as to Single Member Companies in United Kingdom

The United Kingdom Companies Act, 2006 deal with the legal framework of SMC's. This Act is the lengthiest law by the British Parliament comprising of 1300 sections and 16 schedules. It has replaced the Companies Act of 1985 and 1989. It is based on the policy of '*think small company first'* so it became an impetus to provide flexible structure for small companies. It is to be noted that in whole Europe, UK is amongst the easiest country for incorporation of and smooth running of a company pre-eminently, a Limited Liability Company of a single member. Online incorporation prevails, dividends are simple to declare, capital

[10] Under EU law, the legal personality and limited liability status of "third country companies" are not automatically recognised by EU Member States and will need to be carefully considered under any relevant national law or international law treaties. Certain EU jurisdictions (including Germany and Austria) apply a 'seat'-based regime, which will mean that UK-incorporated companies and LLPs which have their central administration or principal place of business in those jurisdictions may find that their separate legal personality is no longer recognised there and that the limited liability of their shareholders is lost. This may mean that consideration needs to be given to incorporating a local entity and transferring the business to that entity or taking other steps to restructure or to localise their operations in such jurisdictions.UK companies with branches in EEA Member States may also now face additional filing and disclosure requirements in relation to those branches in those EEA Member States and local advice should be taken to confirm the position. For details see: LEXOLOGY, (last visited on Jul. 16, 2021), https://www.lexology.com//library/detail.aspx?g=f094652e-ad34-4eaf-bc38-1649763d4e1f.

stipulations are slashed and other rules are relaxed too.[11] The legal provisions as to SMC's are contained as under:

a) Meaning: SMCs are the companies who have a sole member. These companies can either originally be incorporated as SMC or later become so when all their shares converge into the hands of a single person.[12] In UK, a SMC is generally formed as a single-member private limited company or as a single-member public limited company.[13] Before 2009 only private companies were allowed to form such companies but by the coming of the UK Companies Act, 2006 and from its effective date of implementation *i.e.*, from October 1, 2009 public companies incorporation by single member also started.

In the Company law statute of UK, the term private limited company is not elucidated properly. It is just mentioned that a company who by its nature is not a public company will be considered as a private company. As to what is meant by a public limited company, the law states, it is a company consisting of a share capital (£ 50,000 allotted share capital)[14] and also its certificate of incorporation must mention that it is a public company".[15] Thereby the elementary distinction between these two entities in UK is that a public company is allowed to make its shares and debentures available to be purchased by the general public. But the rules as applicable to private companies generally delimit the sale of the company's shares.[16] In it the riders as to the offering are that it must be either offered for purchase to the members of the same company or the persons whom the directors of the companies permit. Despite this restraint if the private company

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[11] ELEMENTAL COSEC, (last visited on Mar. 20, 2021), https://www.elementalcosec.com/2013/06/07/harmonisation-of-eu-single-member-companies.

[12] The United Kingdom Companies Act, 2006, § 7 No. 46, The Act of Parliament, 2006 (United Kingdom).

[13] *Report: Commission staff working document impact assessment report accompanying the document proposal for a directive of the European Parliament and of the council on Single-Member Private Limited Liability Companies,* 2014 (European Parliament).

[14] The United Kingdom Companies Act, 2006, § 763 No. 46, The Act of Parliament, 2006 (United Kingdom).

[15] The United Kingdom Companies Act, 2006, § 4 No. 46, the Act of Parliament, 2006 (United Kingdom).

[16] The United Kingdom Companies Act, 2006, § 763 No. 46, the Act of Parliament, 2006 (United Kingdom).

still offers its shares to the public, the law considers it as a serious contravention and punish it with criminal consequences.[17]

b) Incorporation: SMC can be formed in UK for lawful purposes only by one person by subscription of his nomenclature to the Memorandum of Association (*hereinafter* referred to as the MoA)[18] in addition to the compliance of all other necessary requirements as to its registration.[19] The public as well as the private limited companies by a single member can be incorporated in UK.[20] However, it is mandatory for a public limited company to have a capital of £50,000. Out of this at least 25% (£12,500) of capital is to be paid to the Registrar of Companies (*hereinafter* referred to as the RoC) and from him a certificate of commencement of trading[21] must be obtained before the company starts working.[22] As regards Private Company, there is no need of even any minimum share capital. Just the relevant documents have to be delivered to the RoC and a certificate of incorporation thereon must be obtained.

Further, a proper company name has to be verified with the Company House in UK. The chosen name cannot be an existing registered company's name or an existing trade mark. Further, a registered office address must be selected. It

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[17] PEARSON, (last visited on Jan. 22, 2018), *http://catalogue.pearsoned.co.uk/assets/hip/gb/hip_gb_ pearsonhighered/samplechapter/Macintyre%20ess_C10_1.*

[18] The United Kingdom Companies Act, 2006, § 8 No. 46, the Act of Parliament, 2006 (United Kingdom).

[19] The United Kingdom Companies Act, 2006, § 7-13 No. 46, The Act of Parliament, 2006 (United Kingdom).

[20] In England, Section 7 Sub Paragraph 1 of the Companies Act, 2006 indicates that a company is formed under this Act by one or more persons. Hence, both a private and public companies can be established by a single founder. Another area of law permitting the formation of these forms of companies is the Single Member Private Limited Companies Regulation of 1992. According to Section 1(3A), "…one person may, for a lawful purpose, by subscribing his name to a MoA and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company being a private company limited by shares or guarantee. For details see: DOCPLAYER, (last visited on December 21, 2018), *https://docplayer.net/65466919-Concept-of-single-member-companies-in-the-light-of-eu-harmonization-comparative-analysis-of-serbia-germany-united kingdom*.

[21] The United Kingdom Companies Act, 2006, § 763 No. 46, The Act of Parliament, 2006 (United Kingdom).

[22] *FORMACOMPANY, https://www.formacompany.com/en/uk/public-limited-company.php* (last visited on Apr. 11, 2021).

can be a home address also but it has to be a physical one. It will be the place where all the official communications can be sent. It must be in same country where the company is registered *i.e.,* a company registered in England can have a registered office address only in England.[23]

As regards director, a minimum of one director is required by a private limited company as opposed to public limited which requires two directors.

An application for the registration of the company, MoA and having a statement of compliance, Article of Association (*hereinafter* referred to as the AoA) is to be submitted to the Companies House.[24] In UK, there also exists a new format of MoA what is currently known as the 'association clause' – where the subscribers declare their will to incorporate a company and consent to take the stated number of shares.[25]

It is to be noted that there exist three different methods such as electronic software filing with standard fee of £13, paper filing in the IN01 form with the standard fee of £40 or web incorporation service through Companies House's online portal where the standard fee is £15.[26]

When the whole of the paper work is final and conclusive, a certificate of new company's incorporation will be issued. It will depict the nomenclature of the newly incorporated company, its registration number and date of incorporation.[27]

c) Entry into register: Limited companies with only one member must make an entry in the concerned register thereby.[28] The law mandates that details as to the nomenclature and registered address including a declaration that it is an SMC

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[23] *GOV.UK,* (last visited on Apr. 12, 2021), *https://www.gov.uk/limited-company-formation/company-address*

[24] *GOV.UK,* (last visited on Apr. 29, 2021), *https://www.gov.uk/limited-company-formation/memorandum-and-articles-of-association*

[25] The United Kingdom Companies Act, 2006, § 8 No. 46, the Act of Parliament, 2006 (United Kingdom).

[26] Rajesh Kumar Aggarwal, *A Comparative study of U.K Companies Act, 2006 and Indian Companies Act, 2013*, *4 IERJ* ,33-36 (2015).

[27] GLAZERS.CO., (last visited on Apr. 30, 2021), *https://www.glazers.co.uk/docs/setting-up-a-uk-company.pdf*

[28] The United Kingdom Companies Act, 2006, § 8 No. 46, the Act of Parliament, 2006 (United Kingdom).

must be entered into the register whenever a SMC is incorporated by virtue of the Companies Act, 2006. This entry is also to be made in case a company gets converted to a SMC. It can happen when the membership of limited company abates or in case an unlimited company having a single member converts to a limited company on its re-registration. This entry is mandatory and its non-compliance is viewed seriously.[29] The ethos of such stringency and compulsory disclosure for both public and private limited liability companies can be traced back to the Twelfth Directive's publicity requirement and the First Council Directive.[30]

d) Eligibility of a member: Only one shareholder is required. The sole shareholder may manage the company himself or delegate his power whatever is in the best interest of the company. In case of SMC's, the quorum requisite is presence of one member in person or by proxy.[31]

e) Director: In UK, at least one director can form a private company and as regards the public companies, the requisite number is atleast two directors.[32] One director must be a natural person, irrespective of the type of the company.[33] Rest

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[29] Any contravention as to this entry makes one liable for summary conviction to a fine not exceeding level 3 on the standard scale and for continued contravention a daily default fine not exceeding one-tenth of level 3 on the standard scale. For details see: The United Kingdom Companies *Act*, 2006, § 123 No. 46, The Act of Parliament, 2006 (United Kingdom).

[30] They state that, the basic documents of the company should be disclosed in order that the third parties may be able to ascertain their contents and other information concerning the company, especially particulars of the persons who are authorized to bind the company. For details see: DOCPLAYER, (last visited on May 10, 2021), https://docplayer.net/65466919-Concept-of-single-member-companies-in-the-light-of-eu-harmonization-comparative-analysis-of-serbia-germany-united-kingdom.html.

[31] Turning on to the Twelfth Directive, Article 4 states that "the sole member shall exercise the powers of the general meeting of the company and all the decisions taken by the sole member shall be recorded in minutes or drawn up in writing. For details see: The United Kingdom Companies Act, 1985, § 370 No. 6, The Act of Parliament, 1985 (United Kingdom).

[32] The United Kingdom Companies Act, 2006, § 154 No. 46, the Act of Parliament, 2006 (United Kingdom).

[33] The United Kingdom Companies Act, 2006, § 155 No. 46, the Act of Parliament, 2006 (United Kingdom).

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can be individuals or corporate bodies.[34] That means in SMC's if there is only a single corporate director, he must be a natural person only (*i.e.*, a human being and must be at least 16 years old)[35] and in case of more than one, they can be other corporate bodies such as companies and Limited Liability Partnership (*hereinafter* referred to as the LLP). In case of contravention by a company of any of these rules, the Secretary of State is entitled to instruct the company in this regard.[36] Further, there is no restriction on the number of directors which can be appointed in UK.[37] Veritably, UK also has the concept of Shadow Directors *i.e.*, a director as per whose directions the other directors are accustomed to act.[38] In England directors are duty bound to make reports for every financial year which must indicate to the shareholders an impartial view of the assets and an elucidation of the main hazards and hassles of the company. Besides this, the report has to indicate the principal activities of the company, business review and other relevant issues. If the sole shareholder is a manager, it is advisable that he prepares all these reports for any eventualities. But if he is not a manager and wants to supervise the affairs of his company, the management has to prepare and submit all these documents to him so that the sole shareholder sees the whole review of the company's business activities.[39]

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[34] *OFFICE MAKING BUSINESS SIMPLE,* (last visited on June 20, 2021), https://1office.co/blog/company-registration-non-uk-resident.

[35] The minimum age of Director in UK is 16 years. The Secretary of State may make provision by regulations for cases in which a person who has not attained the age of 16 years may be appointed a director of a company. For details see: The United Kingdom Companies Act, 2006, § 157-158 No. 46, The Act of Parliament, 2006 (United Kingdom).

[36] Default in following the directions of the Secretary makes one liable for summary conviction to a fine not exceeding level 5 on the standard scale and for continued contravention, a daily default fine not exceeding one-tenth of level 5 on the standard scale. For details see: The United Kingdom Companies Act, 2006, § 156 No. 46, The Act of Parliament, 2006 (United Kingdom).

[37] *Supra note* 5.

[38] The United Kingdom Companies Act, 2006, § 251 No. 46, the Act of Parliament, 2006 (United Kingdom).

[39] The United Kingdom Companies Act, 2006, § 415,416-419 No. 46, the Act of Parliament, 2006 (United Kingdom).

f) Board Meetings: In SMC's only one qualifying person is enough to pass a resolution.[40] So, a single member present either in person or by proxy can constitute a quorum. If he holds any meeting, he must record it in the minutes. If as a sole member he takes a decision, except by written resolution of the company, he must give a written record of the decision to the company. This is to ensure continuity of records and transparency.[41] Further, as per the Companies Act, 2006 private companies are no longer required to hold annual general meetings. Under the old law, it was possible for a private company to dispense with some of the formalities such as holding annual general meetings or laying accounts only if all the shareholders agreed to this effect.[42] As regards public companies they are still required to hold an annual general meeting.[43]

g) Contract by a sole member: A SMC is allowed to make a contract with the one-person member/director of the company by three methods *i.e.*, written contract, terms of contract already entered in the MoA, terms of contract entered in the minute. Any neglect on his part makes him liable for penalty.[44] Any direct

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[40] The United Kingdom Companies Act, 2006, § 318 No. 46, The Act of Parliament, 2006 (United Kingdom).

[41] *THE NATIONAL ARCHIVES,* (last visited on Apr. 21, 2021), ***https://webarchive.nationalarchives.gov.uk/20090607085536/ pdf***.

[42] ASSOCIATION OF PUBLISHERS OF ONLINE LEGAL DOCUMENTS, (last visited on Mar. 10, 2021), http://www.apod.org.uk/articles/the-real implications-of-the-companies-act-2006-on-small businesses.

[43] Public Companies must do hold annual general meeting within seven months of the end of the financial year. This period will be shortened to six months after a transitional period. The notice period for an annual general meeting of a public company will continue to be 21 clear days. For details see: K & L GATES, (last visited on May 12, 2021), *http://www.klgates. com/the-companies-act-2006---resolutions-and-meetings-09-18-2007/*

[44] Failure to do this makes one liable for summary conviction to a fine not exceeding level 5 on the standard scale. For details see: The United Kingdom Companies Act, 2006, § 231 No. 46, The Act of Parliament, 2006 (United Kingdom).

or indirect interest in the transaction must also be declared[45] in writing or by way of minutes[46] by the director to other director.

h) Requirement of a Company Secretary: A private company in UK is not required to have a Company Secretary. This exemption has made it cheap and easy for small entrepreneurs to do their businesses. Under the old law also, private companies were able to have a sole director as company secretaries since 1992.

i) Dissolution of Companies: In England, the dissolution of a company can be either voluntary or compulsory. A company may be dissolved on the application of the company or any of its directors.[47] The RoC can also dissolve the company provided a reasonable ground exists to believe that a SMC is either not carrying on business *i.e.*, it has become dormant or is not in operation properly.[48]

j) Piercing the corporate veil: SMCs in essence are also enclosed with certain unavoidable issues. It may be that the shareholder may not maintain a clear-cut separation of the financial identity of the company assets from his personal asset or it may fail to have honest and accurate accounts of the company. It may also include the circumstances under which a corporate capital may be used for private purposes and the company may be established to defraud creditors. In such situations, the single shareholder must remember that he has certain duties when he does business with this form of a company. Of all the duties, the pre-eminent is that he has to respect the separate nature of the business and thereby the integrity of these companies and is duly prohibited from engaging in business whose main objectives are to defraud third parties. It is the conviction of the law maker that 'the shareholder must respect the law as it is and in the event that he transgresses the law, the UK law immediately declares it as an abuse of the

[45] If the director of a company is in any way, directly or indirectly interested in a transaction or arrangement that has been entered into by the company he must declare the nature and extent of the interest to the other directors. For details see: The United Kingdom Companies Act, 2006, § 182 No. 46, The Act of Parliament, 2006 (United Kingdom).

[46] The United Kingdom Companies Act, 2006, § 186 No. 46, the Act of Parliament, 2006 (United Kingdom).

[47] The United Kingdom Companies Act, 2006, § 1003 No. 46, the Act of Parliament, 2006 (United Kingdom).

[48] The United Kingdom Companies Act, 2006, § 1000 No. 46, the Act of Parliament, 2006(United Kingdom).

existing corporate law and impose liability regime, civil and criminal, that can effectively deter such abusive behaviours of sole shareholders. As regards civil liability, the highest civil liability is piercing the corporate veil.[49]

k) Taxation: Every Limited Liability Company must register for Corporation tax with Her Majesty's Revenue and Customs (HMRC). Since April 1, 2016 the Corporate Tax for Profits is 19%. Besides the Corporation Tax, there are Value Added Tax and Capital Tax for Gains.[50]

III. Data

As far as the quantitative data regarding the total number of SMC's is concerned, it is problematic to get its exact figures in UK since SMC's are not distinct companies for data collection and thereby are not autonomously recorded in the Business Registers of UK. These SMCs usually belong to Small and Medium Sized Enterprises (*hereinafter* referred to as the SMEs). These SMEs fall into three categories in UK *i.e.*, "Micro having 0-9 employees, Small having 10-49 employees and Medium having 50-249 employees. The last available record on SMC's is at the commencement of 2020 when there were 5.94 million small businesses (with 0 to 49 employees), 99.3% of the total business. SMEs account for 99.9% of the business population (6.0 million businesses). SMEs account for three-fifths of the employment and around half of turnover in the UK private sector. The UK private sector business population is made up of 3.5 million sole proprietorships (59% of the total), 2.0 million actively trading companies (34%) and 414,000 ordinary partnerships (7%) in 2020". Thereby, the private sector of UK seems to be essentially subjugated by small employers and non-employing businesses.[51]

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[49] SSRN, (last visited on June 20, 2021), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193070*.

[50] UK Corporation Tax Rate 2018-2019. For details see: GOV.UK, (last visited on June 21, 2021), *https://www.gov.uk/government/publications/ratesand-allowances-corporation-tax/rates-and-allowances-corporation-tax#corporation-tax-rate*

[51] *Report*: *Report onBusiness Population Estimates for UK and the region*, 2018 (UK's Department for Business, Energy and Industry Strategy).

IV. Legal Framework of One Person Company in India

The legal framework of OPC in India is contained in the Act of 2013 and various rules appended with it. So, for proper synchronization a study of diverse rules combined with the new law is undertaken herewith and the relevant legal framework is explained below:

a) Meaning: As per section 2(62) of the Act of 2013 an OPC refers to a company having only single person as a member. It will be a private limited company having no limit on minimum paid up share capital.[52] So, it is a company where a single shareholder holds 100% shareholding. It is also specified that OPC can be a company limited by shares or guarantee or unlimited company.[53] A company by its nature is called limited by guarantee when the liability of its members is fixed and limited by the MoA to only that amount which the members bound themselves to contribute to the assets of the company in the event of its being wound up.[54] Similarly, a company limited by shares also limits the liability of its members by the MoA to an amount which is unpaid on the shares respectively held by them.[55]

b) Incorporation of One Person Company: The Act of 2013 and the Companies (Incorporation) Rules, 2014 includes provisions for formation of OPC's in India. OPC can be incorporated by an Indian citizen for lawful purposes but not for charitable purpose.[56] It can only be a private company. The process of incorporating OPC is simpler if correlated to private and public limited companies. There are many relaxations in terms of legal complexities involved in incorporation of OPC under the Act of 2013.[57] An application in Form No. INC.2 for incorporation shall be filed complying with the requirements of the Act of

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[52] The words of 'one lakh rupees or such higher paid-up share capital' omitted by Act 21 of 2015, S. 2 (*w.e.f.* May 29, 2015). Foe details see: The Indian Companies Act, 2013, § 2(68) No. 18, The Act of Parliament, 2013 (India).

[53] The Indian Companies Act, 2013, § 3(2) No. 18, the Act of Parliament, 2013 (India).

[54] The Indian Companies Act, 2013, § 2(21) No. 18, the Act of Parliament, 2013 (India).

[55] The Indian Companies Act, 2013, § 2(22) No. 18, the Act of Parliament, 2013 (India).

[56] The Companies (Incorporation) Rules, 2014, Rule 3, Central Government, 2014 (India).

[57] Neha Yati and Krusch. P. A, *One Person Company in India, 2*INT. J. LAW LEG., 4-38 (2015).

2013 in respect of registration[58] with the Registrar within whose jurisdiction the registered office of the company proposed is situated along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014.[59] It must be noted that at the time of incorporation the availability of the proposed name for the company will be cross checked by the RoC. A Director Identification Number (DIN) will be assigned to each director and an application will also lie to obtain digital signature for each director. A properly drafted AoA accompanied with the MoA containing objectives of the OPC will be filed with the Registrar. A name of nominee supplemented with his written consent is to be filed with the Registrar. Once the paper work is complete, the Registrar within a time span of seven days of receiving of documents will grant a certificate of incorporation, after which the OPC can start the business.[60]

c) Name of One Person Company: The law mandates that OPC shall paint or affix its name outside its registered office for clear identification and transparency. In case of the seal of the papers, bill-heads, other official publications and in all its notices, the name of company, its address, corporate identity number along with telephone number, e-mail must be mentioned. Wherever the name of OPC is required to be printed or engraved the words "One Person Company" shall be mentioned in brackets below the name of such company. It is a mandatory requirement with the sole objective to distinctly tell the other party that he/she is dealing with a single member private limited company.[61]

d) Eligibility of member: A natural person only (*i.e.*, artificial juristic personalities are excluded) who is an Indian citizen or otherwise and resident in India for 120 days in the immediately preceding calendar year can incorporate an OPC.[62] Apart from that, a person is not permitted to incorporate more than one OPC's and be a member in more than one OPC. As regards the status of minor is

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58 The Indian Companies Act, 2013, § 3 No. 18, the Act of Parliament, 2013 (India).

59 The Companies (Incorporation) Rules, 2014, Rule 12, Central Government, 2014 (India).

60 RAJKUMAR AND RISHABH, ALL YOU WANT TO KNOW ABOUT ONE PERSON COMPANY, 155 (Bharat Law House Pvt. Ltd. 2014).

61 The Indian Companies Act, 2013, § 12 No. 18, the Act of Parliament, 2013 (India).

62 The Companies (Incorporation) Rules, 2014 *amended by* the Second Amendment, 2021, Rule 3, Central Government, 2014 (India).

concerned, he can neither incorporate nor become member of OPC. He is also barred from holding any beneficial interest in an OPC. In case of any violation of these rules by OPC or any officer of OPC, a fine extending to ten thousand rupees can be imposed on it. If the contravention still continues then further fine of one thousand rupees can be imposed on it for each day during which the contravention continues.[63]

e) Requirement of a Nominee: To ensure the perpetual succession of OPC, the law has mandated the appointment of a nominee. Section 3 of the Act of 2013 read with Rule 4 of the Companies (Incorporation) Rules, 2014 mandates that a name of nominee with his previous consent in writing must be mentioned in MoA and Form No. INC.3 while filling for incorporation. A nominee must be a human being, Indian citizen, resident of India[64] and willing to work for the company in case of sole member's death or incapacity to contract. Withdrawal by nominee of his consent and change of nominee by the member is also possible. In both cases, a new nominee is to be appointed within fixed time and the change has to be notified to the Registrar. Further, in case of a sole member of OPC becomes nominee in another company then on first company's sole member death or incapacity to contract, the nominee become a new member so he has to elect to continue either as a member of new company or earlier company with 180 days. This must be done as the law mandates that a person to be a member in only one company at a particular moment. Herein also, in case of violation of any of these provisions by company or any officer of OPC, a fine extending to ten thousand rupees can be imposed on it. If the contravention still continues then further fine of one thousand rupees can be imposed on it for each day during which its contravention continues.[65]

f) Appointment of Directors: The law as to the appointment of directors is covered under Chapter XI of the Act of 2013[66] and the Companies (Appointment and Qualification of Director) Rules, 2014. Every OPC should have at least one

[63] The Companies (Incorporation) Rules, 2014, Rule 5, Central Government, 2014 (India).

[64] The Companies (Incorporation) Rules, 2014, Rule 3, Central Government, 2014 (India).

[65] *Supra note 79*.

[66] The Indian Companies Act, 2013, § 149 - 172 No. 18, the Act of Parliament, 2013 (India).

director. It can have a maximum of fifteen directors. In case there is more than one director, at least one director must have resided in India for approximately one hundred and eighty-two days in the previous calendar year.[67] If there is no provision for appointment of the first director in the AoA of the company, the sole member by fiction of law will become its first director until the other directors are appointed.[68] The directors of OPC must satisfy the provisions relating to qualification. The duties of directors in an OPC are similar to any other company.

g) Board Meetings of One Person Company: Chapter XII of the Act of 2013[69] and the Companies (Meetings of its Board and its Powers) Rules, 2014 covers the meetings of Board and its powers. Generally, a company should have at least four meetings of Board of Directors. But in case of OPC, it is enough if at least one meeting is conducted in six months and the interval between the meetings must be of 90 days atleast. The provision with regard to meeting and quorum is not applicable in case there is only one director.[70] The quorum for a meeting of the Board of Directors of a company (in case there are more members) should be 1/3rd of sheer membership or two directors. The virtual presence of directors by video conferencing or by other audio visual is also allowed and constitute quorum.[71] There is no provision for annual general meeting[72] and extra ordinary general meeting[73] in an OPC.

h) Annual Return can be authenticated by the Director alone: Section 92 of the Act of 2013 states that all the companies incorporated under the law are required to prepare an annual return of income to be signed by the director and company secretary and in case, there is no permanent company secretary, by any practicing company secretary. However, exemption is given to OPC in this regard as there is no need of a company secretary in OPC and only director can sign the annual return. Thus, even the financial statement of an OPC can be signed only by single director and later be submitted to the auditor. With this, a report of Board

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67 The Indian Companies Act, 2013, § 149 No. 18, the Act of Parliament, 2013 (India).
68 The Indian Companies Act, 2013, § 159 No. 18, the Act of Parliament, 2013 (India).
69 The Indian Companies Act, 2013, § 173-195 No. 18, the Act of Parliament, 2013 (India).
70 The Indian Companies Act, 2013, § 173 No. 18, the Act of Parliament, 2013 (India).
71 The Indian Companies Act, 2013, § 174 No. 18, the Act of Parliament, 2013 (India).
72 The Indian Companies Act, 2013, § 96 No. 18, the Act of Parliament, 2013 (India).
73 The Indian Companies Act, 2013, § 100 No. 18, the Act of Parliament, 2013 (India).

of Directors is also attached which is generally a report comprising explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report.[74] It is to be noted that OPC is also exempted from preparing cash flow statement *i.e.*, the financial statement of an OPC exclude cash flow statement.[75]

i) Status as to business conducted during Annual General Meetings: OPC is dispensed with the holding of an annual general meeting, so any business which is the subject matter of such meeting can be transacted just by entry in the minute book and by signing it. The date mentioned in the minute book will be considered as the date of the meeting. There is no applicability of ordinary or special resolution in case of an OPC.[76] Maintaining a minute book is mandatory.[77]

j) Conversion of or into One Person Company: As per section 3 of the Act of 2013 an OPC may be formed by one person and its legal status is that of a private company. Further, section 18 of the Act of 2013 facilitates conversion of a company of one class registered under this Act into a company of another class. Accordingly, a company which is not an OPC can be converted into an OPC and vice-versa.[78] OPC can be converted into private or public company just by raising the minimum number of members to two or seven and directors to three without any stringency as to paid-up share capital and average annual turnover during relevant period.[79]

k) Contract by sole member with One Person Company: An OPC is allowed to make a contract with the one-person member/director of the company by three methods *i.e.*, written contract, terms of contract already entered in the MoA, terms of contract entered in the minutes. It is an incumbent duty of the company to

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74 The Indian Companies Act, 2013, § 134 No. 18, the Act of Parliament, 2013 (India).

75 The Indian Companies Act, 2013, § 2(40) No. 18, the Act of Parliament, 2013 (India).

76 The provisions of section 98 and sections 100 to 111 (both inclusive) shall not apply to a One Person Company. For details see: The IndianCompanies Act, 2013, § 122 No. 18, The Act of Parliament, 2013 (India).

77 The Indian Companies Act, 2013, § 118 No. 18, the Act of Parliament, 2013 (India).

78 The Indian Companies Act, 2013, § 18 No. 18, the Act of Parliament, 2013 (India).

79 The Companies (Incorporation) Rules, 2014, *amended by* the Second Amendment, 2021, Rule 6, Central Government, 2014 (India).

communicate to the Registrar as to such contract within fifteen days its approval by board.[80]

l) Taxation: OPC being a Private Company is not given any kind of exemption under the Income Tax Act, 1961. So, for taxation, the normal slab rates apply *i.e.*, 25%. Additionally, Minimum Alternate Tax is also applicable as calculated 15% of the book profits of OPC.[81]

VII. Data

Since the commencement of OPC's in India, its popularity undoubtedly is increasing as revealed by the last available statistics *i.e.*, till July 31, 2021 in totality 39,672 OPC's got registered with the Union Ministry of Corporate Affairs. The further categorization makes it clear that OPC as a business model is highly preferred form in Business services followed by manufacturing and community, personal and service sector. However, the trading sector shows the least motivation to opt for this model of business.[82]

VIII. Conceptual Analysis

The conceptual analysis of the SMC vis-à-vis OPC is discussed hereunder:

A. Similarities and Dissimilarities

As stated in the introductory part, the concept of OPC in India owe its progeny from UK law so the similarities are countless. Both in UK and India before this concept of SMC and OPC respectively were formally recognized, there in practice, existed many small businesses being managed by one person having dummy directors *i.e.*, certain 'non-effective' shareholders who use to lent their names without any active role being played by them in running the company. Similarly, after its legal recognition in both countries it is apparent that most of features are alike for instance in both the jurisdictions a solo individual can

[80] The Indian Companies Act, 2013, § 193 No. 18, the Act of Parliament, 2013 (India).

[81] The Income-tax Act, 1961, § 115BAA No. 43, the Act of Parliament, 1961 (India).

[82] Report: *Monthly Information Bulletin on Corporate Sector, July, 2021* (Ministry of Corporate Affairs, Government of India).

incorporate such companies and he will be laced with the protection of limited liability.

Analogues to India, a limited company in UK is one in which the pecuniary obligations of its members are fixed and limited by its constitution. It can be incorporated either as a company which is limited by shares or by guarantee.[83] In both the jurisdictions there is no minimum capital requirement. Even as regards resolution single qualifying person is enough to pass such resolution and alike India, directors in UK are accountable for proper running of the company and for ensuring the preparation of accounts and reports. There is no residency requirement for being a director in UK, the only being a registered office address in UK itself.[84] Unlike public limited companies, there is no need to appoint a Company Secretary in case of private limited companies.[85] Further, both in India and UK the contract between the company and the sole shareholder has to be in writing. This provision rules out any possibility to defraud creditors unaware of separate legal personality of the company.

Regarding the dissimilarities, the foremost is regarding origin. The EU introduced certain regulations in 1992 which applied directly to UK and allowed a single member to form a private limited company.[86] Then UK passed the Companies Act, 2006 which extended the horizons of SMC's. Before 2006, only private limited companies could form SMC. But now both public and private companies can be formed by a single member.[87] It is to be noted that this inclusion of private

[83] As regards companies which stand limited by shares, "it means that in the event of liquidation of the company a member's liability is limited to paying off any amount unpaid on his or her shares". In case of Companies limited by guarantee, "the liability of members of companies limited by guarantee is restricted to paying an amount which they have agreed to pay in the event of the company going into liquidation". For details see: *The United Kingdom Companies Act*, 2006, § 7 No. 46, The Act of Parliament, 2006 (United Kingdom).

[84] *GOV.UK,* (last visited on June 30, 2021), *https://www.gov.uk/limited-company-formation/shareholders*

[85] *GOV.UK,* (last visited on June 28, 2021), *https://www.gov.uk/limited-company-formation/appoint-directors-and-company-secretaries*

[86] The Companies (Single Member Private Limited Companies) Regulations, 1992, No. 1699, the European Communities Act, 1972, 1992 (United Kingdom).

[87] The United Kingdom Companies Act, 1985, § 7 No. 6, the Act of Parliament, 1985 (United Kingdom).

companies headed by single man was made possible by an amendment made in section 1 of the 1985 Act. These amendments were strongly backed by the Companies (Single Member Private Limited Companies) Regulations 1992, which itself was an aftermath of the European Directive 89/667.[88]And, as regards India this concept was technically introduced in policy making by Dr. J.J Irani Committee report in May, 2005 and later formally recognized by the Act of 2013. So, its origin in India is quite recent in comparison to UK. Apart from it was observed that in UK, the minimum age of director is 16 years[89] as opposed to India where it stands as 18 years.[90] Unlike India, there is no nationality or residence requirement for a Director in UK. Technically, the major difference that exists is not regarding the incorporation and functioning of OPC but the tax structure. Undoubtedly, the Government of India has tried its best to incentivize the OPC's in India and has been quite liberal in its formation and carrying but tax structure in both the countries is quite dissimilar as in UK its pro-people.

B. **Single Member Companies are in better position than One Person Company**

An analysis of UK and Indian structure highlights that private limited companies are more preferred and successful in UK than India because taxation structure of UK is quite cost effective than India. In UK, the tax structure has been crafted in such a way that the tax rates for an individual (as a sole trader or partnership) are high but for a company they are less. So, it is wise, not weak, to admit that OPC as a model is lagging much behind in India as compared to UK. Its potential is

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[88] David Ricardo Sotomonte Mujica, Partnerships and Companies: A Comparative Approach To UK Business Organisations, 3 REVIST E – MERCATORIA J, 1-14 (2004).

[89] JORDANS.CO.UK, (last visited on July 21, 2021), *https://www.jordans.co.uk/company-formations/private-limited-company*.

[90] A minor is not competent to contract. According to Palmer's Company Law, "Directors are, in the eye of law, agents of the company for which they act, and the general principles of law of principal and agent regulate in many respects the relationship of the company and its directors". Under section 184 of the Indian Contract Act, 1872, a person who is not the age of majority cannot become an agent. In consequence a minor cannot be appointed to an office of director of a company. For details see: *CACLUBINDIA,* (last visited on July 21, 2021), *https://www.caclubindia.com/forum/age-limit-for-directors-pvt-ltd-107314.asp*.

still unexplored and existence among small entrepreneurs is latent. To enhance its effectiveness, it must be brought to the mainstream in India and indeed the foremost change by the legislature must be done in the taxation structure. The meager tax slab rates for OPC must be introduced which will encourage the sole proprietors to convert their business into OPC and let them enjoy the benefit of limited liability. The large number of newly incorporated OPC's among the smallest businessman will attract attention of rest of the population. It will become an example for others to follow. A new dawn of corporatization in India will emerge with new actors trying their luck, hard work, leadership skills thereby creating employment and balancing wealth. This will in turn help in realization of the true notions of economic equality and democracy in India. So, it's the high time that OPC's should be laced with more subsidies and taxations benefits so that it can uplift small entrepreneurs in entirety and organize the unorganized sector.

IX. Conclusion

It is thereby concluded that by virtue of this paper a successful attempt is made to trace the trajectory of OPC in India and its counterpart SMC in UK. A thorough analysis of both of these models which aim to uplift the smallest entrepreneur in the economy shows both these models in their own territorial jurisdiction are not only iron cladded weapons but effective steel frameworks for the small businesses bringing them out from the stage of phoenix. Streamlining the entrepreneurs by the concerned governments actually will act as a great motivation for the individuals also making them able to work hard using their highest potential. Now they will step into the shoes of 'job-creators' instead of 'job-seekers'. This transition will bring out a whole new vibrating and radiant era where not only the individual will flourish but his family and also the families of those employed by him. Competition will increase too and businesses will no longer remain big companies' dominion and labour will also be treated fairly. Mutual trust and fiduciary relationship will reach its zenith, in turn causing an absolute shift in societal structure. If we talk about UK, we may say UK has already reached such stage as revealed by data mentioned beforehand which highlights the fact that 'UK economy in large share consist of flourishing small businesses'. So, as regards India we have just started and trying hard to incentivize OPC's. Thus, we can say India is on the way right now and destination is yet to be reached. Once

reached, India will see a new dawn of corporatisation and economic justice will be reality of that time and no more only an aspiration of Constitution makers!

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Duties or Rights: Should Duties Trump over Rights?

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Abstract

A narrative is emerging in India that appears to be giving primacy to the fundamental duties of the citizens over their fundamental rights. This article attempts to understand and flesh out the significance of these two, their relationship, and the interplay between them, as contextualised in our Constitutional scheme, with the help of various Supreme Court decisions. It indulges in a discussion on the pragmatic functional relationship between Parts III, IV, and IV-A of the Constitution. It also brings various significant perspectives on the 'right-duty' relationship to the fore, to objectively appreciate the primary importance of the fundamental rights of the citizens and the State's duty to preserve and protect the same. It also emphasises on the importance, weighty role, and the constitutional obligations of the higher courts in preserving the Constitution and the rule of law, by providing effective redress to the aggrieved citizens who bring valid claims of their fundamental rights violations by the State organs and instrumentalities.

Keywords: Fundamental Duties, Constitution, Fundamental Rights, Duties, State, Citizens, Gandhi, Directive Principles.

I. Introduction

Prime Minister Modi in his address on 12th October 2021 on the occasion of the 28th Foundation Day of the National Human Rights Commission emphasised on talking about both rights and duties simultaneously and not separately, giving more emphasis to the duties so that the 'rights are ensured', and thus called upon the citizens to *do* their duties earnestly, though be *aware* of their rights.[2]

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[2] Biggest infringement of human rights take place when they are seen from political prism: PM, NARENDRA MODI (2021), https://www.narendramodi.in/text-of-prime-minister-narendra-modi-s-address-at-28th-national-human-rights-commission-nhrc-foundation-day-programme-557836.

Similarly, a year earlier, Justice S.A. Bobde, the then Chief Justice of India while speaking at the International Judicial Conference in February 2020 reportedly drew our attention to the significance of fundamental duties, and highlighted that, "legal rights have correlatives of legal duties" — and so, stressed upon the need of the citizens performing their fundamental duties.[3] He also quoted father of the nation, Mahatma Gandhi, from Hind Swaraj where he had stated that, "real rights are a result of performance of duty".[4] Going back even further, President Kovind in his address to the Members of Parliament at the inaugural function of the 'Constitution Day' on 26th November 2019 duly emphasised upon the fundamental duties of the citizens of India in the Constitution of India; and reminded citizenry of these 'moral responsibilities'.[5] He also quoted Gandhi, who termed duty as the true source of rights; to stress upon the importance of doing one's duties.[6] So, the citizens of India have been recently reminded for over three years by the top constitutional functionaries to solemnly do their duties.

Though none of the above-mentioned constitutional dignitaries undermined the importance of the fundamental rights and their rightful importance; later on, in the public and private spaces, a narrative seems to have emerged which places the fundamental duties of a citizen (contained in Part IV-A of the Constitution of India consisting of a solitary Article 51-A, which at present lists eleven fundamental duties) at a higher pedestal than her fundamental rights. This is possibly with an objective to disparagingly counter any alleged fundamental rights breach claim of a claimant citizen against the State with a counterclaim of the claimant's failure to discharge some fundamental duty. This paper attempts to indulge in an informed discussion and analysis on the correctness of this emerging narrative by exploring the relation between the fundamental rights and duties, and their respective weights and values in our Constitutional scheme. It does not

[3] *See* "Full Text of CJI's Speech (at First International Judicial Conference 2020)" *The Leaflet*, Feb. 22, 2020, *available at:* http://theleaflet.in/individual-at-the-heart-of-the-constitution-individuals-rights-are-fundamental-asserts-cji-bobde/

[4] *Ibid.*

[5] *See* "Address by the President of India, Shri Ram Nath Kovind at the Inaugural Function of 'Constitution Day'", Nov. 26, 2019, *available at:* https://presidentofindia.nic.in/speeches-detail.htm?767.

[6] *Ibid.*

present an *ad hominem* personal criticism of anyone who subscribes to the above narrative.

The structure of my commentary is as follows: it tries to demystify the relationship between rights and duties from various standpoints and perspectives; it discusses the basis of defining the duties of a citizen, apart from appreciating the basis and limits of fundamental rights; and also, attempts to understand the role and obligations of the State and its instrumentalities in preserving the fundamental rights while enforcing legal duties, which also involves an appreciation of the checks and balances built in our constitutional scheme of separation of powers. It also examines the legitimacy and compulsion to perform clearly illegal duties prescribed by the State, apart from certain unintended pernicious effects of prioritizing the duties over rights. This paper also indulges in a discussion about the nature of the power of judicial review and the constitutional obligation of the higher courts to redress the breaches of fundamental rights by State action, apart from attempting to understand through judicial imprimaturs, the varied interpretations of the constitutional provisions relating to the fundamental rights, directive principles of state policy, and fundamental duties and their interplay; before turning to the final concluding remarks. Thus, this paper succinctly fleshes out various key dimensions of the above duty-based narrative, which is being pushed to the limit in certain quarters, and explores the significance and contours of the rights-based discourse.

II. Rights-Duty Relationship, Fundamental Rights and their Enforcement

The fundamental confusion generated in this discourse arises while tracing a jural relation between legal rights and legal duties when it is simplistically stated, on Hohfeld's deontological construct of rights, that every right has a corresponding duty, or more technically: every right has a correlative of duty — even though Hohfeld understood, that the term 'right' is indiscriminately and loosely used in various senses, as power, or a privilege, or as immunity, apart from 'right' as understood in the strictest sense, whose correlative is 'duty'.[7] Using Hohfeld's model to understand fundamental rights as the rights in strict sense also presents

[7] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE LAW J. 16, 30 (1913).

problems of its own, as the nature of different fundamental rights vary.[8] Rights themselves need legal recognition before they can be enforced, as the famous legal maxim *ubi jus ibi remedium* also prescribes. They can have a statutory basis or even higher, the Constitutional basis itself. Some of them are fundamental in nature, and so sacrosanct they are, that they have been kept separate in the Part III of the Constitution of India.

Now, against whom can one petition the constitutional courts alleging violation of these fundamental rights? It is against the 'State', as defined under Article 12 of the Constitution of India. So, now let us limit this discourse to the citizens' rights and duties, which have been most talked about recently. Let us come back to the 'duty' in the Hohfeldian sense, and its relation with the 'right', in a strict sense. It is perfectly fine to call duty as correlative of a right. But, the right is asserted and enforced by the one, who is a holder of such rights, against the *other* person, who is under a corresponding duty not to violate the rights of the rights holder. If the latter violates the rights of the former, then the former can sue the latter to enforce those rights. So, if the 'State' violates certain fundamental right(s) of some right bearer say, *X* then, *X* can seek redressal against the State from the constitutional courts in this country.

The enforcement machinery for enforcing the fundamental rights is itself provided in the Constitution under Article 226 and Article 32 (which itself is a fundamental right), which enable moving the High Courts and the Supreme Court of India respectively. And, many of these fundamental rights under Part III are available to not only citizens of India, who form a class of natural persons getting legal recognition as such under the Constitution of India; but also, other classes of natural persons, including foreign nationals, refugees, etc.. Some of them have been even enforced by the artificial persons like, the Companies also. The fundamental rights are not privileges earned by first doing one's fundamental duties as citizens; these basic rights have been recognised by the Constitution, and are non negotiable. In this realm the Supreme Court has also expanded the umbrella of fundamental rights provisions by doing their expansive interpretation from time to time.

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[8] See L. H. LaRue, *Hohfeldian Rights and Fundamental Rights*, 35 UNIV. TOR. LAW J. 86 (1985).

Suppose, the Supreme Court is moved under Article 32, then the enforcement of his fundamental right is *guaranteed* by the Constitution; though, due to certain judicially evolved practices and pragmatic considerations, the Supreme Court may require the High Court to be moved initially, or even rarely, reject a belated claim. So, the judiciary keeps a check on the other two organs of the State viz., the executive and the legislature, if their actions lead to violation *inter alia* of the fundamental rights, as the 'State' is generally injuncted by the Constitution itself from making the laws which are inconsistent with or in derogation of the fundamental rights in form of taking away or abridging these rights — and, if such laws are made, they have been declared to be void under Article 13 of the Constitution. Even the writs in nature of *Certiorari* can be issued by these superior courts to quash judicial orders also. The judicial review does not stop at the review of executive action, which is the bulk of Administrative Law; but extends to the judicial review of legislative action as well, which may lead to even striking down of legislations, as has been done by the courts several times in the past — though these legislations are passed by democratically *elected* representatives of the people by *majority*, which comprise the legislature in states, and the Parliament at the Centre. The constitutional amendments can also be struck down as violative of the 'basic structure' of the Constitution; though the exercise of constituent power is no longer equated with mere legislative action, post *Kesavananda Bharati's* case.[9]

Even, President Kovind in his above speech had said, "we need to perform our duties and thereby create circumstances which would ensure effective protection of rights".[10] This prescription is equally relevant for the citizens, to emphasise on the reasonable limitations on their fundamental rights, cautioning those who mistakenly take them to be absolute, as well as for the State and its instrumentalities, who are primarily obligated to protect and preserve the fundamental rights in our constitutional scheme. Can the constitutional courts say, "*X* failed to discharge some fundamental duty, and thus *X* is disentitled to seek relief from us for violation of his fundamental right by the State?" No. The Supreme Court of India in past cases afforded fundamental rights protection to

[9] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.
[10] *Supra* note 4.

the under-trials, convicts, and even death-row prisoners, when such protection was sought. In fact, a three-judge bench of the Supreme Court in *Ankush Maruti Shinde v. State of Maharashtra* recalled the previous judgment of conviction by the Supreme Court, passed by a two-judge bench, and not only reversed the same acquitting the appellants, who had been awarded death penalty, due to lack of fair investigation but, also awarded them five lakh rupees each as a 'reasonable compensation' to be paid by the State, as their fundamental rights under Articles 20 and 21 were held to be violated due to a serious lapse on the part of the investigating agency, which affected fair investigation and fair trial, as a consequence of which they languished in the prison for sixteen years.[11]

III. Interplay between Fundamental Rights, Directive Principles, and Fundamental Duties

The Supreme Court has come a long way from *Champakam Dorairajan*[12] which relegated the Directive Principles of State Policy to a subsidiary position in comparison to the fundamental rights, to *Ashoka Kumar Thakur*[13] where the Supreme Court observed, that both fundamental rights and the directive principles are 'complementary and supplementary' to one another — that Part III cannot be read in isolation, and Part IV is equally important — and, that "Principles of Part IV have to be gradually transformed into fundamental rights depending upon the economic capacity of the State".

Parts III and IV of the Constitution do not always ostensibly conflict with each other, and in fact, they supplement each other in certain scenarios e.g., in the cases concerning environmental measures. Like, in *Hindustan Zinc Limited* case certain provisions for promotion and co-generation of energy from renewable sources were held to protect the fundamental right to life under Art. 21, as well as to advance the mandate of the Art. 48-A of the directive principles of state policy, and Art. 51A-(g) which — though casts a fundamental duty on the citizens to protect and improve environment — as per the Supreme Court, "*mandate upon the State and its instrumentalities to protect the environment in the area*" so, that

[11] Ankush Maruti Shinde v. State of Maharashtra, 2019 Indlaw SC 279.
[12] State of Madras v. Champakam Dorairajan, (1951) S.C.R. 525.
[13] Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1.

the residents of that area lead a healthy life.[14] By extending the fundamental duty under Art. 51-A to the State, the end result was that the impugned environmental regulations were prevented from being struck down on the alleged grounds of violation of Part III provisions viz., Articles 14 and 19(1)(g).

So, we now appreciate that right and duty are neither mutually exclusive nor destructive of each other; but they have an *essential* mutual coexisting relationship. So, one cannot exist without the other, but it is fundamentally wrong to narrate them in a manner as to sound as if the right and its corresponding duty vest in the same person; or, that violation of an inviolable right is justified in terms of violation of another duty by the right holder claimant. Next, we come to Parts III and IV of the Constitution. Again, reinforcing the sanctity and inviolability of fundamental rights in Part III, they are made justiciable, as discussed above; whereas, it is explicit in Part IV, that the Directive Principles of State Policy contained therein are not justiciable, but are supposed to be fundamental in guiding the State in its legislative and executive action — though, many laws e.g., which provide for affirmative action protect and *advance* fundamental rights have been protected in turn by the same provisions.

Though in the initial years of its existence, the Supreme Court of India gave primacy to Part III, protecting the rights of individual claimants, by striking down the laws violating the same — which led the Parliament to carry out constitutional amendments to insulate certain legislations from being struck down — later on, the top court started protecting the progressive laws, by upholding justifications under Part IV. Furthering this trend of apparent dilution of Part III, led the apex court to move towards asserting the importance of Part IV-A — which was inserted in the Constitution through the otherwise contentious 42nd amendment on the basis of recommendations of the *Swaran Singh Committee* — to decide the questions of fundamental rights violations. As Part IV-A is not justiciable — and again, the petitioner seeking action against the State for violation of petitioner's fundamental rights has to establish the same and a corresponding failure of the State in discharging its duty to protect those rights — recourse to Part IV-A by the State may sometimes increase the threshold of proving the violation of a Part III rights, as alleged by the petitioner. Though, seemingly counterintuitive, the

[14] Hindustan Zinc Limited v. Rajasthan Electricity Regulatory Commission, 2015 Indlaw SC 499.

petitioner may also rely on Part IV-A to bolster its claim against the State. For example, in *A.I.I.M.S. Student's Union v. A.I.I.M.S.* the Supreme Court, somewhat unconventionally, interpreted fundamental duties provision as a manifestation of peoples wish, applying it against the State action; and went on to interpret the fundamental duty of every citizen as the *collective duty of the State* — considering fundamental duties not only as a valuable guide to interpret constitutional and legal issues but, which can also be used for moulding the relief granted by the courts.[15]

As mentioned previously, the fundamental rights themselves cannot be, and are also not absolute, and are made subject to explicit reasonable restrictions provided within those provisions themselves. For example, arguably the most sacrosanct right after right to life and liberty under Art. 21, is the right to freedom of speech and expression of a citizen under Art. 19(1)(a), which is subject to express restrictions on certain grounds viz., in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence, all of which are specifically spelt out in Article 19(2). Though there is a considerable jurisprudence which has evolved under these provisions, and the major trends are clear; the outcomes of individual cases may be hard to predict, as much appears to be dependent on the expansive or restrictive interpretation of the fundamental right conferring provision when balancing it with the rights restrictive provisions.

Even when no ground of restriction is explicit a very strict textual interpretation of the fundamental right by the Courts like, of Art. 21 as done in the *A.D.M. Jabalpur* case (now overruled),[16] may lead to defeating these very rights, which the higher courts are obligated to protect. These restrictions, which are considered to be reasonable, are justified as placing *necessary* fetters on the exercise of the individual fundamental rights — and so, aren't they *sufficient* restrictions also?; or other restrictive justifications from the other parts of the constitution like, Part IV-A should be brought in to create more impediments in form of higher thresholds for establishing fundamental rights violations by the State? These are intractable questions, and the libertarian and utilitarian lawyers and judges will

[15] A.I.I.M.S. Student's Union v. A.I.I.M.S., (2002) 1 SCC 428.
[16] ADM Jabalpur v. Shivkant Shukla, (1976) 2 SCC 521.

perhaps reach to the contrary conclusion in the same factual controversy. To save invalidation of a law enacted with a policy objective to pursue the directive principles — on the ground of its inconsistency with provisions of Part III viz., Arts. 14, 19, and 31 — 42nd constitutional amendment inserted provisions like, Art. 31-C for saving such laws from invalidation. The Supreme Court in *Minerva Mills* in fact, *inter alia* upheld Art. 31-C, but delineated its scope to only those laws whose pith and substance showed, that their dominant object was to further directive principles — which are meant to advance social and economic justice —even though they may violate the specified Part III provisions.[17] This allowed for conferring primacy to Part IV over Part III on the basis of the constitutional amendment itself, which was not held to violate the basic structure of the Constitution — which is the only constraint on the constituent power post *Kesavananda Bharti* case — and thus, can be used to even abridge Part III rights contrary to the prescription for the ordinary laws under Article 13. Part III provisions, for example, enforce State responsibility in the realm of domestic law; though, the State Responsibility, in a different context, is also a well-recognised norm of international law. Part III and Part IV of the Constitution may also be seen to bifurcate justiciable civil and political rights, and non-justiciable social and economic rights respectively; as per the design of the Advisory Committee on Minorities and Fundamental Rights, appointed by the Constituent Assembly, under the chairmanship of Sardar Patel.[18]

IV. Prescription of Duties and Preference over Rights

Part IV-A of the Constitution of India, which lists and prescribes fundamental duties, is not justiciable, and thus cannot be the basis of initiating legal action by the State against the citizens; but, as discussed above, even the legal duties imposed by the State through legislation or executive orders may be struck down by the higher courts if they violate fundamental rights of the citizens. Till then, of course, it can be argued, that the subjects are under the legal duty to follow the law or suffer prescribed consequences for transgressions; and, as Dworkin

[17] Minerva Mills v. Union of India, (1980) 3 SCC 625.

[18] S P Bhargava, *Fundamental Rights and the Indian Constitution*, 9 INDIAN J. POLIT. SCI. 24, 29 (1948).

submits, the subjects are under a *general moral duty* to follow them.[19] For those who disobey the law, including those who claim to be the conscientious objectors, the executive will provide justification in the use the State machinery and its police powers against them to enforce the statutory duties imposed on the subjects.

But, what if the 'State' within the meaning of Article 12 prescribes *clearly* illegal and unconstitutional duties on the subjects governed by it? Will it be a *moral duty* of the subject to follow such diktats? What about the *duty*, not only moral, but also, legal and Constitutional, of the 'State' in not imposing such *duties*? Both, the substantive content and manner of enforcement of such prescriptive fiats imposing such *duties* may egregiously violate fundamental *rights* of the individuals who oppose and disobey such prescriptions. And yet, the popular majoritarian public perception and their frame of reference of duties is often too biased in favour of such usually, populist institutional diktats and prejudiced against the minority of violated individuals to reach a correct decision in these vexed and endless right-duty controversies. Under such circumstances, the courts often remain the sole legitimate recourse for seeking protection, recognition and enforcement of the rights of those who suffer through such 'State' action prescribing duties, which are both unconstitutional and illegal.

Let us substantiate this point through a concrete contemporary example prefaced with a question. Can one say that the lawyers who defend certain accused persons, against whom there are serious charges like, terrorism, sedition, gang rape, multiple coldblooded murders of indefensible victims are not doing their duty as *good citizens*? Some Bar Associations have thought so in individual cases, as they have passed resolutions prohibiting their member Advocates from providing legal representation to such accused persons in individual cases; and even practically coerced those Advocates who showed the courage to accept such briefs, leading them to seek protection from the courts. Were the members and office bearers of such Bar Associations who supported passage of such resolutions doing their *duty* as *good citizens* in forbidding other member Advocates from providing legal representation to such accused persons *charged* of heinous offences? Were the member Advocates under a *duty* to follow these resolutions? Or, were these Bodies of Advocates and their conforming members and office bearers

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[19] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 186 (1977).

themselves failing in their Constitutional and statutory duty as Advocates, and even more so as the representatives of the Bar, in creating such impediments in administration of justice? Were the counsels willing to defend such accused persons *bad citizens*, not doing their *duty* by showing defiance to these resolutions? Or, were they conscientiously doing their professional *duty* as lawyers, protecting the rule of law, and advancing the cause of justice? A public debate on these issues is likely to remain inconclusive. More importantly, it cannot effectually and definitively decide this controversy; only courts can, but with unfortunate repercussions both individual and systemic, despite the decisions ultimately rendered in the favour of the wronged individuals.

So, several individual cases on these issues were litigated in various High Courts and the Supreme Court. The courts has consistently ruled against such bodies of the Bar, and protected the *rights* of such courageous defence counsels in their cause of *duty* beginning from the *A.S. Mohammed Rafi* case[20] of the Supreme Court in 2010 and yet, we find such populist but, unconstitutional and illegal Bar resolutions — which not only infringe the rights of the willing and conscientious defence counsels but also infinitely *more importantly* the fundamental rights of the accused persons particularly under Article 22(1) of the Constitution — are passed from time to time by some association of lawyers, in utter disregard to the rulings of the Supreme Court, and in violation of the relevant statutory and Constitutional provisions, which they are expected to protect and advance. The 2020 Karnataka High Court case of *B.T. Venkatesh* is the latest addition in this unfortunate list of cases.[21] Notably, *Mohammed Rafi* judgment was directed, through that judgment itself, to be circulated in all the Bar Associations and State Bar Councils in India. So, these bodies of lawyers cannot claim to be ignorant of the law, though ignorance of law itself is not excusable, and these professional bodies of lawyers are anyways presumed to be learned in law.

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[20] A.S. Mohammed Rafi v. State of Tamil Nadu, AIR 2011 SC 308.

[21] TNN, *Ensure lawyers for sedition-accused: HC*, THE TIMES OF INDIA, February 28, 2020, https://timesofindia.indiatimes.com/city/bengaluru/ensure-lawyers-for-sedition-accused-hc/articleshow/74357343.cms (last visited Nov 1, 2020). B.T. Venkatesh v. State of Karnataka, Order dated March 17, 2020 (W.P. No. 4095 of 2020 (GM-RES) PIL), *available at:* https://www.legitquest.com/case/bt-venkatesh-and-others-v-state-of-karnataka-and-others/1C2872.

In showing contemptuous defiance to the highest court and constantly eroding the law, it appears that these professional bodies which passed such resolutions after *Mohammed Rafi* decision *still* vacuously think that they are ostensibly doing some *duty* in imposing such prohibitory *duties* on their member Advocates. And, the vast *majority* of their members may still either concur or confirm with such resolutions for various reasons, which somewhat lends a hollow legitimacy and recursivity to such measures. What is even more worrying for the entire rule of law, and justice system in this country is, that these reprehensible transgressions are done by the professional bodies comprising of the legal professionals, who are officers of the courts, and also represent the profession collectively in their courts. We must also appreciate, that the content of duty assumes more importance than the mere State authority that ordains it. So, is it the duty of public servants to carry out illegal orders, or order their subordinates to do so, merely on the basis of advancing the justification of doing their duty of following orders from their superiors? The Trials by Nuremberg Military Tribunals clearly negate such a justification, as the duty to prevent illegal wrongdoings was held to prevail under such circumstances, and it was held, that there was no duty to obey orders of the superior authority to carry out illegal executions.[22] So, the obligation to discharge clearly illegal duties ordained by the 'State' cannot be insisted upon as *morally right*, and their legitimacy may be questioned on basis of both their nature and content.

Creating sustained public awareness about the fundamental duties of the citizens is fine. But, this does not absolve the State of its own *duties* towards its citizens; and clearly among its highest duties is to protect the *fundamental rights* of its citizens. Let us also consider here a possible implication on the future behaviour of the potential citizen claimants, who may incidentally develop *greater* reverence towards the State, after *internalising* their fundamental duties as the citizens. No doubt, it may help foster peace, order, and fraternity among the citizens, and between the citizens and the State, and so is a greatly desirable and efficient consequence. But, if the citizens become considerably less litigious, to the extent that they are even willing to overlook or tolerate *some* violations of their

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[22] KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 270 (2011).

fundamental rights by the State, and not willing to sue the State in courts, as they previously would have, is this a really desirable outcome?

From one perspective, such a consequential effect *may* be favoured, as litigation against the State adversely impacts its exchequer, and further strains already burdened resources of the State, including the courts. But now consider a counter perspective too. Will this help advance the 'rule of law'? And also consider this, the State is involved in the most litigation. It sues as well as gets sued most. Will a more passive citizenry lead to a correspondingly more passive State in terms of bringing administrative and legal action against its subjects? Will an unchallenged unconstitutional action of the State not embolden it further to follow the suit in the future against other citizens as well? Perhaps, an action by the citizen claimant does not personally affect the impersonal machinery of the State — run on the public exchequer — as much as it affects an individual claimant, who may be consequentially devastated in case it ultimately fails. This should be a *sufficient* deterrent itself against initiating frivolous legal action against the State. We should not forget, that an individual citizen is no match against the executive action, backed by the State machinery and resources; and so, the violated citizen's final recourse is to move the courts — when administrative mechanisms fail to yield — from whom it seeks protection and redressal, and must be afforded so, if rightfully deserved.

As the State can rightfully emphasise on its citizens' *Svadharma*, as prescribed in Art. 51-A, the citizens can expect that the State will also abide by its *Raja Dharma* prescribed by the Constitution; though the latter is not preconditioned on the performance of the former. True, for Mahatma Gandhi duty was a source of right, and of primary importance; but his individualism has been viewed as more ethical and religious rather than political and social.[23] *Bapu* was an embodiment of truth, duty, values, and righteousness. We should not forget that, though he gave primacy to duty, Gandhi's life's mission was also to fight for the civil and political rights, and he led our freedom struggle against the British rule.[24] Gautam Bhatia has gone to the extent of advancing a suggestion to consider an update to the *Hind Swaraj* quote of Gandhi — cited by the then Chief Justice, and reproduced earlier

[23] G N Sarma, *Gandhi's Concept of Duty*, 41 INDIAN J. POLIT. SCI. 214, 215–16 (1980).
[24] *Id.* at 215–16.

— and reverse the same, in this constitutional age, to: "real duties are the result of the fulfillment of rights".[25]

V. Conclusion

By upholding the constitutional provisions, principles, values, in form of adherence to the constitutionalism the Constitutional Courts also protect the legitimacy of the State from eroding, preventing it from slipping into a *Tacitus trap* — thereby allowing every Government to take quick remedial course corrections wherever and whenever it is found to be wanting in fulfilment of its obligations. Further, by preserving and asserting the independence of judiciary, which is a basic feature of our Constitution, the Constitutional Courts protect the inviolable provisions of the Constitution from being transgressed by the State; and by so doing their Constitutional duty they do *complete* justice, and it in turn protect and preserve their own identity and legitimacy. Though unlikely, in desperation, a State may seek to preserve its legitimacy on the basis of assertion of its brute executive power instead of the rule of law; but, as experience shows, pursuit of such a state policy is not going to help it in the long run, even though it may provide some delusive short-term assurance.

In view of Ronald Dworkin's initial classification of political theories, *we* can be said to have adopted the *right-based* model, as fundamental, for our Constitution; instead of a *duty-based* one.[26] Though, the democratic system provides the very foundation of constitutionalism, it cannot be the sole criterion to judge the *vires* of an executive action of the democratically elected government by the majority of electorate; and this is where the importance of the sacrosanct Constitutional provisions is realised. The policy of furthering the collective rights by allowing the State measures based on the directive principles, even though it meant tolerating certain fundamental rights breaches of certain individuals, appears to have progressively found favour with the Supreme Court — though the utilitarian streak of such policy may make it difficult to accurately judge its egalitarian character and efficacy; as it may *actually* be furthering certain *personal or*

[25] Gautam Bhatia, *Rights, duties and the Constitution*, THE HINDU, February 26, 2020, https://www.thehindu.com/opinion/lead/rights-duties-and-the-constitution/article30915951.ece.
[26] DWORKIN, *supra* note 18 at 171–72.

external preferences instead of its avowed objectives.[27] The rightness of a State action is judged on the basis of adherence to the Constitution, its spirit and values, and the constitutional morality. Rawls argues for the inviolability of an individual's justice — based on fairness — which should not be overridden even at the cost of entire society's welfare.[28] Amartya Sen proposes a 'goal-rights system', where certain rights are included within the systemic goals, apart from retaining their inherent instrumental value.[29]

Gautam Bhatia quotes Samuel Moyn to caution about the traditions, which invoke the language of duty to efface or subordinate individual, which according to Ambedkar is the fundamental unit of the Constitution; and — with the help of an instructive case of the Supreme Court from 1980s which upheld differential treatment of male and female flight attendants — prescribes, that without the moral compass of fundamental rights by placing them "in the transformative Constitutional scheme the language of duties can lead to unpleasant consequences".[30] Moyn himself considers it to be 'grievous mistake' to make enjoyment of rights depend on the assumption of duties, apparently as Gandhi insisted.[31] In fact, Moyn goes on the extent of submitting that, "it is undeniable that the rhetoric of duties has often been deployed euphemistically by those whose true purpose is a return to tradition won by limiting the rights of others". Even CJI Bobde, as then was, in his above cited speech, similarly reiterates that the individual and individual rights are at the heart of the Constitution, and were recognised as 'fundamental'.[32]

The upshot of the entire discussion is: though it is *desirable* that the citizens must be made aware of the significance of the fundamental *duties*, the *protection* of their fundamental *rights* against the *undesirable* unconstitutional State action remains an *unexceptionable* norm enshrined in the Constitution. The tenability and enforceability of the fundamental *rights* claims of the *citizens* is neither dependent upon nor preconditioned by their performance of fundamental *duties*,

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[27] *Id.* at 234.
[28] JOHN RAWLS, A THEORY OF JUSTICE 3 (Revised Ed. ed. 1999).
[29] Amartya Sen, *Rights and Agency*, 11 PHILOS. PUBLIC AFF. 3, 15–16 (1982).
[30] Bhatia, *supra* note 24.
[31] Samuel Moyn, *Rights vs. Duties: Reclaiming Civil Balance*, BOSTON REVIEW, 2016, https://bostonreview.net/articles/samuel-moyn-rights-duties/.
[32] *Id.*

as *good citizens*. The superior courts as the guardians of the Constitution, must zealously protect these rights and provide redress and remedies whenever required — if needed, even *suo moto* or through Public Interest Litigation — as they are enjoined to do as per our Constitution as well as the established judicial norms, practices, culture, and the jurisprudence evolved in this regard, in the post-independent India. In view of the Dworkinian conception of individual rights as *political trumps*, in an apparent conflict, the fundamental rights should trump over fundamental duties — not the other way round — if the latter are advanced to reinforce an argument for a collective welfare State measure which violates individual fundamental rights.[33] It should be *always* remembered, that the fundamental rights of individual citizens need complete protection to enable the citizens to effectually discharge their fundamental duties.

[33] DWORKIN, *supra* note 18 at xi.

A Jurisprudential Study on Individual Liberty v. Public Interest: A Case of COVID-19

***Dr. G. Rajasekar*[1]**

Abstract

Human community witnessed many outbreaks of infectious disease from very ancient period. Indian society is also not spared by the nature in this regard. These diseases posed great threats not only to the public health security of the nations but also significantly disrupted the economic and commercial activities of the State.

The power exercised by the state in protecting public health during health emergency is limited by the individual right to liberty, right to food, right to privacy, right against discrimination etc. Therefore, a fine balance may be drawn between the individual liberty and the power state to maintain public health.

Keywords: Personal Liberty, Public Health, COVID-19

I. Introduction

Human community witnessed many outbreaks of infectious disease from very ancient period. Indian society is also not spared by the nature in this regard. These diseases posed great threats not only to the public health security of the nations but also significantly disrupted the economic and commercial activities of the State.

Unlike earlier centuries, nineteenth century is a remarkable one in the human history. There is a paradigm shift in the concept of the state. The state across the globe became a welfare state. This concept has increased role of the state to a larger extent. Again, the end of the Second World War has resulted in growth of human rights. This has changed the functions of the state from coercive nature to right based approach. This dual nature of the state, that is protecting the rights of the individual on one side and the security of the state on other hand really made the function of the state a complex one

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Responding to this change both the international community and the municipal state came with declarations and conventions and Law respectively to guard the rights of its citizen. To strengthen this role most of the countries in the world have adopted a Constitution guaranteeing protection to the fundamental rights to its citizen and also cast an obligation on the part of the state to provide the social security and welfare measures of the citizen. This can be understood from the Part III[2] and Part IV[3] of the Indian Constitution. Therefore, it is a settled principle that fundamental rights are not absolute and always subject to reasonable restriction. In other words, fundamental rights deal with individual liberty[4] and reasonable restriction focuses on public interest or social interest[5]. Thus, in the name of security of the state and on public interest the state can derogate the fundamental rights of the citizen[6]. Therefore, the political trumps held by the individual are termed as individual rights.

But the experience shows that the containment measures taken by the public health authorities is proven to be a disproportionate one on the poor and marginalised. The surveillance and the brutal actions taken by the police on the lockdown violators are seems to be violative of the personal liberty of the person. The general public felt that quarantine and other regulatory measures fell harder on the poor. It also felt that there were many instance in which the ethnic and religious minorities are stigmatized as the communicators of the disease.

II. Right to Life and Personal Liberty

The right to life and the right to personal liberty are guaranteed under Art.21[7] which has received the widest possible interpretation. The right to live means something more than mere animal existence and includes the right to life consistently with human dignity and decency. In other words it can be said as this right is not merely physical act of breathing but, it is a life with dignity. Reputation of a person is his valuable asset and is a facet of his right under Article.21 of the

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[2] See generally Arts.19,21,22, 32 of the Constitution of India.
[3] See generally Arts.39,41, 42 and 47 of the Constitution of India.
[4] Art.19 (1) a to g and Art.21 of the Constitution of India.
[5] Art. 19 (2), and other Preventive Detention Laws.
[6] See generally Arts. 352, 356,358,359 of the Constitution of India.
[7] Art. 21 read as, No person shall be deprived of his life or personal liberty except according to the procedure established by law.

Indian Constitution[8]. A good reputation is an element of personal security and it is protected by the Constitution equally with the right to the enjoyment of life and property under Article 21 of the Constitution[9]. Under Article 21 of the Constitution, so many rights have found shelter growth and nourishment. One can easily understand these developments have evolved from judicial decision. Art.21 of the Constitution which guarantees protection of life and liberty can be said to be heart and soul of the fundamental rights[10]. Thus, this right can be said as a finer grace of human civilization[11]. However, this right also not an absolute right and it can be controlled by reasonable restriction[12].

The concept of Personal liberty was first defined by the Apex Court of India in *A.K.Gopalan V State of Madras*[13] by the following words:

By qualifying the word liberty, the importance of the word 'personal liberty' is narrowed down to the meaning given in English Law to the expression 'liberty of person'. Art.19 and 21 deals with different aspects of liberty. Art 21 deals with the deprivation of right (total loss) of personal liberty but Art 19 is protecting the rights of its citizen from unreasonable restriction (partial control).

Therefore, it can be safely said that a personal liberty of person found in Art.21 can be deprived by means of a valid law and in case of freedom under Art.19 can be enjoyed by a free citizen.

III. The Jurisprudence of Dignity

The comparative reading of Arts 19 & 21, one can easily infer that the aim of these articles are not only to protect the physical existence but also the quality of

[8] Sukhwant Singh v. State of Punjab, AIR 1995SC1601.
[9] Umesh Kumar v. State of Andhra Pradesh, AIR, 2014 SC 1106 see also, Om Prakash Chautala v. Kanwar Bhan, AIR 2014 SC1220.
[10] Mohd.Sukur Ali v. State of Assam, AIR 2011 SC1222.
[11] Dr. Nalla Thampy Terah v. Union of India, AIR 1985 SC1133.
[12] Asha Ranjan v. State of Bihar, AIR 2017 SC 1079, see also, Church of God in India v. K. K. R. Majestic Colony Welfare Asso. (2000) 7 SCC 282- The person has the right to enjoy these freedoms but it should not adversely affect the right of others including that of not being disturbed in their activities.
[13] AIR 1950 SC 27.

life[14]. The hard social reality of today is the right to life with dignity of migrant workers.

The violation of human dignity and right to privacy of migrant workers really frustrate the object of Art.21 of the Indian Constitution. Going by the clean words of our Supreme Court in M.Ngaraj case, human dignity is inseparable and intrinsic to human existence, As such, the dignity of a person is inalienable and neither be given up nor be taken away from a person[15].

Again in Justice.K.S.Puttaswamy[16], it is observed that, the essence of dignity and liberty infused into the very existence of a person. The right to privacy was recognized and its jurisprudence interpreted to express the recognition of such a right for every person. It also laid down that the reflection of the concept of dignity is laid.

IV. Right to Health as a Fundamental Right

The widely acceptable definition of health is that given by the WHO in the preamble of its constitution, according to World Health Organization, “Health is a state of complete physical, mental and social wellbeing and not merely the absence of disease[17]”

The word Right to health could be seen neither in Part-III nor in Part IV of our Constitution. It is the Indian Judiciary by its creativity brought this right in the Indian Constitution under Art. 21. Therefore, the plain reading of the various decision of the Supreme Court, the Right to health is a right of every human being in most attainable levels.[18] Further, it has also been held that the right to health is integral to the right to life[19]. Thus, Right to Health has been much considered as

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[14] State of H.P. & Ors v. Umed Ram Sharma & Others, AIR 1986SC847
[15] M.Nagaraj v. Union of India, (2006)8SCC212 see also, Jeeja Ghosh v. Union of India, (2016) 7 SCC 761.
[16] Justice K.S.Puttaswamy & Others v. Union of India, (2017) 10 SCC 1.
[17] Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19–22 June 1946; signed on 22 July 1947 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100); and entered into force on 7 April 1948).
[18] Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 812.
[19] State of Punjab v. Mohinder Singh Chawla, (1997) 2 SCC 83.

the basic and fundamental human right by the international community under international human rights law[20].

V. Judiciary and Right to Health

At no point of time the Supreme Court of India want to compromise health of the citizen with quality of justice provided by it to the aggrieved parties who comes before it.

Constitutionally speaking the Directive Principles of State policy is not enforceable one[21] and also subject to the economic condition of the state[22]. Therefore, many a time state used this as a weapon to escape its duty, responsibility and liabilities in providing and protecting health of the common public. Therefore, the judiciary proactively rescue and brought this right under the purview of Article 21 of the Constitution of India by enlarging the scope of Article 21. Article 21 ensures the right of life and liberty to every one irrespective of citizens or not.

Now the concept of personal liberty is wide enough to include rights that may or may not be directly linked to the life and liberty of a person. Thus, it now includes right to health as well. This can be understood from the following decisions of the Supreme Court.

In *CESC Ltd. v. Subash Chandra* Bose[23] the Supreme Court observed that "right to health is a fundamental right". The Court came to this conclusion relying upon international instruments.

The Apex Court again in *Consumer Education and Research Centre v. Union of India*[24] opined that right to health is also an integral part of the right to life under

[20] Article 25 1. Of UDHR runs as, *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. See also,* **Article 12.**1. of ICESCR read as The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
[21] Art. 37, "The provisions contained in this part shall not be enforceable by any court…."
[22] Art. 41, "The state shall within the limits of its economic capacity…."
[23] AIR 1992 SC 573 at p.585.
[24] AIR 1995 SC 636.

Part III. This right also includes the access to medical care for the highest attainment of living standards.

VI. Right to Health Care as a Duty of the State

A welfare state is a parent or guardian of the individual[25]. So, the state has to provide, promote and protect the individuals' right without any compromise. Therefore, right to health care and maintenance of public health is a primary role of the state.

A. International Level

In contrast to all the other human rights, the right to health creates an obligation upon the states to ensure that the right to health is respected, protected and fulfilled, and is duly entitled to all its citizens[26].

According to World Health Organization, Health is a state of complete physical, mental and social wellbeing and not merely the absence of disease[27].

Going by the above words of WHO one can easily infer that the healthy life of a human is not only devoid of disease and infirmity but also inclusive of his physical, mental, social wellbeing. Later WTO has also played a momentous role both at the international and national in guiding development of health policy with an overall objective of ensuring & attaining the highest standards of health care to all the people around the world[28]. WHO has not only given a wider definition to HEALTH but also brought the vision of HEALTH CARE.

B. National Level.

A plain look at nature of Directive Principles of State Policy under Part IV of the Constitution of India leads to a conclusion that it is the responsibility of the state

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[25] Charan Lal Sahu v. Union of India, AIR 1990 SC 1480.

[26]ICESCR, **Article 12.2** The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (c) The prevention, treatment and control of epidemic, endemic, occupational, and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

[27] *Supra Note.17.*

[28] WTO Agreements and Public Health A Joined Study BY WHO and WTO Secretariat. (date of visit 1-05-2020), https://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf.

to ensure social and economic justice to its citizens. Therefore, one can easily come to a decision that Part IV of the Constitution directly or indirectly relates to the public policy in terms of health[29]. The following decisions of our Apex court picturise how judiciary effectively fix the responsibility on the state.

In *Ratlam Municipal Corporation*[30] case the court held that "it is the primary duty of the state under Article 47 of the Constitution to ensure the living conditions of the people are healthy and enforce this duty against any governmental body or authority who defaults in doing so irrespective of the financial resources it has".

The Supreme Court, in *Paschim Banga Khet mazdoor Samity & Ors. v. State of West Bengal & Ors*[31], while widening the scope of Art 21 and the responsibility of the State the Court observed that, it is the primary duty of the government in a welfare state is to secure the welfare of the people by providing adequate medical facilities to the people.

In *State of Punjab v. Ram Lubhaya Bagga*[32], the Supreme Court of India held that a comprehensive reading of Arts. 21, 41 and 47 of the Indian Constitution, makes it clear that these articles explain the duty of one another. Hence, the right enshrined under Article 21 imposes a parallel duty on the state which is further reinforced as under Article 47. Furthermore, it is pertinent to note that the Apex Court in this case viewed health to be a sacrosanct, sacred and valuable right.

From the above ratios it is quite clear that improvement of public health being one of the primary duties of the state. The state can impose restriction on any right found in the Part III of the Indian Constitution. In this regard the Court observed that the movement of a person may be restricted on the Ground of Public Health and Public morals[33].

In *Uttar Pradesh v. Kaushalya*[34], the Court held that on the ground of public health and public morality the right to movement of a prostitute can be restricted.

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[29] See generally Arts.38,39(e), 41,42,47,48

[30] Ratalam Municipality v. Vardichan, AIR 1980 SC 1622.

[31] (1996) 4 SCC 37.

[32] AIR 1998 SC 1703.

[33] Kamala China v. State, AIR 1963 Punj.36.

[34] AIR1964 SC416.

VII. Maintenance of Public Health

In common parlance maintenance of Public Health is nothing but an art of prolonging the life by preventing disease and promoting health through the organized efforts and informed choices of society, communities and individuals.

Going by the words of WHO Public Health can be defined as the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition". In India though, public health is not explicitly found in the Constitution of India, the judiciary has explained the need for the maintenance of public health in many of its decision. While interpreting the Part-IV of the Indian Constitution the judiciary observed that it's the duty of the state to take care of the public health. This can be understood from the following words of the Supreme Court.

By reading Arts.21 and 47 together the court held that one of the primary obligations of the state is to provide better health services to the poor. This can be understood from the following words of the Supreme Court in *Vincent Panikur Iangara v. Union of India* [35] :

"… maintenance of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution makers envisaged. Attending to public health in our opinion, therefore, is of high priority-perhaps the one and the top.

To achieve the above goal, it is felt that an effective public health system regulated by effective legislations is highly essential for any society.

Technically speaking, Public health System is a study of the powers and functions of the state. This state function is normally regulated by a statute, or rule or local ordinance. It also deals with the limitation on the powers of the state in curbing the individual liberty and the other interest of an individual that are legally protected.

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[35] AIR 1987 SC990.

Therefore, the stakeholders of Public health are the state having responsibility of maintain the public health and the other is the population as a whole, has a legitimate expectation of benefitting from public health services

The right to health for all people means that everyone should have access to the health services they need, when and where they need them, without suffering financial hardship[36].

VIII. Constitutional Structure of Indian Public Health Law

The Constitution of India distributed the Power to enact Laws regulating the Health issues to the Parliament and The State Legislatures through the list seen in the Seventh Schedule[37]. Constitutionally speaking The Parliament has no power to legislate on items from the State List, which include matters like public health, hospitals and dispensaries, water and sanitation. However, two-thirds of the Rajya Sabha may vote to allow parliament to pass binding legislation on any state issue if “necessary or expedient in the national interest”.

In India periodically, many Health Laws has been enacted by the Parliament and the State Legislatures to tackle the health issues during the normal time and in emergency situation. In normal time one could find that there is a balance between the health laws and protection of the liberty of the individual. These laws are mainly right based approach instead of coercive nature of the state. That is to say the pendulum swings equally between the obligation of the state and liberty of the individual.

But the Health Laws enacted to maintain the emergency are in coercive nature and restrict the individual liberty. These types of Law empower both the central government and state government to take special measures and prescribe regulations in case of dangerous epidemic disease[38].

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[36] *Supra Note:17*

[37] VII- Schedule Entry: 6 of the State List, Public Health and Sanitation; hospitals and dispensaries., Entry:29- Prevention of the extension from one state to another of infectious diseases of pest affecting men, animals or plant.

[38] THE EPIDEMIC DISEASES ACT, 1897- [2A. Powers of Central Government.— When the Central Government is satisfied that India or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease and that the ordinary provisions of the law for the time being in force are insufficient to prevent the outbreak of such disease or the spread thereof, the Central Government may take measures and

Moreover, the objective of Epidemic Diseases Act-1897[39] is to provide better prevention of the spread of dangerous epidemic diseases. The Epidemic Diseases Act empowers both the Union and State governments to take effective measures to control the further spread of the disease. Thus, any state government, when satisfied that any part of its territory is threatened with an outbreak of a dangerous disease, may adopt or authorize all measures, including quarantine[40], to prevent the outbreak of the disease. The Disaster Management Act, 2005[41] spells the Powers and Functions of the Authorities during the disasters[42].

Today all the countries including India is facing a great health catastrophe due to COVID-19.

The spread of COVID-19 posed a serious threat to the maintenance of public health. In order to tackle the situation, the state came with lockdown invoking Sec.144 of the Cr.P.C. ultimately resulting in certain restrictions on the freedom of Assembly and Freedom of movement etc. For

Jurisprudentially speaking, these pandemic laws empower the state to design and enforce regulations to reach the decided goals of curbing the epidemic rather than catering to the basic needs of the Individual. In other words, it can be said that the existing Legal frame works are heavily relaying upon maintenance of Public Health forgetting to safeguard the liberty of the individuals though certain liberties are non-derrogable at any point of time.

While answering to an issue relating to Public Health in *Ratalam Municipality*[43] case, the Supreme Court by making a comparative reading of Secs.188 and 268

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prescribe regulations for the inspection of any ship or vessel leaving or arriving at any port in 2[the territories to which this Act extends] and for such detention thereof, or of any person intending to sail therein, or arriving thereby, as may be necessary.], Sec.188 of Indian Penal Code, see generally DISASTER MANAGEMENT ACT, 2005.

[39] ACT NO. 3 OF 18971.

[40] *Ibid.*

[41] ACT NO. 53 OF 2005

[42] Sec. 6. Powers and functions of National Authority. —(1) Subject to the provisions of this Act, the National Authority shall have the responsibility for laying down the policies, plans and guidelines for disaster management for ensuring timely and effective response to disaster.

[43] *Supra Note*.24.

of IPC and Sec.133 of Cr. P.C held that public health, decency, dignity and morals are interrelated.

IX. Concept of Balancing of Right

The balancing of right approach is ingrained in the Social Engineering propounded by Roscoe Pound. Balancing, weighing or accommodating interest was understood as an integral part of the libertarian. While explain the concept of balancing of right, supreme court touched upon Dworkin's thesis and dismissed it for its "all or nothing" rule based approach as opposed to the more malleable principle based approach of other scholars which according to the Supreme Court permits balancing of rights (not between individual but between individual and society)"[44]. The Courts generally use pragmatic and Practical approach than hyper legalistic approach since the human rights and fundamental rights cannot be compromised.

X. Lock Down Orders and Individual Liberty

The word emergency has different meanings. It is distinguished based on the seriousness of incident involved or might involve or depend upon the widespread risk of injury or harm to the public at large, destruction or huge damage to the public property. In these circumstances it is the duty of the state to take appropriate and effective preventive measures to deal with the emergency situation.

While doing so, the care should be taken that the restriction should never be excessive either in nature or in time[45].

The interpretation made by the Supreme Court on Secs.188 and 268 of IPC and Sec.133 Cr.P.C. In Ratlam Municipality is highly relevant in the wake of the current lock-down scenario[46]. The question of courts right to intervene on the reasonableness and procedural preparedness before enforcement by the State was raised in *Alakh Alok Srivastava V Union of India*[47], by way of public interest

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[44] Anuradha Bhasin v. Union of India, (2020)3 SCC637, see *also* Foundation for Media Professionals v. UT of Jammu Kashmir (2020)5 SCC 746.

[45] Ramlila Maidan Incident, In re, (2012)5 SCC 1.

[46] Tarique Faiyaz, COVID-19 and the Current Challenges of Quarantine Law Enforcement in India, https://www.jurist.org/commentary/2020/04/tarique-faiyaz-covid-19-quarantine-india/

[47] Writ Petition(s)(Civil) No(s).468/2020, Supreme Court of India dt.31-3-2020.

litigation. In the writ petition the petitioner has highlighted the plight of thousands of migrant labourers who along with their families were walking hundreds of kilometres from their workplace to their villages and towns in defiance of COVID-19 lock-down order. The jobless and migrant workers stranded without any means of transportation are nothing short of forced detainees in the midland. The police actions under Section 188 of the IPC are justifiable but resulted in abuses against people in need. The sealing of state borders has caused disrupted freedom of movement and halted the supply of essential goods is blatant violation of liberty[48].

The declaration lockdown during pandemic may be inconsonance with Art.19(2) but not providing transportation to the migrant workers within a reasonable time is a clear violation Art.19(1)(d) and Art.21 since, it is a deprivation of their dignity.

This can be understood from the catena of decision of the Supreme Court of India with respect to the right to movement of Migrant workers during COVID 19. Time and again the Supreme Court reiterated that "the state is under the obligation to remove the hindrance affecting the enjoyment of the fundamental rights of Art.19 (1) (d) and Art.21. It also observed that the denial of rights of the migrant workers is nothing but stripping of their dignity as human beings, which is a protected right under Art.21 of the Indian Constitution. Imposing compulsory measures to keep social distancing and wearing of face mask may be reasonable but complete denial of movement of migrant workers is dipropionate.

Though the state's power to quarantine a person to maintain the public health is a legitimate one no doubt it seriously affected the liberty of an individual. Liberty of an Individual and public health are not complementary but supplementary to each other.

One of the facets of Art.14 is to get rid of in human practices prevalent in the country and the unequal treatment of the working groups (workers of the state and migrant workers) by the state governments is an arbitrary action and will shake the foundation of the democracy. Therefore, in Maneka Gandhi case, the Supreme Court held that arbitrary action is in violation of Right to equality protected by

[48] *Supra Note*.36.

Art.14 of the Indian Constitution. The Court also highlighted the link between Arts.14, 19,21 which is called as Golden Triangle of the Indian Constitution[49].

Tussle between Liberty and Security is inevitable in a democratic society having rule of law. The pendulum should not swing in either extreme direction so that one preference compromises the other. Time and again the Indian Judiciary observed that during preventive laws cannot be used as a tool to prevent the legitimate exercise of any democratic rights. Therefore, it is the duty of the state to balance the rights and restrictions based on the principles of proportionality and thereafter apply the least intrusive measure[50].

The fundamental freedoms enshrined in Art.19(1) are found with certain exceptions. Therefore, the settled principle is "reasonable restriction imposed on the Fundamental Freedoms in Art.19 (1) must satisfy the test of proportionality[51].

So, it is to be noted that the restrictions must be minimal and not to exceed the limit necessary in a particular situation. Hence, restriction on the Freedoms encapsulated under Art.19 (1) cannot be an instrument of coercion or persecution or harassment.

XI. Doctrine of Proportionality

However, the Supreme Court now a day made it clear that a clash between two rights must be decided in the light of Proportionality. Justice Chandrachud J observed in *Justice K S Puttasawamy (Retd) and Anr. v. Union of India & Ors.*[52], observed that, "An invasion of life or personal liberty must meet three-fold requirement of (i). Legality, which postulates the existence of law (ii). Need, defined in terms of a legitimate state aim (iii). Proportionality which ensures a rational nexus between the objects and means adopted to achieve them.

In the same case Kaul J. observed that (i) The action must be sanctioned by law (ii) the proposed action must be necessary in a democratic society for a legitimate aim, (iii) The extent of such interference must be proportionate to need for such interference (iv) procedural guarantees against abuse of interference with rights,

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[49] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[50] Modern Dental College & Research Centre v. State of Madhya Pradesh, (2016) 7 SCC 353.
[51] Rupinder Singh v. Union of India, AIR 1983 SC 65.
[52] (2017) 10 SCC 1 at p.509 para 325 and p.632 para 638.

which echoes Article 21's central requirement of having a "procedure established by law".

So, from the observations of the Judges one may easily inferred that only to the nature and extent to which a law interferes with fundamental rights must be proportionate to the goal it seeks to achieve. Therefore, in the name of public interest individual liberty cannot be invaded completely. It is pertinent to say that reasonable measures should alone be followed in case of restricting the liberty of an individual. Time and again the Supreme Court of India reiterated that restriction of personal liberty should not be made in a casual manner and it should be dealt with utmost care. In this connection it is pertinent to quote the words of Lord Diplock in *R V Goldsmith,*

> *"You must not use a steam hammer to crack a nut if a nut cracker would do*[53] *"*

XII. Conclusion

Therefore, in the light of above discussion it is clear that any public health law would certainly inconsistent for the simple reason that Government, on the one hand is compelled to protect the health of the people on the other hand, it cannot disproportionately assault individual rights in the name of communal good. The power exercised by the state in protecting public health during health emergency is limited by the individual right to liberty, right to food, right to privacy, right against discrimination etc. Therefore, a fine balance may be drawn between the individual liberty and the power state to maintain public health.

Any country that follows the principles of Rule of law and respecting human rights will not recognize any health legislations, regulation or executive order even during a health hazard disproportionately conflicting with the life and personal liberty of an individual

[53] (1983) 1 WLR 151 at p.155.

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Conferring the Rights to Air: A Way to Change Social Behavior in India

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Abstract

India is a land of celebrations in the name of national festival or religious festivals or victory of individual or team. By celebration we seek to be entertained and amused at the cost of natural resources. In 2017, the Allahabad High Court bench comprising Chief Justice DB Bhosale and Justice MK Gupta held that every citizen had the right to celebrate festivals in a peaceful manner. But now a day over celebration with fire crackers and loud sound are going into the vein of almost all life events whether big or small. In Ajay Goswami V. Union of India, the Supreme Court Upheld the right of adult citizens to entertainment notwithstanding that such entertainment may be inappropriate for children. On 23rd October 2019, the Supreme Court of India refused to impose blanket ban on sale of firecrackers but allowed the sale of low polluting green firecrackers which are within the permitted decibel limit and emission norms. This decision is in parallel with the existing bunch of environment protection legislation except the permission to use of green pollutants. These type of judgments and legislations are made to make the human being enjoy and the nature weep. The pollution level in New Delhi peaked on the morning just next day of Diwali celebration because of unbridled right to celebrations. On Monday, i.e. 25th November 2019, the Supreme Court accused the Centre and Delhi government of politicizing the issue and said that the city is no longer livable and had become worse than hell.

Key words: *Green Firecrackers, pollutants, environment protection, emission norms, air and noise pollution, legal person, rights*

I. Introduction

"The man of our time is losing the power of celebration. Instead of celebrating, he seeks to be amused or entertained. Celebration is an active state, an act of expressing reverence or appreciation. To be entertained is a passive state—it is to

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receive pleasure afforded by an amusing act or a spectacle. Entertainment is a diversion, a distraction of the attention of the mind from the preoccupations of daily living. Celebration is a confrontation, giving attention to the transcendent meaning of one's actions."

Abraham Joshua Heschel

It reads like a perfect paragraph on our non-stop reasons of celebrations for entertainment. It is a tendency in human being that is to bury oneself in entertainment and amusement and forget the cost of such entertainment. In modern age the celebrations mean public demonstration with loud music, lightening of fire crackers, big gathering, shouting and feasting in bulk which remains behind waste food, noise and air pollution. It is like assault and rape of nature (Prakriti) without any repercussions from present legal system. Indian penal code punishes for crime against women, property and human being but what about the crime against nature and its resources? These resources are treated as universal property and anybody can explore it anytime without any sense of obligation towards their protection.

Around the world, firecrackers are increasingly becoming the way to celebrate important occasions or festivals. Whether it is New Year party or Diwali or Ramzan or wedding or winning of national sports or public or private inaugural events etc., fireworks are rapidly becoming part and parcel of these celebrations.

II. Fundamental Rights of Air

The concept of legal personhood has always been applicable beyond human beings to corporations, state, temple, idols and other non-human entities, as they are considered as legal person for application of law. The importance of conferring legal personhood is that such a person becomes subject of rights and duties. The conferring rights to nature will extend legal personality to trees, rivers, lakes, mountains, air, water bodies and entire eco-system. This will lead to protection of environment as an entity with legal rights. Currently environmental laws only protect human beings if their rights are violated by environment degradation, no law protect the environment itself or punish the rapist of environment.

Article 21 of Indian Constitution says, no person shall be deprived of his life and liberty. The Supreme Court of India interpreted right to life to include right to

health, food, water, clean air, education etc. in simple terms, the right to life is imparted to person to live in dignity. Here person includes legal person not only human beings. If this right is also given to air then its dignity can be maintained and assault on it can be prohibited because human mind doesn't have any respect to its free surrounding unless disrespect calls repercussions by way of punishment or compensation. Fundamental Rights of Human being starts where the freedom of nature ends.

III. What Indian Religion says on Personhood of Nature?

Every relationship is a two-way street. You give something and you take something. But our relationship with the nature is one way where you take everything in return of nothing.

Diwali was only festival the celebration of which festival was considered incomplete without the use of plenty of firecrackers. But now a days all religion people are enthusiastic about them that they start blowing up fire-crackers days and night before and after the day of festival. While firecrackers create beautiful patterns and lights, they are also composed of chemicals that, when burned, cause significant pollution.

According to Guru Nanak, conservation of nature ought not to be out of pity or because of the need to survive. Rather, ecosystems are as much a part of existence as we are aware of violation of human rights, so too should we be vigilant of ecological violations.[2] It says in Guru Granth Sahib:

Air is our guru, water our father and the great earth is our mother;

Day and night are the male and female nurses, in whose lap the whole world plays.[3]

Guru Nanak places nature on equal footing with human race, being the one to talk on nature's justice.

All the elements of nature are integral parts of the system of God's creation. All the parts of the system naturally draw from and give back to the whole. The sun

[2] "Guru Nanak's Green Bani" by Gurwinder Kaur, The Speaking Tree, The Times of India Publication, Tuesday, December 17, 2019

[3] "Guru Nanak's Green Bani" by Gurwinder Kaur, The Speaking Tree, The Times of India Publication, Tuesday, December 17, 2019

lends stability to the earth and provides heat and light necessary for life to exist. Earth creates food from its soil for our nourishment and also holds essential minerals in its womb for a civilized lifestyle. The air moves the life force in our body and enables transmission of sound energy.[4] We humans too are an integral part of the entire system of God's creation. The air that we breathe, the Earth that we walk upon, the water that we drink, and the light that illumines our day, are all gifts of creation to us. While we partake of these gifts to sustain our lives, we also have our duties toward the integral system. Shree Krishna says that we are obligated to participate with the creative force of nature by performing our prescribed duties in the service of God. That is the yajña he expects from us.[5]

IV. Purpose of Environmental Legislations in India

The preamble of The Environment (Protection) Act 1986 puts emphasis on the protection and improvement of the environment. In due course of time, the Indian courts have widened the scope of the legislation so as to make the "polluter pays" to the victim of environment pollution and also costs to restore the disturbed ecology and environment. The constitution of India itself contains provisions for the protection and improvement of the environment under Art. 48A.[6] In *Hinch Lal Tiwari v. Kamla Devi*,[7] the Supreme Court has held that the material resources of the community like ponds, forests and mountain etc. are bounty of nature. They are responsible for maintaining ecological balance all over. Therefor they need to be protected for the healthy environment which enables people to enjoy quality of life which is the essence of fundamental right guaranteed under Art 21 of the Constitution. Further in *Anirudh Kumar v. MCD*,[8] the Supreme Court reiterated that anyone who wishes to live in peace, comfort and quite within his house has a right to prevent the noise as a pollutant reaching him and nobody can be compelled to listen and nobody can claim as his right to make his voice trespass into the ears or mind of others.

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[4] (Retrieved on 17th Jan, 2019 at 7pm), https://www.holy-bhagavad-gita.org/chapter/3/verse/10.

[5] सहयज्ञा: प्रजा: सृष्ट्वा पुरोवाच प्रजापति: |
अनेन प्रसविष्यध्वमेष वोऽस्त्विष्टकामधुक् || 3:10|| Bhagwad Gita.

[6] Dr. S.C. TRIPATHI , ENVIRONMENTAL LAW, 25 (Central Law Publications, seventh edition 2019).

[7] 2001 (6) SCC 496.

[8] AIR 2015 SC 3136.

The government of India had set up a separate department of Environment in 1980 to carry out study and suggest the government about the causes and situation of environmental pollution from time to time. And various series of legislation pertaining to environment protection were enacted by the Parliament, but we still need a law to check the social behavior of people towards nature. Some people are not well versed with the threat to environment and other part of the people prefers to enjoy present at the cost of future. On a number of occasions, the Supreme court of India has emphasized that the environmental education should be imparted from the primary school to university level. In *M. C Mehta v. Union of India*,[9] the Supreme Court directed the central government and University Grant Commission to take appropriate steps to give effect to the guidelines laid down by the court for environmental awareness among the people.

V. Green Celebration

Firecrackers are often used to celebrate festivals, events, fairs and functions such as weddings because people love the colours and spectacular patterns of firecrackers. Firecrackers primarily contain sulphur nitrates, magnesium, nitrogen dioxide and carbon. However, they also contain added chemicals added to act as binders, stabilizers, oxidizers, reducing agents and colouring agents. To create the multi-coloured glitter effect the colours are made up of antimony sulphide, barium nitrate, aluminium, copper, lithium and strontium.

Experts say that being exposed to such noxious air for a sustained period can cause serious damage to lungs, especially for those who have respiratory problems. Dr. Loveleen Mangla, a pulmonologist and respiratory specialist with Metro Hospital in Noida says that such pollutants can damage generations if not controlled as soon as possible.10

The Central Pollution Board measured the National Air Quality Index in 2015 and discovered that at least eight states experienced extreme pollution and deteriorated air quality on Diwali night. In Delhi alone, the number of PM10 (Particulate Matter) particulates that are hazardous to health rose to two thousand microns per square meter. The limit recommended by the WHO or World Health Organization is forty times less than this number. In 2016, the Centre for Science

[9] AIR 1996 SC 2715.

[10] Abhishek Anand, *Crackers leave Delhi gasping on Diwali*, INDIA TODAY, 29th October 2019.

and Environment, a Delhi based non-profit organization, conducted an exposure monitoring exercise at some places of Delhi for three hours on Diwali night. The CPCB standard of PM 2.5 in a day is 60µ/m3 and that for PM 10 is not more than 100µ/m3. In the high density area of Delhi, it was observed that PM 2.5 concentration at night was initially 872 µ/m3, touching a maximum of 1,270 µ/m3. Similarly, PM 10 readings averaged at 1,400µ/m3, reaching 2060 µ/m3. An indicative analysis showed that the air in Delhi at Diwali night was 15 and four times more dangerous than what CPCB calls 'severe'.[11] Northern India witnessed "Severe" category air quality for five days *i.e.*, 12 to 16 Nov 2019 which compelled the government to close all schools in the national capital, Haryana and its adjoining areas.[12]

In order to involve people in the effort, Government had launched a campaign called 'Harit Diwali and Swasth Diwali' during September 2017 involving over 2000 schools in Delhi and over two lakh schools in the country.

In 2018, just before Diwali, India's Supreme Court banned regular firecrackers for all festivals. It said that only 'green' crackers could be sold in the country. The Apex Court also fixed 2-hour daily slots for bursting eco-friendly crackers during Diwali. To comply with the order, the government raced ahead to release green firecrackers in 2018, but these were not found to be satisfactory. Therefore, many violations of the SC order were reported across India.

The eco-friendly crackers released by CSIR replace barium nitrate with potassium nitrate as the oxidant. This replacement will bring down emissions of particulate matter, as well as harmful gases like Nitrogen Oxide and Sulphur Dioxide. The crackers will also contain water or air, and dust suppressants that make pollutants settle down. The overall use of chemicals has also been reduced.[13]

VI. Judicial View on Celebration of Festivals

In 2017, the Allahabad High Court bench comprising Chief Justice DB Bhosale and Justice MK Gupta held that every citizen had the right to celebrate festivals

[11] Anisha Raman, *SC Judgement on Firercrackers: Execution a Major Challenge*, http//downtoearth.org.in.
8 After 5 consecutive days of 'Severe' air quality, AQI improves to 'Very Poor' in Delhi, India Today Web Desk, New Delhi, Nov 17, 2019**.**
[13] 9 How Govt. Plans to Take on Diwali Air Pollution With 'Green' Fire Crackers, by TWC India Edit Team on 8th October 2019

in a peaceful manner. But now a day over celebration with fire crackers and loud sound are going into the vein of almost all life events whether big or small. In *Ajay Goswami v. Union of India*, the Supreme Court Upheld the right of adult citizens to entertainment notwithstanding that such entertainment may be inappropriate for children

In *Arjun Gopal and Others v. Union of Indian* and others,[14] writ petition was filed on September 24, 2015 on behalf of three infants for banning the use, in any form, of firecrackers, sparkles and minor explosives, in any form, during festivals or otherwise. The opposite group consists of manufacturers of crackers, manufacturers' association, license holders and State of Tamil Nadu. Additionally, one interventionist, namely Indic Collective was also opposing the ban contending that burning of crackers during Diwali is a religious activity which is in vogue for time immemorial and, therefore, it should not be banned.[15] Studies by CPCB had categorically found that burning of crackers during Diwali was contributing to air as well as noise pollution in an alarming manner. The manufacturers and traders contended on Art. 19(1)(g) of the Constitution namely fundamental right to carry on business, a revenue of Rs. 6000 Crore per annum to the State as well as employment to large number of workers on which five lakh families sustain cannot be put in jeopardy by imposing a total ban.[16] After hearing the parties the court accepted that burning of crackers during Diwali is not the only reason for worsening air quality, at the same time, it definitely contributes to air pollution in a significant way. It also has acute psychological, mental and even physical effect on animals. In the application seeking intervention and directions (IA No. 68897 of 2018) filed by Gauri Maulekhi, the applicant has placed on record plethora of literature based on various studies depicting profound effect of noise/sound on the health of animals, extending to their neuroendocrine system, reproduction and development, metabolism, cardiovascular health, cognition and sleep, audition, immune system, DNA integrity and gene expression.[17]

In Vellore Citizens' Welfare Forum case, Supreme Court had banned the tanneries when it was found that they were causing immense damage to the environment. Thus, environment protection, which is a facet of Article 21, was given supremacy

[14] Writ petition (Civil) No. 728 of 2015 & Ors.
[15] Para 15 of Writ petition (Civil) No. 728 of 2015 & Ors.
[16] Para 18(iv) of writ petition 2015.
[17] Para 30 of Writ Petition 2015.

over the right to carry on business enshrined in Article 19(1) (g). In striving balance between two contrary interest right to health and right to carry on business, the Supreme Court issued following directions:

a) green crackers only would be permitted to be manufactured and sold.
b) The manufacture, sale and use of joined firecrackers (series crackers or laris) is hereby banned as the same causes huge air, noise and solid waste problems.
c) The sale shall only be through licensed traders and it shall be ensured that these licensed traders are selling those firecrackers which are permitted by this order.
d) No e-commerce websites, including Flipkart, Amazon etc., shall accept any online orders and effect online sales.
e) Barium salts in the fireworks is also hereby banned.
f) PESO will ensure fireworks with permitted chemicals only to be purchased/possessed/sold/used during Diwali and all other religious festivals, of any religion whatsoever, and other occasions like marriages, etc.
g) Extensive public awareness campaigns shall be taken up by the Central Government/State Governments/Schools/ Colleges informing the public about the harmful effects of firecrackers.
h) On Diwali days or on any other festivals like Gurpurab etc., when such fireworks generally take place, it would strictly be from 8:00 p.m. till 10:00 p.m. only. On Christmas eve and New Year eve, when such fireworks start around midnight, i.e. 12:00 a.m., it would be from 11:55 p.m. till 12:30 a.m. only.
i) An endeavor shall be made by the authorities to explore the feasibility of community fire cracking.

In 2018 the national capital witnessed its second-highest pollution level in December. The Central Pollution Control Board (CPCB) data showed the overall air quality index (AQI) at 446 while the Centre-run System of Air Quality and Weather Forecasting (SAFAR) gave a much higher AQI of 471.[18]

[18] Diwali 2019: Supreme Court allows only 'anar' and 'phuljari' in Delhi to curb air, sound pollution; legal firecrackers to carry QR code, Oct 23, 2019, Firstpost.

In 2019, the fireworks manufacturers had requested permission for manufacture of fireworks with Barium substitute i.e., Barium Nitrate. This is said to reduce the pollution to the extent of about 25 to 30 per cent. SC declines the request on 11th April 2019 by saying the Petroleum and Explosive Safety organization (PESO) is looking into the matter for the best formulation that may be permissible for manufacture of firecrackers.

VII. Lag between Law and Social Behavior

In the Constitution of India, it is clearly stated that it is the duty of the state to 'protect and improve the environment and to safeguard the forests and wildlife of the country'.[19] It imposes a duty on every citizen 'to protect and improve the natural environment including forests, lakes, rivers, and wildlife.'[20] Time and again the Indian Laws have taken a turn and tried adapting to the dynamics of the modern need. However, this transition phase has been proved miserable. There is always a certain difference between actual social behavior and the behavior demanded by the law. A lag appears when the law does not answer the needs arising from major social changes or when the sense of social obligation is not regulated by the significant laws or social behavioral changes occur and no parallel changes or adjustment processes take place in law.[21] The primary responsibility for changing the law is imposed on parliament and Courts.

VIII. Conclusion

The violence being inflicted on natural resources is directly related to the enjoyment of life arising out of needs and greed for luxury. If we do not adhere to the principles of mother nature then the time is not so far when we would face the most antagonistic face of nature. The inefficient hierarchy of priorities in Indian life hinders our earth to attain its full potential. According to Supreme Court[22] environmental Justice could be achieved only if we drift away from the principles of anthropocentric to eco-centric. Many of environmental legislation and principles like sustainable development, polluter pays principle have their roots in anthropocentric principles. Anthropocentricism is always human interest focused and non-humans have only instrumental values to humans. The public

[19] Article 48A of the Constitution of India.
[20] Article 51A(g) of the Constitution of India.
[21] VILHELM AUBERT, SOCIOLOGY OF LAW, 90 (Penguin Books Ltd., Harmonsworth).
[22] T.N. Godavarman Thirumulpad v. Union of India & Ors. 2012 (3) SCC 277.

trust doctrine which means that all humans have equitable access to natural resources treating all-natural resources as property of all humans has anthropocentric roots.

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Live-In Relationship: Morality, Ethics and Need for Legislation

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Abstract

In India, a Live-in relationship is no more an alien concept considering the changes in societal fabric and its choices. Still, the issue of acceptability of the live-in relationship sometimes crops up which mandates recognition of its existence and the need to accord legitimacy to the same. Considering, that right to marriage has been maintained as a fundamental right via a plethora of judgments; and further protection has been given in such relationships which do resemble marriage-like institutions; it is high time that live-in relationships should be given statutory recognition with similar conditions of eligibility which are applicable in marriage. Various committees and judgments have indicated the same, yet the live-in relationship has not achieved the statutory recognition which is long due. The issue is not of existence but of protection which is at risk considering occasional draconian judgments which refuse to consider the right to companionship as a fundamental right and put unwarranted insistence on morality and ethics even to protect life and liberty. The institution of marriage has itself undergone a major change, yet some parts of the society and legal system simply refuse to acknowledge the same. This paper is an attempt to focus on the need for legalization and legislation pertaining to live-in relationships which would recognize the right of companionship beyond marriage and would also accord protection of life and liberty in such relationships.

Keywords: *Live-in-relationship, Fundamental rights, marriage, protection of life and liberty.*

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I. Introduction

After the landmark judgments of Lata Singh,[3]D Velusamy[4]and S Khusboo[5]recently a one-page order of the Punjab and Haryana High Court not only raised the eyebrows of many legal luminaries but also pushed us to the threshold of the conservative mindset of the legal system. In the case of Ujjwal and Anr. v. State of Haryana[6]the Punjab and Haryana High Court refused to grant protection of life and liberty to a young couple in live-in relationship against the apprehended threat from the girls' family. The one-page order while rejecting the prayer read, '*if such protection as claimed is granted, the entire social fabric of the society would get disturbed*.' The present case not only disregarded various norms relating to live-in relationship by the Hon'ble Apex Court but also failed to consider the Constitutional mandate of life and liberty irrespective of status. The question here is '*can morality be a ground for refusing the right to life and liberty*', further '*how to define the standard of morality and parameters of morality in a simple manner can ask who is to define morality?*' If society is to define morality, we are living in the same society in which one's permitted grave sins like '*SatiPratha',* nurtured the culture of *'Devdasi',* and permits the *'mutilation of female genital'* in the name of religion. The natural school of jurisprudence was rejected by the analytical school of jurisprudence for being vague and being completely based on morality and having divine origin. But the same natural school of jurisprudence rediscovered its relevance post-two World Wars as it was felt that morality, cooperation, and harmony are the essence of co-existence. Since then, the law and legal systems have evolved in various dimensions. There is no system currently prevalent in civilized nations which is completely devoid of morality. But having said so the question remains the same "*who is to define morality*"?

While it is an essential question to be decided another aspect that cannot be ignored is the Constitutional guarantee of protection of life and liberty which is to be grated in all circumstances and can be denied only after exercising due process. In its order, the Punjab and Haryana High Court failed to consider the

[3]Lata Singh v. State of U.P. &Anr., (2006) 5 SCC 475.
[4]D.Velusamy v. D.Patchaiammal, 2010 10 SCC 469.
[5] S. Khushboo v. Kanniammal&Anr, (2010) SC 347.
[6] Ujjwal and Anr. v. State of Haryana, CRWP-4268/ 2021 (O&M), Date of Judgment 12-05-2021.

mandate of the Constitution which is not subjected to standards of morality even if that remains a relevant aspect in the eyes of the presiding judge. It is really heart-wrenching that even after so many landmark judgments and enriched jurisprudence created by the Hon'ble Supreme Court still live-in relationship has remained a *taboo* in many parts of India. Due to lack of legislation sometimes it becomes difficult to recognize and validate the companionship choices made by adults a very recent example of the same was seen in the case of Ujjwal.[7]

The interlinking of morality and the right to protection against threats to life and liberty were mixed in the present case which is completely against the mandate of the Constitution. This interlinking could be possible only due to the lack of definite legislation with respect to live-in relationships which has kept the doors of discussion open to judge the individual choices of two adults on the threshold of morality and ethics.

In a plethora of judgments, the Apex Court as well as various High Courts have tried to accord protection and confer rights to individuals in a live-in relationship. Yet, the time has come to formally recognize the live-in relationship and accord protection not only *via* legal jurisprudence but also through definite and well-defined laws.

II. Marriage and Morality

Marriages in India hold sacred value and are considered pious bonds. Be it any religion, and even though in some religions it is expressly considered a contract[8] still the nature and expectations of a marital relationship are close to morality and ethics. Among Hindus, marriages were always considered as a divine bond that was unbreakable and a sacramental affair but the enactment of the Hindu Marriage Act, 1955 by which the right to divorce was granted and a 'walk out space' was created, the theory of inseparable bond of man and woman came to an end. The concept of '*Ardhangini'* went for a toss as soon as marital bond became a matter of choice. Also, marriages were considered important considering the primary purpose is to beget progeny and to satisfy the Hindu belief of the son being revered as the "receiver from Hell" thus a lot of emphasis has been placed

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[7] *Supra* note 4, at 1

[8] *Sharia* (Muslim Personal Law) considers marriage a contract and both the parties can have their terms written down while entering marriage subject to certain restrictions.

on the marital relationship.[9]Various authorities in law have also considered marriage as a necessary institution in creating domestic relationships. In Baillie's Digest, marriage has been defined as "*a contract for the purpose of legalizing sexual intercourse, and procreation of children*". As discussed earlier not, only authorities in law but religion and pronouncers of religion have also emphasized the sacred nature of marriage. Prophet of Islam says, "*Marriage is my Sunna and those who do not follow this way of life are not my followers*."[10]The Courts have consistently maintained in a plethora of cases that there cannot be a divorce *de hors* the grounds as given under the statutory laws, even in those cases where there is a complete breakdown of the marriage. In a nutshell, great faith is placed in the institution of marriage under religion, statutes, and by the Courts in India, and the same is not ended in a hurried manner and on random grounds outside the purview of statutory law. Coming to the main reasons behind considering marriages as sacred affairs included inseparable bonds, the importance of progeny, and continuity of the same. These were the reasons behind conferring morality and validity to the companionship under marriages. But with the time and afterthe enactment of various Acts relating to Hindu marriage, maintenance, guardianship, and succession rights; now the marriages are no more forever, children even in live-in relationships do have certain rights, adopted son acquires the same status as of natural born son, daughters are inheriting property and the theory of salvation through son is no more a mandate for everyone. In fact, the same Apex Court which had maintained that no divorce can take place beyond the statutory grounds has been constantly creating arguments in favour of interpreting the grounds in a manner as to cover such cases which do not have the ground of fault for divorce necessarily. In a nutshell, society, legal systems, and institutions have chosen to proceed further from their age-old norms which conferred morality and ethics on marital relationships and are opening for other relationships which are not immoral but certainly are not solemnized like marriage.

III. Right to Companionship: A Fundamental Right

The Apex Court through its progressive judgments has expanded the ambit of fundamental rights to recognize various ancillary rights which are *sine qua non*

[9]B.M. GANDHI, HINDU LAW, 4th Ed., 260, (Eastern Book Company).
[10]AQIL AHMAD, MOHAMMEDAN LAW, 108, (Central Law Agency26th Ed.).

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to the protection of life and liberty. One such right which has constantly been upheld by the Apex Court includes the right of companionship or right of marriage. The Apex Court considered it essential enough to bring it within the category of 'right to life, a well-recognized fundamental right. Depriving a person of marriage would be equated with depriving him or her of the right to life.[11]In the case of Shafin Jahan v.Asokan K.M.[12]the Apex Court commenting on the right of self-determination held that,

> *"….Right to self-determination is an important offshoot of gender justice discourse. At the same time, security, and protection to carry out such choices or options specifically, and a state of violence-free being generally is another tenet of the same movement. In fact, the latter is apparently a more basic value in comparison to the right to options in the feminist matrix"*

Further, the court held that 'non-acceptance of her choices would simply mean creating discomfort to the constitutional right by a constitutional court which is meant to be the protector of fundamental rights. Such a situation cannot remotely be conceived. The duty of the Court is to uphold the right and not to abridge the sphere of the right unless there is a valid authority of law. Sans lawful sanctions, the centripetal value of liberty should allow an individual to write his/her script. The individual signature is the insignia of the concept.'

Despite having decided several cases and treating the right to choose a partner as a fundamental right, the Courts including the Apex Court have deliberately refrained from according toa similar status to the live-in relationship as a marriage. The Courts have recognized the right of a couple to have life and liberty in a live-in relationship but have not considered it as equal to marriage which had left open the gates for discussion both in favour of morality of the same and against it. 'Live in relationship' is indicative of that relationship which does not follow the formal solemnization of marriage but, the parties to the marriage observe the same rights and obligations as are observed in any formal marriage, and, for the rest of the world the union is nothing less than a marital union with the elements of stability and continuity, having an active will to remain with each

[11] 'X' v. Hospital 'Z', AIR 2003 SC 664.The court in this case upheld the right of an HIV+ patient to get married with the consent of other partner in marriage.
[12]Shafin Jahan v. Asokan K.M., (2018) 16 SCC 408.

other like husband and wife but, without the formal solemnization. The need and understanding of live-in relationshipslie in the fact that 'law is a regulatory scheme tested in the laboratory of society. A law that cannot reduce human suffering is as good as non-existent. Considering the object of law, the Courts in India have always tried to strike a balance between the harsh contours of law and the need of society in changing times. In A Dinohamy v. W L Blahamy[13]realizing the fact and acceptability of a live-in relationship, the Privy Council held that living respectively as husband and wife would create a presumption of law[14] in favor of substantial marriage and not a fact, or condition of concubinage unless otherwise established. In a much later case, the Supreme Court held that there is a difference in morality and legality and while the live-in relationship is not considered moral in society, there is no illegality in the same. Hence a man and woman even without marriage can live together if they wish to.[15] In yet another case of S. Khushboo v. Kanniammal[16]the Supreme Court refused to consider pre-marital sex and relationship between husbandand wife without there being a marriage, a taboo. While upholding the basic right of capable men and women to enter into a relationship including one alive-in relationship, the courts are guided by the mandate of the Constitution of India which under Article 21 guarantees 'right to life and personal liberty' meaning thereby, one is free to live the way he or she would want to and with respect to live-in relationship, it might be unacceptable and immoral in the eyes of society but there is no unlawfulness or illegality in such relationship. Interestingly, the Supreme Court has added a rider on the right of women in a live-in relationship and has held that the presumption of marriage can only be applicable where the parties are capable of entering into a marital relationship but do not choose to avail the same i.e. Live-in relationship is permitted only among unmarried people having attained majority and belonging to heterogeneous sex.[17] In *D. Velusamy v. D Patehchaimal*[18] the Supreme Court laid down certain guidelines in order to presume a marital relationship between the parties so that the benefits of various welfare legislations

[13]Dinohamy v. W L Blahamy, AIR 1927 PC 185.
[14] Section 114 of the Indian Evidence Act, 1872.
[15]Payal Sharma v. Superintendent, Nari Niketan and others, 2001 (3) AWC 1778.
[16]*Supra* note 3, at 2684.
[17] Indra Sarma v. KV Sarma, AIR 2014 SC 309.
[18]*Supra* note 2, at 479.

could be extended to the partners in such relationship. These guidelines *inter alia* include –

- The couple must hold themselves out to society as being akin to spouses.
- They must be of legal age to marry.
- There should not be a legal bar to entering a marital relationship including the bar of an existing marriage.
- Cohabitation must be voluntary.
- They must have held themselves out to the world as being akin to spouses for a significant time.

Thus, while talking about grounds or conditions for the presumption of marriage in a live-in relationship, the presumption would be drawn only then when there is no legal disability in contracting the marriage and there has been continuity and intention to entera marriage-like relationship. Having said so, simply living with someone for a long time, without having the intention to be in a relationship akin to marriage, would not create a presumption in favour of marriage. And once the presumption does not take place there is no occasion to grant maintenance or any other matrimonial rights. Thus, there is certainly recognition for live-in relationships but that is not equal to marriage. Coming to common law jurisdiction While equating the Common Law marriage with live-in relationship it is necessary to know the attributes of the Common Law marriage. Several US states offer their heterosexual residents this additional way of organizing their living-together arrangements. This kind of relationship can be established when the couple cohabits together and their actions support the factum of 'marriage-like relation' between them such as having a joint account, carrying the same last name, sharing the same household, having common custody of kids etc. Initially, the idea of common law marriages was conceived to address the grievances of heterosexual group which later grew further to support the idea of live-in-relationships among two opposite sexes who although were ready to be together and provide stability to the relationship but were averse to the institution of marriage.[19] A common law marriage is legally binding in some common law jurisdictions but has no legal consequence in others; even in the countries where

[19]Shoshana Grossbard, *Common Law Marriage and Couple Formation*, Discussion Paper No. 8480, San Diego State University and IZA Victoria, Vernon Empire State College, New York (Sept. 2014) http://ftp.iza.org/dp8480.pdf.

it is permitted in the nature of the contract, the lack of uniformity in the protection of children born out of such marriages is a clear discouragement to enter into such relationships.[20] Apart from US, some other countries also such as France, have been experimenting with legalizing such relationship, wherein a homosexual as well as a heterosexual couples can through a civil contract, organize their association and enjoy the rights of a married couple without marriage. Such agreements are revocable by the parties by giving three months prior notice to the other. In France these agreements are popularly known as 'civil solidarity pacts' (*pacte civil de solidarite*). In the year 1999 the French National Assembly gave legal status to such pacts. Coming to India, in India common law marriages has no application and no such contract as in France has any application here and statutorily there is no recognition to such a relationship; the protection mechanism in India has been developed by the Judiciary through creative and beneficial interpretations of laws as applicable in India.

IV. Presumption of Marriage in Live-In Relationship Section 114, Evidence Act, 1872

Despite there being no statutory recognition of live-in relationships, the courts in India have drawn presumption in favour of marriage if there is long cohabitation akin to marriage, under section 114 of the Indian Evidence Act, 1872. This concept of drawing presumption is not a new or current practice in fact, from a very early age the presumption in favor of marriage has been considered if the couple is living like husband and wife and cohabitation is for substantially long years. The Privy Council in the case of AndrahennedigeDinohamy v. WijetungeLiyanapatabendigeBlahamy[21] upheld the application of presumption which was later affirmed in the case of Mohabbat Ali Khan v. Md. Ibrahim Khan.[22]In the case of Gurubasawa v. Irawwa W/O ChinnappaBarashetti[23] the court held that "a long period of cohabitation between the parties is a very strong circumstance and that in the absence of any other cogent and absolutely convincing material, that it could also raise the presumption before a Court of a

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[20]Dr. Swarupa N. Dholam, *Socio-legal dimensions of 'live-In relationship' in India,* http://mja.gov.in/Site/Upload/GR/final%20article%20in%20both%20lanuage%20%281%29.pdf
[21]*Supra* note 11.
[22]Mohabbat Ali Khan v. Md. Ibrahim Khan, (1929) 31 BOM LR 846.
[23]Gurubasawa v. Irawwa W/O ChinnappaBarashetti, AIR 1997 Kant 87.

valid marriage." In this case, presuming the relationship based on long cohabitation the court granted a Succession certificate. Recently Supreme Court has held that, if an unmarried couple is living together as husband and wife, then they would be presumed to be legally married, and the woman would be entitled to inheritance after the death of her partner. A bench of Justice MY Eqbal and Justice Amitava Roy said continuous cohabitation of a couple would raise a presumption of valid marriage unless established otherwise. Law presumes in favour of marriage and against concubinage. While the court has been liberal in presuming the existence of valid marriage in case of long cohabitation it has restricted the application of the same in some peculiar cases. In *Indra Sarma v. KV Sarma*[24] the Supreme Court refused to presume a relationship in marriage to a person who is already married. The Apex Court held that live-in a relationship with a married person cannot be a relationship in marriage and the test laid down in the case of D. Velusamy[25] had not been satisfied. Further, the court held that the party to such a relationship would either be in a concubinage or bigamous relationship or in an adulterous relationship. Where the parties enter a relationship knowing well the legal disability such as in the present case the generic proposition of presumption of marriage would not be applicable. Further, in the case of *Madan Mohan Singh v. Rajni Kant*,[26]it was held that the live-in relationship if continued for a long time cannot be termed as a "walk-in and walk-out" relationship and that there is a presumption of marriage between the parties. Looking at the approach adopted by the Supreme Court, it can be clearly inferred that the Court is in favour of treating long-term living relationships as marriage itself rather than making a new and separate concept like live-in relationship. While the courts have considered presumption in favour of marriage it will not be good enough to cover such relations where marriage cannot be presumed due to inherent legal disability in the parties in entering a marriage. Thus, at present, there is a presumption in favour of valid marriage if a considerable time is spent together by the couple in a relationship akin to marriage, but the presumption would be inapplicable if the parties to live in relation suffer from one or the other disability under the law to contract marriage with each other even if they decided to.

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[24]*Supra* note 15 at 755.
[25] S*upra* note 2.
[26] Madan Mohan Singh v. Rajni Kant, (2010) 9 SCC 209.

V. Maintenance of Rights of Women in Live-In Relationship

As a matter of fact, no personal law or statutory law gives recognition to live-in relationships *per se*. Having said so, no personal law or statutory law criminalizes it either, meaning thereby, that the law with respect to the live-in relationship has not yet evolved and it is only through interpretations that the courts are filling the void. The silence of statutes compelled the *National Commission for Women* to advocate for the rights of women in live-in relationships by recommending the incorporation of the term 'live-in relationship' under section 125 CrPC in the year 2008.[27] Similar recommendations were also made by the Malimath Committee[28] and the Law Commission of India[29] which was also acknowledged by the Maharashtra Government in the year 2008. It was consistently maintained that if there is cohabitation for a significant lengthy time frame, the fact of marriage should be presumed and appreciated, and the benefit is to be given to the spouses. Hence, it suggested that the word 'spouse' in Section 125 CrPC ought to be altered to incorporate a woman who was living with the man in a marriage-like relationship. As far as the practical application of section 125 CrPC is concerned, in the case of *Chanmuniya v. Virendra Kumar*[30] the court clearly maintained that the standard of proof of marriage as required under section 7 of the Hindu Marriage Act, 1955 should not be a precondition for maintenance under section 125 CrPC. A perfect expansive interpretation of the word 'wife' was given by the Supreme Court in the present case. the Supreme Court after a broad analysis of the case and statutory provisions held that a broad and expansive interpretation should be given to the term 'wife' to include those cases also where a man and woman have been living together as husband and wife for a reasonably long period of time without having undergone the legal necessity of marriage. Since the proof of marriage under section 7 of the Hindu Marriage Act, 1955 is not strict

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[27] Satya Prakash, *NCW pleads case of live-in partners*, December 26, 2006, HINDUSTAN TIMES, https://www.hindu stantimes.com/india/ncw-pleads-case-of-live-in-partners/story QlUkFC76vsLYlsd1eAihUI .html

[28] The Malimath Committee was constituted to recommend reforms in Criminal Justice System in November 2000.

[29]*Refer* Law Commission of India, Report no. 242, Prevention of Interference with the Freedom of Matrimonial
Alliances (in the name of Honour and Tradition): A Suggested Legal Framework, August 2012, https://lawcommissionofindia.nic.in/reports/report242.pdf

[30]Chanmuniya v. Virendra Kumar, (2011) 1 SCC 141.

enough to be a pre-condition for maintenance under section 125 CrPC the liberal interpretation can take care of the women left as destitute. Thus, a man who lived with a woman for a long time, even without having undergone the legal necessities of a valid marriage, should be made liable forthe maintenance right of the woman. Not only this, extending the right of woman and stretching the application of Domestic Violence Act, 2005, Apex Court also warned against the robotic application of presumption and cut out the cases in which the presumption would not be applicable. While observing the case of Indra Kumar Sarma v. KV Sarma in which an unmarried female and a married male lived together in live in relationship with two children and spent nearly 18 years together; after separation, the wife demanded maintenance, protection, and residence order. The Apex Court after analyzing the case in detail held that the no such order can be passed in the present Act as there would be presumption when all the conditions of D. Velusamy are complied with which includes no legal bar on parties to contract marriage if they wish to. In the present case since the male was already married presuming marriage, would only create the effect of legalizing bigamous marriage which is, completely outside the purview of the Hindu Marriage Act, 1955 and outside the purview of the protection and maintenance scheme as laid down under the Domestic Violence Act, 2005 or the Section 125 CrPC.

VI. Legitimacy of Children and Maintenance Rights under Live-In Relationships

In the year 2014, a bench of Justices BS Chauhan and J Chelameswar clearly said that long-term continuous cohabitation would create the presumption of marriage. Further, it was held that children born out of prolonged live-in relationships could not be treated as illegitimate and they would be treated as the legitimate child of the parents living in live-in relationships. Prior to this recent ruling in the year 1994 also in *S.P.S. Balasubramanyam v. Suruttayan,*[31] it was observed that the children born out of 'live in relationship' are legal children. Similar benefits were extended in a plethora of cases in which the Supreme court clearly held that as the presumption of marriage is considered to protect the women in a live-in relationship, and the children being the innocent party to such a relationship, should not bear the brunt of the law, and should be brought under a mechanism of protection being the legitimate child. The legitimacy of children has been

[31] S.P.S. Balasubramanyam v. Suruttayan, 1994 SCC (1) 460.

considered independently from the relation of parents and this facilitated the application of the law with respect to the maintenance of the child. Further, section 112 of the Indian Evidence Act, 1872 creates legitimacy in favor of a child born during the continuance of a valid marriage between their parents. Extending the presumption as drawn under section 114 of the Evidence Act, 1872 once the presumption is held conclusive under section 114 automatically section 112 would be applicable. All these judgments of the Supreme Court not only justify the mandate of the Constitution as set out under Article 39(f) which puts the state under the obligation to give the children adequate opportunities so that they develop in a proper manner and further safeguard their interest; but also validates the presumption of legal marriage in live-in relationship under section 114 of the Evidence Act, 1872.

Not only maintenance but in some cases the Supreme Court has presumed the existence of marital relation for giving property right as well which will eventually be transferred to children only. In the case of *Vidhya Dhari v. Sukhrana Bai*[32] the court on the fact of having stayed together for a very long period as husband and wife granted the right in the property to the female partner in live-in relationship. The Courts have held the children, born out of a live-in marriage relationship, being entitled to the sole property of the parents but not having any right in the coparcenary property of the parents.

VII. Application of Protection of Woman from Domestic Violence Act, 2005 in Cases of Live-In Relationship

Considering the limited law on domestic violence under the Criminal statutes and the right to seek divorce on that ground under personal laws; the enactment of the DV Act, 2005 as it is popularly known, was a welcome change for the women in India as it gave yet another mechanism of protection which was not within the limits of personal law and provided a general and secular remedy to all the women in a matrimonial relationship. The Act under section 2(f) defines Domestic relationships and it says that,

> *'Domestic relationship' means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a*

[32]Vidhya Dhari v. Sukhrana Bai, (2008) 2 SCC 238.

relationship in marriage, adoption, or family members living together as a joint family.

Both the terms ‘Domestic relationship’ and ‘relationship in marriage’ have been interpreted in the most liberal and creative way, to extend the benefit of the Act in live-inrelationships. The Act offered various remedies including the right to live in a shared household, protection order, and restraint order considering all kinds of abuses a woman meets with including physical, mental, and sexual torture. Under the Act section 2(a) deals with the term ‘Domestic relationship’ and this term is further explained under section 2(f) which also includesthe term ‘marriage-like relation’. Both these terms have been defined and explained by the Supreme Court in the most liberal way and by the end of 2006 it was clear that the Act will apply to live-in relationships also and the status of women in legal marriage and the status of women in a live-in relationship would be brought at par under the DV Act, 2005 to avoid any anomaly between the legally wedded wife and a presumed wife under section 114 of Indian Evidence Act, 1872.In M. Palani v. Meenakshi[33] the respondent filed a claim for maintenance of Rs. 10,000/- for food, clothes, shelter, etc for her bare survival. The Husband resisted the claim on the ground that they never lived together and only had a consensual sexual relationship without any intention to entera marriage-like relationship. It is very interesting here to see that earlier the contentions of the opposite party used to be a clear denial of marriage but with the liberal approach in the application of such welfare legislation as in the present case the new line of argument has developed that is ‘not having intention to enter into marriage like a relationship’. The Madras High Court closely looked into the definition of ‘domestic relationship’ as given in Section 2(f) of the Protection of Domestic Violence Act, 2005, and found that the Act nowhere specifies a particular period to infer the factum of domestic relationship. Further, the Court held, that at least at the time of having sex by them, they shared a household and lived together and thus granted relief in favor of the wife. ‘Sometimes the judgments of the Courts are too creative in their approach. In *Deoki Panjhiyara v. Shashi Bhushan*[34] an application by the wife for maintenance under the Domestic Violence Act, 2005 was allowed despite the contention of the husband as to not having a valid marriage between the wife and him. He contended that since the wife has already

[33]M. Palani v. Meenakshi, C.R.P.(PD) No.238 of 2008, High Court of Madras.
[34]Deoki Panjhiyara v. Shashi Bhushan, (2013) 2 SCC 137.

been married before getting married to him, she is not entitled to relief. Rejecting his claim, the court held that this fact was in the knowledge of the husband, but he did not raise any objection to it neither sought nullity of the marriage nor stopped living with the wife and hence in the absence of valid decree of nullity or the necessary declaration as to void status of marriage the maintenance right of the woman cannot be curtailed. While discussing this case there are two propositions- *firstly*, a bigamous marriage is void ab initio and does not confer any right to the parties to the marriage. *Secondly*, a live-in relationship exists, and a marriage-like relationship is presumed when there is no solemnization of a formal marriage. In Deoki Panjhiara case the grant of maintenance would not justify either of the bars. It is not a live-in relationship and hence marriage cannot be presumed, and maintenance is given. Further, it is not a voidable marriage either in which till the time declaration is sought validity may be continued. Rather in the present case there was bigamy, and the bigamous marriage goes to the root of the relation and is *void ab initio*. Hence on both the logics no relief could have been given.

VIII. Social Acceptance of Live-In Relationship

The workability of law is tested in the complex web of society. Law is not applicable in a vacuum. To maintain social order and security in society proper application of the law is necessary. Acceptance or rejection of practice either in judgments or in the statute is a mere reflection of change in the society. The analysis, discussion, and writings are there to address the transitional phase in the changing society which is neither clearly addressed by the statute nor attains universality in Judicial pronouncements. Live-in relationship in India is in such a phase where the laws on live-in relationship have not yet been settled and the society also has not fully accepted the same but the same is growing with each passing day. In metros, the couples are keener to enter into a relationship that has a commitment to stay together but at the same time absolves the parties from their mutual matrimonial liabilities i.e., financial freedom is not curtailed and no strict compliance to maintenance is made. In the case of separation, there is no need to follow a lengthy and painful process under the law and the separation can be achieved mutually in the way cohabitation was achieved on a mutual basis. As understood, it is widely recognized that the recurring theme of law includes (i) social control, (ii) disputes settlement and (iii) social engineering.

IX. Need for Legislation in Live-In Relationship

The judgments as discussed above clearly established the desire to recognize the live-in relationships as a valid association of two adults yet the question of legislation that can specifically recognize and confer legitimacy on live-in relationships remains a huge issue. Although, some would say that recognition through judgment is enough to address the same but occasional orders as given by the Punjab and Haryana Court in the case of *Ujjawal v. State of Haryana* clearly establish the need to address the social taboo which surrounds the entire idea of live-in relationship. The refusal of the High Court to accord protection to life and liberty on the question of social fabric and morality is nothing but a mockery of justice. This happened even after the landmark judgments of Lata Singh (2006), Indra Sarma (2013), and KS Puttuswamy (2017). All these judgments in clear terms established that live-in is not living in sin and such associations are not a crime. The Apex Court clearly upheld the liberty of an adult to choose a life partner. Further, the decision to get married or otherwise is intensely personal and should not be subject to forceful restrictions.

In KS Puttuswamy the Court held that the autonomy of an individual in relation to marriage is integral to the dignity of the individual. Clearly, the standards of societal immorality are not equal to illegality. The live-in relationship may be treated as immoral, but Courts have clearly refused to treat the same as illegal which is very much reflected in the number of judgments by which protection and rights to individuals in a live-in relationship have been accorded.

Not only the Supreme Court but the Law Commission of India has also clearly advocated for specific recognition of live-in relationships through legislation. In its report on "Prevention of Interference with the Freedom of Matrimonial Alliance (in the name of Honour and Tradition): A suggested Legal Framework,"[35] the report suggested that '*relationships akin to marriage not prohibited by law should also be included in the meaning and word 'marriage'…. [which] means that live-in relationships should also be included and the protection of law….to be accorded to persons in such relationships.*' While suggesting, the Law Commission also warned against the social biases in this regard and reserved the suggestion to first protect the legal marriage which was

[35]*Refer* supra note 25.

at risk due to honor and tradition issues[36]one fails to understand why there is so much reservation in clearly recognizing live-in relationship as legitimate and create specific laws on that. Recognition of the live-in relationship was given at an early stage even by the Privy Council yet due to the societal pressure the state, as well as the judiciary is restrained by clearly emphasizing creating specific legislation or guidelines on the same.

A few years back in the year 2014 the Law Commission of India was asked to take up the study on the live-in relationship to lay a background for legislation but nothing concrete in this regard could be achieved. This results in contradictory judgments and denial of even fundamental rights on the pretext of morality and ethics. Hence, there is a need to develop legislation in this regard at the earliest to put at rest contradictory discussions and violations of rights in case personal choices are exercised beyond the so-called moral fabric of the society. Separate and specific legislation is also necessary considering the current system is inadequate to address the live-in relationship as the basic idea to enter such a relationship is entirely different from entering into a marital relationship and hence the remedies the benefits which are applied in a matrimonial relationship cannot be mechanically applied in live-in relationship. A major concern in a relationship is the commitment issue that triggers the choice of live-in relationship and since the parties have chosen not to take up any obligation post-separation, applying the remedies of personal law in a live relationship would seriously affect the choice of parties and one party would always remain at the receiving end without ever having the intention to opt for it. Couples enter a live-in relationship to avoid the lengthy and painful procedure of divorce, to keep their financial independence intact, and to have lesser obligations in matrimonial relationships. However, applying the reliefs of personal laws, Domestic Violence Act, 2005, and relief under section 125 CrPC are in a way bringing live-in relationship on the same pedestrian of a legally solemnized marriage. This can go either way that is parties may feel discouraged to enter a live-in relationship because despite exercising their right to not be guided by the matrimonial obligations the parties to a live-in relationship are burdened with the same. Another consequence could be since still law does not recognize the no-fault theory of divorce such as in the case of breakdown of marriage live-in could be proved a good option for the couples and this could affect the institution of marriage in totality. Hence, the

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[36] Para 7 of the Report.

drawbacks of the existing system are in a way creating confusion about the benefits and losses of a live-in relationship and the constant attempt of the courts to being the live-in relationship equal to marriage is not a positive answer to address the need forlive-in relationships. Probably because of the concerns above, the Law Commission in its 71st Report (1978) suggested certain amendments in the Hindu Marriage Act, 1955 and Special Marriage Act, 1956 to make the provisions of divorce much simpler so that live-in relations cannot step in as an option. Despite several recommendations by the Law Commission and a plethora of judgments in which the Supreme Court emphasized the need to have an irretrievable breakdown of marriage as a ground for divorce. Since the law has still remained primitive in its approach to guiding matrimonial relations couples are finding an option of 'easy walk in' 'walk out relation' with another party. The Hindu Marriage (Amendment) Bill 2010 introduced by the Rajya Sabha to simplify the divorce procedure and to include the irretrievable breakdown of marriage as a ground for divorce never saw the light of the day further the Malimath Committee Report (2003) recommendation for the amendment of Section 125 of Criminal Procedure Code to include under the ambit of protection women of void marriage and woman under live-in relationship also could not be implemented. Since none of the recommendations, and attempts by the Judiciary, no certainty could be achieved with the live-in relationship the burden is entirely on the Courts to interpret the existing laws in a creative manner to extend the protection but that is only a temporary treat and not a permanent solution.

There is an urgent need to develop the separate mechanism of protection for live in relationship so that both legally solemnized and live-in relationship can survive in a given set of society with their exclusive benefits and liabilities thereunder. Simply applying the existing laws on live-in-relationships will not bring useful results and would further confuse the prospects of marriage and prospects of live-in relationships.

X. Conclusion

The live-in relationship has always been a point of discussion in society. The recent judgment by the Punjab and Haryana High Court again initiated the discussion on the validity and need for recognizing the same as a valid relationship. Between morality and legality, the choice of an adult cannot be put to a risk wherein protection of life and liberty may become a question of discretion and not a constitutional mandate. For the Apex court initially, it was the question

between morality and legality. While accepting the concerns of morality being the focal point of society, the apex court has always tried to strike a balance in the individual choice of mode to express sexual needs and relief under the law in case of exigencies. The Apex court has tried hard to address the need of destitute women by extending the ambit of maintenance laws and protection against domestic violence. To bring justice to those females who were the victims of live-in relationships Indian judiciary took a brave step and through interpretations developed arrangements in which the destitute is protected without going into the issue of morality and immorality in making their choices. Despite the efforts of the Apex Court, Law Commission, and civil society, the fact that live-in relationship is indicative of choices going to be made in near future, the law makes are not ready to accept the change and assert their law-making power in harmony with such change. Due to the passivity of law makes the issues relating to succession, maintenance, guardianship, and protection, find little statutory help for their enforcement. Through interpretation, the Apex Court has tried to address these issues, but interpretation cannot take the place of codified law as interpretation has its own limits. It is the duty of the Court and the lawmakers to ameliorate and create new laws according to the changing needs of society. While at present various personal laws and special laws like the Domestic Violence Act, of 2005 has been made applicable in cases of live-in relationship too yet, the formulation of specific provisions to address the entire working mechanism of live-in relationship is the need of the hour. Live in a relationship has rights and obligations akin to marriage still the children born out of such a relationship are not too sure about the validity of their existence, and the woman in such a relationship is not insured enough to believe in the security of such a relationship. At the same time bringing complete parity in legally solemnized marriage and the live-in relationship would create a lot of confusion in making choices in society. To avoid all the above, it is needed that lawmakers do address the issue of live-in relationships making appropriate laws that will not only reduce the burden on Courts but also would establish the place of live-in relationships in society.

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An Analysis on Civil Nuclear Energy in India: Effectiveness and Way Forward

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Abstract

We cannot depend indefinitely on combustion of coal, gas and oil for most of our energy needs. Nuclear power is clean, safe, reliable, compact, competitive and practically inexhaustible. Today over 400 nuclear reactors provide base-load electric power in 30 countries. Fifty years old, it is a relatively mature technology with the assurance of great improvement in the next generation. Nuclear energy produces almost no carbon dioxide, sulphur dioxide or nitrogen oxides whatsoever. These gases are produced in vast quantities when fossil fuels are burned. One gram of uranium yields about as much energy as a ton of coal or oil - it is the famous "factor of a million". Nuclear waste is comparatively about a million times smaller than the waste generated by fossil fuels, and it is totally confined. Keeping in mind the benefits nuclear energy offers and considering it as an important alternative, the development of nuclear energy in India has been quite rapid. The regulatory and legislative framework are comprehensive, however, the fact that radioactivity comes with its own consequences cannot be ignored.

Keywords – Nuclear Power, Uranium, Nuclear reactors, Thorium, Radiation etc.

1. Introduction

The use of nuclear power in India is well recognized for civil purposes. India had started its nuclear power production with the help of two small boiling water reactors at Tarapur in the year 1960. So as to develop Nuclear power in India in consistency with our inimitable resource position of restricted uranium but great

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thorium reserves, India is following a three-stage programme. For the optimal use of these existing uranium resources, the first stage of this programme depends on the use of pressurized heavy water reactors (PHWRs), whose design was adopted in the year 1964, which use natural uranium very efficiently, producing plutonium as a by-product from spent fuel which further facilitates the use of our large thorium reserves for power generation in subsequent stages of the programme.[3] Moreover, this process involved the use of pressure tubes, instead of a heavy pressure vessel, which could be conveniently built with the country‘s available engineering capacity at that time.[4] These power reactors were considered to have the world's lowest capacity factors till the mid-1990s, which reflected the technical constraints that were being faced by the country because of its technological isolations. Nonetheless, energy generation rose impressively from 60% in 1995 to 85% during 2001-02, which in turn experienced a massive dropout again in during 2008-10, primarily due to the shortage of uranium fuel.[5]

There are currently twenty one operational nuclear power reactors/units in India [Tarapur (Maharashtra), Rajasthan, Madras (Tamil Nadu), Kaiga (Karnataka), Kudankulam (Tamil Nadu), Narora (Uttar Pradesh) and Kakrapar (Gujarat)] with a total capacity of 6780MWe across these six states,[6] which forms approximately 2.9 % of the nation‘s total energy generated. Other than these some are under construction[7] at Madras (Tamil Nadu), Kakrapar (Gujarat), Kudankulam (Tamil Nadu) and Fatehabad (Haryana). Approximately ten more are planned[8] for which the land has been suitably acquired. A three-stage nuclear energy programme has been envisioned by the GOI, whereby it seeks to fetch at least twenty five percent of its total energy from this energy source by the year 2050. The GOI had also envisioned an installed capacity of 20,000 MW of nuclear energy by the year

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[3] Sanat Kumar, Executive Director (Projects), NPCIL; available at: https://dae.nic.in/?q=node/171 (Visited on February 01, 2023)

[4] *Nuclear Power in India*, WORLD NUCLEAR ASSOCIATION (Dec. 23, 2022, 10:40 AM), http://www.world-nuclear.org/informationlibrary/countryprofiles/countries-g-n/india.aspx.

[5] *Technological Advances in harnessing Nuclear Energy*; SCIENTIFIC INDIA (Feb. 02, 2023, 1:04 PM), http://www.scind.org/976/Technology/advances-in-harnessing-nuclear-energy.html

[6] NUCLEAR POWER CORPORATION OF INDIA LIMITED (Feb. 02, 2023, 02:30 PM) http://www.npcil.nic.in/main/AllProjectOperationDisplay.aspx.

[7] Having an Approximate capacity of 4300 MW; Ibid.

[8] Having an Approximate capacity of 33564 MW; Ibid.

2020, which has though been revised to 10,000 MW by the visible realities. In spite, it is estimated to touch the mark of 63,000 MW by the year 2032.[9]

II. Nuclear Energy – Social Justice and Right to Life

India is a nation that can neither be categorized as a developing nation nor as a fully developed nation. It is a nation that has always strived to walk in pace with all the progressing nations of the world by giving its utmost support towards the creation of a better future for the generations to come. India as far its legal setup is concerned is one of the most advanced nations having adopted a written, binding but not rigid Constitution for itself. Whereby, it seeks to provide its entire people their necessary rights and freedoms, ranging from the concept of equality to justice-social, economic and political.

Social justice can be understood as a concept that strives to provide every man his due, to be able to create a society in which its people are free from all types of disparity in their economic, political or social life. In short, social justice endeavours for the creation of a just society. Article 25(1) of the Universal Declaration of Human Rights also highlights the concept of social justice. It recognizes everyone‘s right to adequate living standards, coupled with adequacy of health and well-being of himself and his family. This it states must include the right to food, clothing, shelter, medical care and any other service, necessary for social wellness. Similarly, Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, 1966 obligates the State parties to recognize everyone‘s right to adequate living standards, inclusive of food, clothing, and shelter along with the aim to continuously improve living conditions. As far as the national law is concerned, the Preamble to the Indian Constitution guarantees social and economic justice with equity of status and of opportunity to every citizen, so as to achieve individual and collective dignity with enhanced fraternity. Article 21 provides right to life, where life is not bare animal existence, but a life worth being lived. Taking note of the increasing need for electricity, especially considering our increasing dependence on the use of more and more electricity run equipment, it seems as if electricity should be observed as a vital part of the right to life. On the same time, Article 39(b)

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[9] *India‘a Nuclear Ambition*, GREENPEACE (Jan. 23, 2023, 1:25 PM), http://www.greenpeace.org/india/en/What-WeDo/Nuclear-Unsafe/Nuclear-Power-in-India.

provides for equitable distribution of nation's material resources, maintaining that their ownership and control must be so distributed, so as to promote maximum public welfare. This welfare must be achieved by securing social and economic justice to all the sections of the society by reducing inequalities in employment opportunities and by endeavouring to eliminate status inequality.

In D. S. Nakara v. Union of India[10], the SC has held that the key role of a socialist state is to eliminate inequalities in the life standards of the people, by eliminating inequalities in income, and in status. The directive principles of state policy (hereinafter referred as DPSP) lay down policy guidelines to be followed by the state for raising the living standards of the people. For this, the state is duty bound to provide its citizens such basic amenities of life which play an important role in shaping their future in a welfare state. The early notion of social justice referred to the extension of the three basic amenities of life to all, i.e. food, clothing and shelter. But, the feeling of social justice, being a relative concept,[11] changeable by time, circumstances, culture and ambitions of the people, there crept in a fourth necessity, called energy or to be more precise, electricity. With the dawn of globalization and modernization, there have been new advances in technology every day. Electrification has changed the overall lifestyle of man, suggesting it to have become an inevitable need of the time. Therefore the most significant milestone that the nation must achieve is 100% households having 24x7 quality supply of electricity for setting up a just social order.

To achieve this objective, it is necessary for the governments to make all efforts to increase the production of electricity, so that there is no single village or house which is left in the dark. Since, India has got abundant reserves of natural thorium, so nuclear technology may be one of the convenient technologies that could be adhered to. Using this technology, more efforts can be made for exploiting Uranium for electricity generation. It is presumed that the resultant electricity would be more cost effective which could thus be made available to the masses at cheaper rates.

But, the aim of the system is not only the production of electricity, but its production in a safe and sustainable manner. The concept of sustainable

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[10] DS Nakara v Union of India, (1983)1 SCC 305 (India).

[11] V.R. KRISHNA IYER, SOCIAL JUSTICE - SUNSET OR DAWN 53 (Eastern Book Company, 1987)

development endeavours to strike a balance between human progress and its impacts on the physical environment, considering the drastic climatic changes and the needs of the future generation. In short sustainable development can be understood as, development with care and caution; keeping scope for prevention and cure. Wherefore, it is necessary that production of electricity through nuclear science should be watched from an eagle‘s eye while concerning its safe use. All necessary precautions and measures should be adhered to for maintaining the safety and security of nuclear material and for the prevention of nuclear proliferation. Considering this, the Indian legislature has enacted various laws that deal with the use of atomic energy for peaceful purposes, and have also considered the various international provisions while framing these laws. Further, there are many bodies and boards that are primarily engaged in the task of augmenting peaceful uses of nuclear energy.

III. Nuclear Energy as the Clean Energy

Nuclear energy is the clean, safe, reliable and competitive energy source. It is only source of energy that can replace the significant part of fossil fuels which massively pollute atmosphere and contribute to greenhouse effect. If we want to be serious about climate change and end of oil, we must promote more efficient use of energy, we must use renewable energies – wind and solar – wherever possible, and adopt the more sustainable life style. But this will not be nearly enough to slow accumulation of atmospheric CO2, and satisfy needs of our industrial civilization and aspirations of developing nations. Nuclear power should be deployed rapidly to replace coal, oil and gas in industrial countries, and eventually in developing countries.[12] The intelligent combination of energy conservation, and renewable energies for local low-intensity applications, and nuclear energy for base-load electricity production, is only viable way for future. Tomorrow’s nuclear electric power plants will also provide power for electric vehicles for cleaner transportation. With new high temperature reactors we will be able to recover fresh water from sea and support hydrogen production.[13] We believe that opposition of some environmental organizations to civilian

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[12] Siddharth Varadarajan, *India offers 10,000 MW of nuclear contracts to U.S.*, THE HINDU. September 20, 2008.

[13] Ravindra Tomar, *The Indian Nuclear Power Program: Myths and Mirages*, 20 ASIAN SURVEY. 517, 517-31 (1980).

applications of nuclear energy will soon be revealed to have been among greatest mistakes of our times.

A. Clean

Nuclear energy produces almost no carbon dioxide, and any sulphur dioxide or nitrogen oxides whatsoever. These gases are produced in vast quantities when fossil fuels are burned. Nuclear fission is among energy sources that are least polluting and have lowest overall environmental impact

B. Nuclear Waste

One gram of uranium yields about as much energy as the ton of coal or oil. Nuclear waste is correspondingly about the million times smaller than the waste generated by the fossil fuels, and it is completely confined. Volume of nuclear waste produced is very small. Since nuclear waste is deposited in very deep geological storage sites, hence, it does not enter the biosphere. Its effect on the ecosystem is very less. Waste generated by nuclear energy naturally decays over time while the chemical wastes, for example arsenic or mercury, they last forever. Most fossil fuel waste is in form of gas that goes up smokestack. We don't see it, but it is not without effect, causing global warming, acid rain, smog and other atmospheric pollution.

C. Safe

Nuclear power is safe, as proven by record of half the century of commercial operation, with accumulated experience of more than 12,000 reactor-years. There have been only two serious accidents in commercial exploitation of nuclear power:[14] Three Mile Island in 1979 (in Pennsylvania, USA) and Chernobyl in 1986 (in Soviet Union, now in Ukraine).

D. Reliable

Nuclear reactors provide base-load power and are available over 90% of time; intervals between refuelling have been extended and down time for refuelling have been reduced.

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[14] Ravindra Tomar, *The Indian Nuclear Power Program: Myths and Mirages*, 20 ASIAN SURVEY. 517, 517-31 (1980).

E. Competitive

Cost of nuclear power is competitive and stable whereas fossil fuelled power, especially oil and gas, is at mercy of market.

F. Inexhaustible

Uranium is found everywhere in crust of Earth – it is more abundant than tin. Major deposits are found in Canada and Australia. It is estimated that increasing market price by the factor ten would result in 100 times more uranium coming to market. Eventually we will be able to recover uranium from sea water where 4 billion tons are dissolved.

G. Compact

The nuclear power station is very compact, occupying typically area of the football stadium and its surrounding parking lots. Solar cells, wind turbine farms and growing biomass, all require large areas of land.

IV. Departmental and Regulatory Setup in India

In India there have been a few Boards and Institutions that have been primarily engaged in controlling and managing the activities related to the uses of nuclear technology and nuclear materials. At the national level, the institutional set up is made up of the following major bodies, called as the Atomic Energy Commission, The Department of Atomic Energy, the Atomic Energy Regulatory Board, BHAVINI and Nuclear Power corporation of India Limited. These institutions have their decided code of conduct with specified areas of work, thus making the use of nuclear energy possible for peaceful purposes. The researcher has tried to give the basic details of the roles, powers and activities of these institutions.

A. The Atomic Energy Regulatory Board

The primary objective of Atomic Energy Regulatory Board is to guarantee that no risk is caused to the health of the people and the environment by the use of ionizing radiations and nuclear energy in India. Whereby, it lays down the basic requirements needed to be fulfilled by radiation users for maintaining nuclear safety. Wherefore, it mandates the nuclear and radiation facilities to undergo timely reviews and inspections, following a graded approach and by providing

considerable level of attention to high risk facilities.[15] Nonetheless, it states that the fulfilment of all the safety and regulatory requirements is the core responsibility of the facility's owner.

Atomic Energy Regulatory Board was instituted by the President of India in exercise of the powers given under Section 27 of the Atomic Energy Act, 1962, for carrying out various roles, regulatory and safety in nature, envisioned under Sections16, 17 and 23[16] of the Act. It is responsible to the Atomic Energy Commission (AEC). It was constituted on the November 15, 1983 and came into operation on December 31, 1983, pursuant to a gazette notification.[17] It comprises of not more than five members, including the Chairman and the Member-Secretary as its full time members.

The Atomic Energy Regulatory Board is empowered to lay down standards and frame rules and regulations, in collaboration with the Department of Atomic Energy, concerning the regulatory and safety necessities under the Atomic Energy Act, 1962. The main roles of Atomic Energy Regulatory Board may be broadly stated as:

a. Policy development in the field of nuclear safety, radiation safety and industrial safety, for facilities falling within its purview.
b. Development of the safety codes, standards and guides those are helpful in siting, constructing, designing, operating, commissioning and decommissioning of various plants, suitably in view of international recommendations and the local needs.
c. Granting permissions for siting, constructing, commissioning, operating and decommissioning of a nuclear or radiation facility, after undergoing an appropriate safety assessment.
d. Ensuring complete compliance with all the safety codes and standards, during construction or commissioning of either a Department of Atomic Energy or a non-Department of Atomic Energy installations.

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15 ATOMIC ENERGY REGULATORY BOARD; https://aerb.gov.in/index.php/english/about-us/constitution-order (Dec. 31, 2022, 10:45 PM).

16 Id. at 113 and 128

17 ATOMIC ENERGY REGULATORY BOARD; https://aerb.gov.in/index.php/english/about-us/constitution-order (Dec. 31, 2022, 10:45 PM).

e. Giving technical advice the AEC/Department of Atomic Energy on matters relating to the siting, designing, constructing, commissioning, operating and also decommissioning of the plants under Department of Atomic Energy.
f. Reviewing a Department of Atomic Energy Project from all angles of safety, upon receiving requests for authorizing or commissioning or for operating such a project/ plants. Nonetheless, the Atomic Energy Regulatory Board shall review and satisfy itself upon the following points, before granting such authorization:
    i. The Final Design Analysis Report of project/ plant;
    ii. Any commissioning report and its consequent result; and
    iii. The anticipated operating procedures and the limits and conditions within which the operations are meant to be carried out without any undue risk to the personnel and population involved in such operations. Relevant additional supporting information may be called for by Atomic Energy Regulatory Board for carrying out the above purposes.
g. Reviewing the health and safety aspects in case of any modifications carried out to the design of the Department of Atomic Energy plant, such that it involves changes in its technical specifications.
h. Reviewing the earlier operating experiences considering the radiological and other safety measures that were recommended by the IAEA, International Commission on Radiological Protection or any such other international body provided they were accordingly adapted to suit Indian needs and conditions.
i. Prescribing the acceptable limits of radiations to which the occupational workers or other members of the public may be exposed, along with prescribing the limits for the release of radioactive substances and conventional pollutants in the environment.
j. Reviewing of the various plans prepared by different Department of Atomic Energy units on emergency preparedness, along with the plans prepared for non-Department of Atomic Energy installations and the once for large radioactive sources in transit.
k. Review the nuclear security aspects on safety concerning the nuclear facilities within its purview.
l. Promoting research and development for performing the above roles.

m. Reviewing of the training programme, qualifications and licensing policies for personnel.
n. Prescribing syllabi concerning safety of personnel training at all levels.
o. Enforcing of the rules and regulations on radiation safety and industrial safety that are propagated under the Atomic Energy Act, 1962 and the Factories Act, 1948 respectively.
p. Preserving relationships with national and foreign statutory bodies on safety matters.
q. Taking due steps for informing the public on the connotations of radiological safety.
r. Performing such other roles as the AEC may assign.
s. Informing the public of the 'nuclear incident' taking place in a nuclear installation situated in India, as an obligation imposed under the Civil Liability for Nuclear Damage Act, 2010.

For the performance of these roles, the Atomic Energy Regulatory Board has been conferred with the powers of a Competent Authority, for administering rules and regulations that have been laid down under the Atomic Energy Act, 1962. Additionally, it is also accredited to govern the provisions of the Factories Act, 1948, in order to secure industrial safety for Department of Atomic Energy units.[18] Whenever, the Atomic Energy Regulatory Board is in need of administrative support, it is provided by the Department of Atomic Energy.

B. Department of Atomic Energy

Department of Atomic Energy has been primarily engaged in the development of nuclear power technology emphasizing on developing basic research techniques and applying radiation technologies for the promotion of agriculture, food, industry, medicine etc. It visualizes empowering India through technology for wealth creation and providing better quality life to its citizen by making India energy independent.

Department of Atomic Energy was constituted on August 3, 1954 and is under the direct charge of the Prime Minister. The Secretary to GOI in the Department of Atomic Energy shall be the ex-officio Chairman of the AEC. It is mainly comprised of five research centers, three industrial organizations, five public

[18] The Atomic Energy Act, 1962, s. 23.

sector undertakings and three service organizations. There are two boards under its auspices for promoting and financially supporting extra-curricular research in nuclear and allied fields, also supporting eight institutes of international repute and an educational society for educating the children of Department of Atomic Energy employees.

The programmes of the Department are based upon the following directives:

a. To raise the share of nuclear power by developing native and trustworthy technologies. It also seeks to intensify fast breeder reactors and thorium reactors;
b. To build and operate more research reactors for manufacturing radioisotopes and also to carry out applications using radiation technology in the field of medicine, agriculture and industry. It is occupied in developing better crop varieties and methods for controlling pests and insects, and is also coming up with new techniques for cancer therapy;
c. To develop new and superior technologies and also to encourage transfer of such technology towards industrial sector;
d. To support basic researches in nuclear energy and also increase interaction with related universities and academic institutions. Further, it supports research and development in various Department of Atomic Energy's programmes by promoting international cooperation in areas of advanced research. Department of Atomic Energy programmes relate to the National Common Minimum Programme, agriculture, health and education, food & nutrition security, water resources and energy security; and
e. To contribute towards national security.

The main task of the Department of Atomic Energy involves the designing, construction and operational procedures of nuclear power reactors. It also looks after those nuclear fuel cycle technologies that support the operations of nuclear power reactors. It carries out the processing of nuclear minerals, generation of heavy water, fabrication of nuclear fuel, reprocessing of fuel and management of nuclear wastes.

C. Nuclear Power Corporation of India Limited (NPCIL)

Nuclear Power Corporation of India Limited is a public sector enterprise. The administrative control of NPCIL lies with Department of Atomic Energy. It was registered as a Public Limited Company under the Companies Act, 1956 in September 1987. It is a profit making and dividend paying company. Its main purpose is to operate NPP's, along with the implementation of atomic power projects for electricity generation in accordance with the programmes and initiatives taken under the aegis of Atomic Energy Act, 1962. The revelation behind the inception of NPCIL was to become internationally capable in nuclear power technology to achieve long term energy security for the country. The Company's task is to produce nuclear energy as a safe, economical and environment friendly source of electricity to meet the country's rising electricity needs. NPCIL also has equity participation in Bharatiya Nibhikiya Vidyut Nigam Limited (BHAVINI).

Responsibilities of NPCIL include overall designing, construction, commissioning and operation of any nuclear power reactor. 22 commercial nuclear power reactors with an installed capacity of 6780 MW are being currently operated by NPCIL. It also has eight reactors under various stages of construction with an estimated total capacity of 6200 MW. NPCIL is also engaged in implementing projects on Sustainable Development.

The Corporation strives to get the most out of nuclear power stations in terms of power generation and profitability. Safety being its prime consideration with the motto of 'safety first and production next', NPCIL has a record of 48 years of safe operation. It seeks to safely increase the generation of nuclear power with the available resources. It seeks to provide sufficient man power at all levels through an appropriate human resource development programme, possessing improved skills and technology. It strives to strengthen the existing levels of environment protection along with the achievement of advanced modernization and technological innovations. It promotes sharing of such technological skills and expertise, both at the national and the international level. NPCIL implements its Corporate Social Responsibility (CSR) programmes that include Sustainable Development as one of its main tenets. It is also committed towards achieving excellence in environment safety standards by adhering to the National Environment Policy, laws and other applicable rules and regulations. It seeks to protect and conserve environmental resources by judiciously using them and also

for reducing the generation of nuclear and other environmental wastes, so as to improve environmental performances continuously.

V. Legislative Framework on the Use of Atomic Energy in India

These laws lay down the fundamental rules and procedures for the guidance of all the organizations functional in India, dealing for and with the peaceful and safe uses of nuclear material and technology. The laws deal with the generation of electricity in NPP‘s, the design and construction of NPP‘s, the regulatory bodies, etc.

A. The Atomic Energy Act, 1962

This Act[19] was enacted after thirteen years of the coming into force of the Indian Constitution and is applicable to the whole of India.[20] The main purpose behind its enactment was to deliver for the growth, regulation and use of 'atomic energy'[21] towards the welfare of public and for peaceful purposes.

Under the provisions of this Act, the total control and development of nuclear material and nuclear energy is left in the hands of the central government or its appointed authorities or even by establishing a 'Government Company'[22], which in the present situation is NPCIL. Whereby, it provides some general powers to the Central Government.[23] For instance, the power of manufacturing, production, development, use, disposal of any 'prescribed substances'[24], 'radioactive substances'[25], or articles required for carrying out such purposes. It has to power to conduct and facilitate researches connected with atomic energy,[26] and to produce and facilitate the generation of electricity.[27] It can disposal off any

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[19] ATOMIC ENERGY REGULATORY BOARD, https://www.aerb.gov.in/images/PDF/Atomic-Energy-Act-1962.pdf (Jan. 11, 2023, 4:45 PM).

[20] The Atomic Energy Act, 1962, s.1, cl.2

[21] "atomic energy means energy released from atomic nuclei as a result of any process, including the fission and fusion processes"; See Section 2(1)(a), The Atomic Energy Act, 1962

[22] The Atomic Energy (Amendment) Act 2015, (India).

[23] The Atomic Energy Act, 1962, s.3.

[24] The Atomic Energy Act, 1962, s. 2(1)(g).

[25] The Atomic Energy Act, 1962, s. 2(1)(i).

[26] The Atomic Energy (Amendment) Act 1987, No. 29, 1987 (India).

[27] The Atomic Energy (Amendment) Act 1987, No. 29, 1987 (India).

radioactive substance, etc. which were either acquired by it of its own or by NPCIL.[28] It also has the power to purchase, acquire, store or transport such substances. Further, the central government or its authorized person or institution, also has the power to declare or make publish any "restricted information"[29] and to declare any area or premises as "prohibited area"[30]. It can also take control[31] over radioactive substances or 'radiation'[32] producing plant for:

i. the prevention of radiation hazards;
ii. securing public safety and the safety of persons handling radioactive substances or radiation producing plant; and
iii. ensuring the safe disposal of radioactive wastes;

Whereby, in pursuance of its powers, the Central Government, via the Department of Atomic Energy vide its notification number S.O. 1592(E), dated April 28, 2016 has recently updated the list pertaining to Prescribed Substances, Prescribed Equipment and Technology.[33] Further, to regulate their exports and transfers, the Central Government has issued a set of guidelines entitled as "Guidelines for Nuclear Transfers (Exports)" vide its notification No.32/02/2016-ER. Whereby, the export of prescribed substances, prescribed equipment or transfer of related technology to any country will be governed by these principles and export controls will apply in case of nuclear transfers to any other country.[34]

This Act casts a duty on every person who had ever discovered the occurrence of thorium or uranium in India to explicitly notify about such finding to the Central Government or to any person authorized by it, within a period of three months from such discovery.[35] Similarly, even if a person believes about the occurrence of uranium or thorium at any place in India, he or she should immediately and

[28] The Atomic Energy (Amendment) Act 1987, No. 29, 1987 (India).
[29] The Atomic Energy Act, 1962, s. 3(c).
[30] The Atomic Energy Act, 1962, s. 3(d).
[31] The Atomic Energy Act, 1962, s. 3(e).
[32] The Atomic Energy Act, 1962, s. 2(1)(h).
[33] DEPARTMENT OF ATOMIC ENERY, http://dae.nic.in/writereaddata/pres_subs_0516.pdf (Feb. 12, 2023, 11:35 PM)
[34] DEPARTMENT OF ATOMIC ENERY, http://dae.nic.in/writereaddata/pres_subs_0516.pdf (Feb. 12, 2023, 11:46 PM)
[35] The Atomic Energy Act, 1962, s. 4(1).

likely intimate such belief.[36] If the Central Government at any time is satisfied that any person is mining a substance from which the isolation, extraction, usage or concentration of Uranium is projected by any physical, chemical or metallurgical process, then, to check and control such mining or concentration of uranium carrying substances,[37] it may ask such person to perform the above activities under such terms and conditions as it may notify from time to time, or may even impose total prohibition on his activities. In such a case, pursuant to Section 5(1), the Central Government may decide to pay compensation to such person. The amount of compensation must be determined under section 21; however, it may or may not be consistent with the value of any uranium contained in the abovementioned substance.[38] Nonetheless, if it decides not to pay any such compensation, it must record the corresponding reasons.[39]

Safety is one of the prime concerns of the Central Government when it comes to the use of radioactive substances. Considering this, it can make rules regarding any sites or premises in which radioactive substances are either mined, manufactured, treated, produced, deposited or used or wherever any plant producing radiation, equipment or appliance is put to use.[40] The main purpose behind framing such rules is to prevent any sort of injury that may be caused to the health of employees or other persons either due to radiations or by the ingestion of any radioactive substance, and also to secure the safe disposal of any radioactive waste products resulting from such activities. The Act also prescribes the qualifications of the employees including other service rules. It may also impose requirements, prohibitions and restrictions on employers, employees or any other persons. It also specifies requirements on erection or structural alterations of buildings. To ensure safety while transportation of radioactive substance or prescribed substance it may make rules necessary to prevent any injury during transport or an injury to the health of persons engaged therein.[41]

It may also order the non-disclosure of information contained in a document, drawing, photograph, plan, model, etc., which relates to a NPP or whose use is

[36] The Atomic Energy Act, 1962, s. 4(2).
[37] The Atomic Energy Act, 1962, s. 5(1).
[38] The Atomic Energy Act, 1962, s. 5(3) and 5(4).
[39] The Atomic Energy Act, 1962, s. 5(2).
[40] The Atomic Energy Act, 1962, s. 17(1).
[41] The Atomic Energy Act, 1962, s. 17(2).

proposed for the purpose of producing, developing or using atomic energy. Also, any information that relates to the purpose, method and process of operation of any NPP may also be restricted from being disclosed.[42] Every person is restricted to disclose information obtained by him during the discharge of his official duties.[43]

For ensuring safety in atomic energy operations, the act specifies that after its commencement, no patents will be granted for inventions relating to the production, control, use or disposal of atomic energy.[44] This prohibition will also apply to inventions for which application was made to the Controller of Patents and Designs appointed under the Indian Patents and Designs Act, 1911, before the commencement of this Act.[45] Nonetheless, if an invention is made by a person relating to atomic energy, he has a duty to communicate the nature and description of the invention.[46] Nonetheless, if a person is desirous to apply for a patent in a foreign country that relates to an invention relating to atomic energy, he shall obtain a prior permission from the Central Government before making the application.[47] Further, any invention in the field of atomic energy conceived in establishments controlled by the Central Government, etc. is regarded as an invention by the Central Government.[48]

Compensation is the most important feature that comes into light once one has suffered any form of damages. The act specifically lays down provisions in the form of principles that relate to the payment and determination of compensation. If compensation amount is fixed by an agreement, it shall be paid accordingly, otherwise an expert arbitrator, having knowledge as to the nature of rights affected, shall be appointed, for determining the amount of compensation payable.[49] In determining the amount, regard must be had to the compensation payable under section 9 for acquiring, discovering and extracting rights of any prescribed substance. Reliance must also be placed on the provisions of Section

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[42] The Atomic Energy Act, 1962, s. 18(1).
[43] The Atomic Energy Act, 1962, s. 18(2).
[44] The Atomic Energy Act, 1962, s. 20(1).
[45] The Atomic Energy Act, 1962, s. 20(2).
[46] The Atomic Energy Act, 1962, s. 20(4).
[47] The Atomic Energy Act, 1962, s. 20(5).
[48] The Atomic Energy Act, 1962, s. 20(7).
[49] The Atomic Energy Act, 1962, s. 21(1).

23(1) of the Land Acquisition Act, 1894, as far as they may be made applicable to the provisions of section 9.[50] The arbitrator is to also consider the compensation payable under section 11 and 12.[51]

The Civil Liability for Nuclear Damage Act, 2010

The main purpose behind the enactment of the Civil Liability for Nuclear Damage Act, 2010 (hereinafter referred as CLND) was to make provisions for civil liability in case of 'nuclear damage'[52] and for the payment of immediate compensation to the victims of such an incident. The compensation is decided on the basis of the principle of no-fault liability. The appointment of Claims Commissioner and the establishment of Nuclear Damage Claims Commission both are incidental to the provisions of this Act.

The Act obligates Atomic Energy Regulatory Board to notify a 'nuclear incident'[53], within fifteen days of the mishap, with widely publicizing the nuclear incident.[54] Considering this the Atomic Energy Regulatory Board vide its Directive No. 01/2013 has provided the standards and assessment procedure for the notification of the happening of a nuclear incident. Nonetheless, if Atomic Energy Regulatory Board is satisfied that the threat or risk involved in such a nuclear incident is irrelevant, in that case it is not so obligated to notify the nuclear incident.[55]

The Act authorizes any person suffering nuclear damage to claim compensation. For deciding claims for compensation, either one or more Claims Commissioner (hereinafter referred as CC) is appointed by the Central Government,[56] as per the specified qualifications.[57]

For adjudicating such claims, he has to follow the prescribed procedure. If the CC needs to hold an enquiry, he may associate with him nuclear experts. The CC has

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[50] The Atomic Energy Act, 1962, s. 21(2)(a).
[51] The Atomic Energy Act, 1962, s. 21(2)(b).
[52] The Civil Liability for Nuclear Damage Act, 2010, s. 2(g).
[53] The Civil Liability for Nuclear Damage Act, 2010, s. 2(i).
[54] The Civil Liability for Nuclear Damage Act, 2010, s. 3(2).
[55] The Civil Liability for Nuclear Damage Act, 2010, s. 3(1).
[56] The Civil Liability for Nuclear Damage Act, 2010, s. 9.
[57] The Civil Liability for Nuclear Damage Act, 2010, s. 10.

all the powers of a civil court as are given to it under the Code of Civil Procedure, 1908 (5 of 1908), for trying suits and is deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).[58]

Upon notification of a nuclear incident, the CC is duty bound to cause wide publicity for inviting applications from the persons who have been affected by it, for claiming compensation for the nuclear damage.[59] Such applications may be made by any person sustaining personal injury, by the owner of the damaged property, by the legal representatives of the deceased or by any other person who has been duly authorized to be the agent of such person, owner or legal representative.[60] The application is to be made in the prescribed format, along with the required documents, not later than three years from the nuclear damage.[61] Once the application is received, the CC must notify it to the operator and provide both the parties an equal opportunity of being heard, before disposing off the application. He must dispose of the application by making an award within a period of three months from its receipt. Nonetheless, while deciding upon the amount of compensation, the CC must not consider any benefit, reimbursement or amount that has been already received by the applicant as an insurance amount.

The right to claim compensation extinguishes, if it is not made within a period of ten years, where damage has been caused to property and twenty years, where some sort of personal injury has been suffered. The time limit commences from the date of occurrence of the incident. Nonetheless, where such nuclear incident involved some sort of nuclear material that was either stolen, lost, jettisoned or abandoned before the happening of the said incident, then the period of ten years shall be calculated from the date of the nuclear incident, but shall not exceed a period of twenty years from the date of such theft, loss, jettison or abandonment.[62]

In case of the happening of a nuclear incident, if the Central Government is of the opinion that in larger public interest, the claims for compensation needs to be decided by a Commission instead of a CC, it may notify for the establishment of

[58] The Civil Liability for Nuclear Damage Act, 2010, s. 12.
[59] The Civil Liability for Nuclear Damage Act, 2010, s. 13.
[60] The Civil Liability for Nuclear Damage Act, 2010, s. 14.
[61] The Civil Liability for Nuclear Damage Act, 2010, s. 15.
[62] The Civil Liability for Nuclear Damage Act, 2010, s. 18.

a Nuclear Damage Claims Commission (hereinafter referred as NDCC).[63] The NDCC is comprised of one Chairperson and not more than six other members. Such persons must possess special knowledge in the field of nuclear law and liability arising out of a nuclear incident. A CC who has held that post for at least five years may also be appointed as the Chairman of the NDCC.[64]

An application before NDCC must made in the prescribed form, not later than three years from the date of knowledge of nuclear damage by the victim.[65] For dealing with these claims under Section 31 or 33, the NDCC has original jurisdiction. Though NDCC is not bound to follow the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), yet it must not deviate from the principles of natural justice. Nonetheless, for discharging its roles, it has the same powers as are vested in a court of civil jurisdiction. The NDCC must also dispose of the application within a period of three months after providing an opportunity of being heard to the parties concerned. After the award the insurer or any other person, other than the operator, who is required to pay any amount in accordance with the award and up to the extent of his liability, as may be decided under the contract, has to deposit that amount within the stipulated time and manner, as may be directed by the CC or the NDCC. The remaining amount, above the amount deposited by the insurer, etc., has to be deposited by the operator. If the insurer or the other person specified fails to deposit the amount of award within the stipulated time, then such amount may be recovered from him as arrears of land revenue. Any amount so deposited must be disbursed to the specified persons within a period of fifteen days from such deposition.[66]

Keeping in mind the large population density of our country and the national policy favouring the setting up of more and more NPP‘s for expansive energy growth, the safety and security of the NPP‘s, of the people and of the environment are extremely important. Wherefore, provisions have been set as part of equitable justice and as part of national and international law, pertaining to remedy the loss/damage to the environment, to human health, life and/or property.

[63] The Civil Liability for Nuclear Damage Act, 2010, s. 19.
[64] The Civil Liability for Nuclear Damage Act, 2010, s. 20.
[65] The Civil Liability for Nuclear Damage Act, 2010, s. 31.
[66] The Civil Liability for Nuclear Damage Act, 2010, s. 36.

Nuclear and radioactive releases are undoubtedly dangerous to human health and environment. In case of a nuclear accident potent enough to cause contamination of the surroundings, Disaster Management Plans (hereinafter referred as DMP) are of paramount importance. Considering that nuclear/ radiological emergencies can occur due to factors beyond human control, the law on disaster management was formulated by the Parliament.

VI. Conclusion

Humanity will have to methodically reduce its dependency on large-scale ignition of fossil fuels for energy production in coming decades, with purpose of carrying out this change. All energy sources may be considered and some will be deployed in useful 'niche' applications. Nonetheless, only nuclear power plants are capable of sustainably and reliably supplying large quantities of clean and economical energy needed to run industrial societies with negligible emission of greenhouse gases. Nuclear energy meets all standards of sustainability as defined by United Nations Brundtland Commission.

In the first phase, world's industrial nations should take lead in transforming major part of their stationary electrical energy producing capacity from fossil-fuel based to nuclear-fission based. With the long term energy policy and proper incentives, this could be achieved within the few decades. Such the transformation could drastically reduce global rate of greenhouse-gas emission with respect to both atmospheric carbon-dioxide and methane.

Renewable energy sources will not be able to supply needed large quantities of energy sustainably, economically and reliably. In addition, renewable energy sources with fossil-fired backup power will in many cases not contribute towards reduction of greenhouse-gas emissions. Distorting market with subsidies and by legislation to attract intermittent energy technologies into applications for which they are not well suited is economically wasteful. Also, replacing stand-alone coal-fired stations with stand-alone gas-fired stations will, in many cases, not result in the reduction in rate of emission of greenhouse gases due to (often poorly quantified) problems of methane leakage. Countries that depend on imported natural gas should be aware that they carry full responsibility for their part of global consequences due to atmospheric leakage of methane associated with their part of imported gas, including leakage taking place outside their borders.

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One solution to avoid 'free riding' would be the grid-connection fee, to be imposed on countries with the large intermittent producing capacity, for purpose of compensating adjacent countries for use of their interconnected electric grids as back-up power, and for having to accept surplus intermittent energy at times when it is not needed, thus forcing their base-load power plants to operate in the uneconomic 'accommodative' mode.

Intermittent energy sources with stored-energy facilities might, in some cases be economically viable, particularly for isolated locations without access to the electric grid. But 'heavy lifting' in terms of replacing global use of coal, oil and gas must come from the large-scale deployment of nuclear fission energy, with the goal for full fuel recycling for maximum long-term sustainability of this critical zero-carbon energy source.

Nuclear power is the intense source of energy and transport infrastructure needed for nuclear fuel is very small. 10,000 MWe nuclear power capacity needs only about 300–350 tons of enriched fuel per annum, as against 35–50 million tons of coal needed for the coal fired thermal power station of same capacity requiring about the shipload or 20 trainloads per day to transport coal. Pressure on rail, port and other infrastructure will be immense when large thermal capacity is added, apart from emissions arising out of transporting such large quantities of coal. Land needed for setting up the nuclear power station is also less when compared to thermal coal-fired power stations and hydroelectric stations which involve large submergence of land.[67]

i. Energy Policy

Integrated Energy Policy of country recognizes that nuclear power based on indigenous resources can provide long term energy security for country and recommends continued support for three-stage program and development of thorium fuel cycle. It also recommends exploring possibility of setting up large nuclear capacities based on imports once necessary agreements for international cooperation are in place.

[67] T.L. SHANKAR (1985), ENERGY POLICY FORMULATION: THE INDIAN EXPERIENCE 70-86 (R. S. Ganapathy, S. R. Ganesh, R. M. Maru, S. Paul, R. M. Rao ed., Sage Publications 1985).

ii. Privatisation and Deregulation

Nuclear power generation and related fuel cycle activities are under Central Government. Department of Atomic Energy is responsible for setting up and operating nuclear power plants. Other related fuel cycle (both front-end and back end) activities are carried out by different units of Department of Atomic Energy, GOI. As of now, there is no equity participation by private sector in area of nuclear power generation[68]. In order to facilitate having possibility of joint ventures with other public sector company, Atomic Energy Act 1962 was amended in year 2015. This is essentially aimed to attract investment in nuclear power sector for capacity addition.[69]

iii. Role of Government in Nuclear R & D

Most of R&D related to nuclear power is funded and carried out by Department of Atomic Energy under Government of India. Nonetheless through extra mural research funding, R&D is also carried out in some of academic research institutions outside Department of Atomic Research Centre.

iv. Nuclear Energy and Climate Change

India is the large country and so needs the large electricity producing capacity. Power generation in India was 4.1 billion kWhr in 1947-48 and in 2014-15; it was about 1272 billion kWhr including captive power. In next 50 years, it may increase by the factor of 12 or more. At present, the major component of electricity is generated using fossil fuels and there are environmental concerns like greenhouse gas (GHG) emissions associated with energy generation using fossil resources. If India continues to rely on fossil resources as at present, it will have serious effects on local, regional and global environment.

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[68]T.L. SHANKAR (1985), ENERGY POLICY FORMULATION: THE INDIAN EXPERIENCE 70-86 (R. S. Ganapathy, S. R. Ganesh, R. M. Maru, S. Paul, R. M. Rao ed., Sage Publications 1985).

[69] T.L. SHANKAR (1985), ENERGY POLICY FORMULATION: THE INDIAN EXPERIENCE 70-86 (R. S. Ganapathy, S. R. Ganesh, R. M. Maru, S. Paul, R. M. Rao ed., Sage Publications 1985).

Therefore, it is necessary that India continues to develop nuclear energy and meets the significant percentage of its electricity needs based on nuclear energy.[70]

Despite strong rationale for reducing GHG emissions that contribute to global warming, for meeting increasing demand for electricity, and for improving national security aspects of energy supply, installation of nuclear power projects is slower than other projects. There is considerable anti-nuclear sentiment in country. There are several reasons why nuclear power has not met expectations for capacity growth projected several decades ago. One factor is that public perception of nuclear energy is unfavourable; in part due to concern about effects of radiation that public associates with nuclear energy. These challenges are –

v. Need of Independent Regulator

Atomic Energy Regulatory Body (Atomic Energy Regulatory Board) has functioned as regulator in-charge of nuclear power reactors in country. Atomic Energy Regulatory Board draws professionals from Department of Atomic Energy facilities as one cannot doubt technical competence of Atomic Energy Regulatory Board professionals. Nonetheless, recently, Atomic Energy Regulatory Board's role and its importance as the regulator become prominent in public discourse on account of its structural dependency. With separation of military and civilian nuclear programme, it is imperative that regulator is independent financially as well as statutorily.

Close tie between regulator and regulated is never desirable. THE move towards this has been made with draft legislation on "Nuclear Safety Regulatory Authority Act" under consideration. This will help to provide statutory independence to regulator. Nonetheless, the major challenge is finding suitable scientists with relevant knowledge outside ambit of nuclear establishment. Nonetheless, it must be

[70] T.L. SHANKAR (1985), ENERGY POLICY FORMULATION: THE INDIAN EXPERIENCE 70-86 (R. S. Ganapathy, S. R. Ganesh, R. M. Maru, S. Paul, R. M. Rao ed., Sage Publications 1985).

mentioned that lack of any major accident have shown that regulator in India has been effective.[71]

vi. Nuclear Fuel Availability

Domestic availability of uranium, only fuel source as of now, is one of major concerns in going ahead with nuclear programme. Presently it is mined only in Jharkhand and Andhra Pradesh, which is also of low quality. THE few other sites, including in Karnataka and Meghalaya, reportedly have uranium deposits. Techno-eco feasibility of opening new mines would however very much depend on eco-sensitive nature of these sites and public perception in area. The estimate of resource availability is also the matter of contention. Possibility of import of uranium, which has opened up now, could ease situation. Concern here is somewhat varied perceptions and approaches on part of potential exporting countries.[72]

vii. Import Cost

Nuclear power has higher overall lifetime costs compared to natural gas with combined cycle turbine technology and coal, at least in absence of the carbon tax or the equivalent "cap and trade" mechanism for reducing carbon emissions. India is planning to import high capacity reactors from abroad. Cost of these reactors is considerable higher compared to domestic ones. If the domestic reactor costs around five to seven crores per MW estimated cost of the imported reactor is found to very between 16 crore/MW to 36 crore/MW based on technology. This could have the significant impact on cost of power.[73]

viii. Higher Capital Cost

New nuclear power plants typically have high capital costs for building first several plants, after which costs tend to fall for each

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[71] Ravindra Tomar, *The Indian Nuclear Power Program: Myths and Mirages*, 20 ASIAN SURVEY. 517, 517-31 (1980).

[72] Siddharth Varadarajan, *India offers 10,000 MW of nuclear contracts to U.S.*, THE HINDU. September 20, 2008.

[73] Siddharth Varadarajan, *India offers 10,000 MW of nuclear contracts to U.S.*, THE HINDU. September 20, 2008.

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additional plant built as supply chains develop and regulatory processes settle down. Fuel, operational and maintenance costs are relatively small components of total cost. Most operating nuclear plants are economical to operate when costs going forward are considered, i.e. when sunk capital and construction costs are ignored. Nonetheless, new plants appear to be more expensive than alternate sources of base load generation, notably coal and natural gas fired electricity generation, when both capital and operating costs are taken into account. Coal plants have capital costs intermediate between those of gas and nuclear. Nonetheless, if CO2 emissions were in future to become subject to control and the significant "price" placed on emissions, relative economics could become much more favourable to nuclear power.

ix. Waste Disposal

Nuclear power has perceived adverse safety, environmental, and health effects, heightened by Three Mile Island and Chernobyl reactor accidents, but also by accidents at fuel cycle facilities in United States, Russia, and Japan. There is also growing concern about safe and secure transportation and disposal of nuclear materials and security of nuclear facilities from terrorist attack. There are many radioactive waste streams created in various parts of nuclear fuel cycle.[74] Nuclear power has unresolved challenges in long-term management of radioactive wastes. United States and other countries have yet to implement final disposition of spent fuel or high-level radioactive waste streams created at various stages of nuclear fuel cycle. Since these radioactive wastes present some danger to future generations. Management and disposal of high-level radioactive spent fuel from nuclear fuel cycle is one of most intractable problems facing nuclear power industry throughout world. Spent fuel from nuclear reactors contains radioactive material that presents health and environmental risks that persist for tens of thousands of years. At

[74] Ravindra Tomar, *The Indian Nuclear Power Program: Myths and Mirages*, 20 ASIAN SURVEY. 517, 517-31 (1980).

present, no nation has successfully demonstrated the disposal system for these nuclear wastes.

x. International Policies

Opening up possibility of trade has helped India secure fuel supply for those reactors which are under IAEA safeguard. THE growing dependency on imported fuel could be the cause for concern in future as imports are contingent on international sentiments. Currently NSG has made the exception for India, through there are regular voices of disclosure due to this, for instance, both Australia and Japan have expressed reservations about India's position on CTBT and NPT, with several within countries demanding for more stringent controls on Indian nuclear programme. While current administrations in two countries are more interested to fix the deal with India (uranium exports from Australia and technology from Japan), negotiations have been protected. Strategic considerations also become important while considering uranium imports.

xi. Land-related Issues

Difficulties in acquiring land and issues faced in commencing work in previously acquired land are some of crucial issues stalling development of new power plants, as well as opening up of new mines. Public protests have been seen in Jaitapur, Kudankulum, and in Domiasiat in Meghalaya. Protest against large-scale infrastructure projects has been faced in several other sectors as well. While some of reasons for these protests are systematic-insufficient compensation, bad implementation of rehabilitation and resettlement, no social impact assessments are carried out to gauge impact of resettlement of people, insufficient consultation with public etc. in case of nuclear these larger systemic issues are also back-grounded with public perception against nuclear. There is need to develop more robust and exclusive programme for all sectors to address concerns of public around large infrastructure facilities.[75]

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[75] Ravindra Tomar, *The Indian Nuclear Power Program: Myths and Mirages*, 20 ASIAN SURVEY. 517, 517-31 (1980).

xii. **Public Acceptance**

Expanded deployment of nuclear power requires public acceptance of this energy source. Nuclear in India, due to international isolation, hitherto, had been the subject removed away from public eye. There seemed to be very little information coming out of administration or government about programmes. There have been very little efforts in part of nuclear establishment to engage with public at large. Nonetheless, globally as well, post Fukushima accident, people's opinion about nuclear energy was on the decline, with increasing safety concerns about nuclear. Reflection of this trend was seen in India as well, with the growing discontent against nuclear projects. THE strong negative public perception regarding nuclear power and its effects has stalled development of new sites at several places.

India today is recognized as the country with advanced nuclear technologies. Comprehensive indigenous capabilities have been developed in all aspects of nuclear power and associated fuel cycles. It has the large R&D base, qualified human resource and facilities for continual development of human resource, industrial capability and capacity as well as robust regulatory framework. Performance of Indian nuclear power stations and implementation of projects have been comparable to international benchmarks technologies for several complex in-core operations have been established and deployed successfully.

A Conceptual and Theoretical Study of Responsibility of State of Origin of Refugees Towards the Host Countries

Dr. Satarupa Ghosh[1]

Abstract

The thrust area of this research is to put some light on the right of refugee hosting countries as to regulate the refugee flow and to protect the right of refugees. Responsibility sharing is a core principle of International responses to refugee crises. There must be a holistic approach to international burden sharing that will enhance the protection of refugees as well as the host community. Right to compensation of the refugee hosting countries as a means of enforcing justice and of preventing future refugee flows is the prime concern of this study. The right and duty of compensation in the refugee context are justified and should be further developed. Refugees are people who have had to flee their country because of armed conflict, serious human rights abuses or persecution. A refugee is a person who cannot return to their own country because they are at risk of serious human rights abuses there. Because their own government cannot or will not protect them, they are forced to flee their country and seek international protection.

Key words: Refugee, Right to compensation, host country, burden sharing, country of origin, state responsibility, right to return.

I. Background

Just over 21 million people or 0.3% of the world's population are refugees right now. This includes 5.2 million Palestinians, many of whom have been refugees for decades.[2] The vast majority of refugees are hosted in low and middle income countries, with one quarter (about 4.2 million people) living in least developed

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[2] Because almost all Palestinian refugees fall under the mandate of the United Nations Relief and Works Agency for Palestine Refugees (UNWRA), while most other refugees fall under the mandate of UNHCR, data on refugees is often presented in different ways. This report covers all refugees.

countries.[3] Meanwhile many of the world's wealthiest nations host the fewest refugees, both in absolute numbers and relative to their size and wealth.

Around the world, new conflicts and crisises are forcing more people to leave their countries. The crisis in Burundi, for example, has pushed over 265,000 people into neighbouring Rwanda, Tanzania, the Democratic Republic of the Congo (DRC), Uganda and Zambia.[4]Armed conflict in South Sudan has driven 1 million people to leave their country for Uganda, Ethiopia, Kenya and other countries in the region.[5] More than 1 million refugees worldwide are considered by UNHCR to be vulnerable and urgently in need of resettlement to other countries. Vulnerable refugees include survivors of violence and torture, women and girls at risk, and those with serious medical needs. Only around 30 countries offer resettlement places for vulnerable refugees, and the number of places offered (known as "resettlement places") annually falls far short of the needs identified by UNHCR.[6]

II. International Burden Sharing

Amnesty international's proposals for responsibility sharing efforts to address the global refugee crisis have failed to address even a small fraction of the actual needs. Moreover, they are often based on measures to ensure that the wealthiest countries face the least disruption. Many of the world's wealthiest countries have devoted significant resources to ensure that refugee populations remain in less wealthy countries.

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[3] According to UNHCR, Global Trends, Forced Displacement in 2015, p.2 86% of refugees under its mandate live in developing regions.(Jan. 12,2022,09: 15 PM), http://www.unhcr.org. According to UNRWA Nearly one-third of the registered Palestine refugees, more than 1.5 million individuals, live in 58 recognized Palestine refugee camps in Jordan, Lebanon, the Syrian Arab Republic, the Gaza Strip and the West Bank, including East Jerusalem. (Jan. 15, 2022, 10: 15 PM), http://www.unrwa.org/palestine-refugees.

[4] Burundi Situation UNHCR Regional Update 1-31 May 2016 (Jan. 21, 2022,09:30 PM), http://reporting.unhcr.org.

[5] Theedor Meron, Human Rights and Humanitarian Norms as Customary Law 82-85 (Oxford, 1989).

[6] Amnesty International, Tackling The Global Refugee Crisis, From Shirking To Sharing Responsibility 35 (Amnesty International Ltd Peter Benenson House, 2016) (Jan. 28,2022, 03: 15 PM) https://www.amnesty.org

The total refugee population of 21 million is just 0.3% of the population of the planet. Amnesty International believes that it is possible, if states will share the responsibility, to ensure that these people who have had to flee their homes and countries, though no fault of their own, can rebuild their lives in safety elsewhere.

Amnesty International is campaigning for much greater responsibility sharing amongst states and for greater protection of the rights of refugees around the world. The concept of responsibility sharing is rooted in international human rights and refugee law. States have obligations to assist each other to host refugees, and obligations to seek, and provide, international cooperation and assistance to ensure that refugees can enjoy international protection. The following sections set out Amnesty International's proposals.[7]

A. Develop a Mechanism to Share Responsibility

Amnesty International believes that states' respective contributions to refugee responsibility-sharing should be far more equitable, based on an objectively defined capacity of the state to host and assist refugees. However, this is not happening. While a small number of countries host millions of refugees, many countries provide nothing at all. Responsibility sharing will never be a reality until there is a proper basis and structure to guide states on what their fair share of responsibility looks like.

Amnesty International is proposing a fundamental reform to the way in which states share responsibility. The proposals of Amnesty International are simple:

a. Introduce a system that uses relevant, objective criteria to show each state what their fair share looks like.
b. Then use these criteria to address critical dimensions of the current global refugee crisis.
c. The proposal focuses on two key dimensions of the global refugee problem: resettlement of vulnerable refugees and alleviating pressure on host states that receive very large numbers.

According to Amnesty International states' respective contributions to refugee responsibility-sharing should be proportionate to an objectively defined capacity to host and support refugees. National wealth (for example, GDP or GNI),

[7] *Id.*

population size and unemployment rates are all factors that affect a country's ability to host and integrate refugees. While states might add to or modify these criteria, and assign different weighting to each one, they should focus on agreeing a relatively small number of relevant, broadly applicable, common-sense criteria that enable responsibility-sharing.[8]

B. Guaranteed Full, Flexible and Predictable Funding For Refugee Protection and Meaningful Financial Support to Countries Hosting Large Numbers of Refugees

Amnesty International is calling on states to increase their contributions to UN inter-agency humanitarian appeals for refugee crisis situations, and to publish annually the amounts they commit and disburse.

In the case of countries hosting large refugee populations, states should also provide bilateral assistance – both financial and technical support, depending on the host country's needs – to enable the host state to provide support to refugees and asylum-seekers, including ensuring access to adequate shelter, food, health care and education. The extent of such bilateral assistance should also be published annually.

Although a flexible approach to responsibility-sharing may allow states to contribute in different ways to a common response, financial support to the countries hosting large numbers of refugees and asylum-seekers in times of crisis should not be considered as a substitute for, or come at the expense of, programmes to accept people in need of protection, such as: contributions to resettlement; accepting the transfer of refugees from countries that have exceed their ability to cope; or the admission of asylum-seekers at the border. Wealthy countries cannot avoid taking their share of the responsibility for hosting and assisting refugees by paying other countries to do so.[9]

Following Amnesty International, World Bank on December 17, 2019 announced upto $2.2 Billion for refugees and host countries over next three years from July 2020 to June 2023. The World currently has more refugees that at any time since World War II. Around 85 percent of the 25.9 Million refugees globally are hosted by developing countries, and three quarters of refugees are still displaced, which

[8] *Id*.
[9] *Id*.

can deeply impact on the host countries. World Bank has taken this as long term investments that address the needs of both refugees and the communities that host them is a critical part of the long-term solution to this growing refugee challenge.[10]

III. Relevant Fields of International Law

A. State Responsibility

In addition to a focus on the rights and duties of the host state, it is essential that such issues be linked to various fields of international law so as to make it possible to seek out specific legal rules that relate to the situation. The question of the origin of the refugee, for example, is related to the framework of state responsibility. [11]

The concept of State responsibility is as old as the human civilization. It has been the perennial responsibility of the State to protect the life and liberty of its citizenry. Today an individual has become central to the entire human rights discourse and is being regarded as a subject of International Law. Moreover, national boundaries are losing their meaning. Consequently, a new world human order is being emplaced. The human rights of all individuals including that of refugees have become a polemical debate heralding a new premise whereas state concerns and individual rights are at loggerhead with each other. In this conspectus, it is incumbent upon the state to reconcile this paradox in an age of transnationalisation of human rights and civil liberties. Asylum countries are not as much responsible as country of origin. Thus, country of origin should directly be held responsible for the refugee flows and it is the responsibility of the refugee generating state not to create problems of galling proportions for the other states as it is contrary to the notion of a civilized state. The responsibility of the country of origin is higher than the responsibility of state of reception under the International Law.[12]

B. Responsibility of Origin States towards Host States

When looking into the issue of responsibility of a State of origin towards receiving States, one should from the very outset draw a distinction between States that

[10] World Bank Report 2019 (Mar. 12, 2022, 09: 15 AM) https://www.worldbank.org.
[11] *Id*.
[12] Nafees Ahmed, Refugees: State Responsibility, the Country Of Origin and Human Rights, 10(2). APJHRL,1, 1-22 (2009).

have suffered tangible injury by being burdened with having to take care of a substantial group of people from the relevant country of origin, and other countries that are not directly affected but may make representations and raise claims as guardians of international legality. [13]

States Directly Injured

As already pointed out, claims under the legal heading of State responsibility presupposes in the first place that a breach of an international obligation has occurred at the hands of the State. Pursuant to the fundamental principle of sovereign equality, each State must respect the sovereign equality of its neighbours. If it pushes large groups of its own citizens out of its territory, fully knowing that the victims of such arbitrariness have no right of entry to another country but will eventually have to be admitted somewhere else on purely humanitarian grounds, it deliberately affects the sovereign rights of its neighbours to decide whom they choose to admit to their territories."[14]

State Acting as Guardians of International Legality

Even States that have not directly been affected by a flow of refugees may have legal claims against the State of origin. What matters is the fact that according to the authoritative pronouncement in the Barcelona Traction case[15] every State has legal standing to act - in some form - for the protection of basic human rights that have been breached. Generation of refugees is of course not an element of the indicative list given by the ICJ, and it would not fit therein. The criterion chosen by the ICJ is that of particular gravity. Hence, everything depends on the specific circumstances. If, for instance, a government engages in a policy of genocide, thereby terrorizing the members of the persecuted group and inducing them to flee abroad, every member of the international community may be considered affected.

According to Article 5 of Part II of the draft articles of the ILC on State responsibility, in case of a violation of a human rights obligation under customary international law or if the breach attains by its seriousness the quality of an

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[13] *Id* at p.14.
[14] Luke T. Lee, The Right to Compensation: Refugees and Countries of Asylum, 80 AJIL 532, 532-567 (1986).
[15] ICJ Report, 1970.

international crime, all other States are to be considered injured; in case of a human rights obligation based on treaty law, all other States parties. This gives them legal standing to participate in the enforcement process.[16]

Responsibility of Origin State towards the International Community

In more than one occasions the General Assembly has stressed that flows of refugees unleashed by one country affect the entire international community.[17] Indeed, this simple truth finds confirmation in the fact that persons having lost the protection of their home State must be given a place to stay, food, shelter and medical care. To assist national governments in performing this task, the UN has created the office of the UNHCR, which for its part requires to be financed by the members of the international community.

In order to implement the responsibility of the State of origin, the international community can make use of the powers of the Security Council, provided that the requirements for action in accordance with Article 39 of the UN Charter - a threat to or a breach of the peace or an act of aggression - are met. Intervention by the Security Council can serve in particular to stop the actions that have set in motion a mass exodus. Almost unchallengeable in theory, this conclusion is hard to translate into concrete practice. Except in the case of the Kurds of Iraq, the Security Council has never taken the view that to generate a flow of refugees may constitute a threat to international peace and security.[18]

It goes without saying that the international community has additionally a vivid interest in recovering from a State of origin the costs it has defrayed for taking the requisite measures of protection. First of all, recovery would help refill the budget of UNHCR, which is constantly under threat in as much as it rests totally on voluntary contributions by interested States. On the other hand, if governments had to realize that money spent for the benefit of refugees were recoverable from them, this might act as deterrent in critical situations where fundamental policy

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[16] VERA GOWLLAND, DEBBAS (ED), THE PROBLEMS OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW 66 (Martinus Nijhoff Publishers 1996).
[17] *Id*.
[18] UNGA Resolution, 688, (1991), Preamble para 3.

determinations are being made. In law, a good case can be made for a claim to reimbursement.[19]

Since its inception back in the 1920s refugee law has considerably and invariably been perceived as a special branch of international law addressed almost exclusively to potential asylum countries. In particular, the Geneva Convention of 1951 on the Status of Refugees sets forth an elaborate regime of legal rules that create duties for States Parties having received refugees are being faced with demands for admission. Thus, the country of origin, which has set in motion the tragic sequence of events, is an essential - and even the most important - actor in the complex triangular relationship whose other elements are the refugee and the receiving States" If it behaved in consonance with current human rights standards, the whole problem would simply disappear.[20]

In this context, it is necessary to determine whether in fact the origin of the refugee came about as a result of some kind of wrongful act on the part of the territory from which the refugee came. If so, the question can be looked at in terms of the framework of the Articles of State Responsibility. Furthermore, this framework not only requires that responsibility should be determined, but also that there be a consideration of the consequences of responsibility.

Liability with Accountability

The other side of state responsibility, which has also been explored in the refugee issue, is the aspect of liability. The liability question is complicated because responsibility, as such, does not arise from the initial wrongful act, or even the causes of the refugee flow, but rather from the damage caused to the host country. States have a duty to ensure that any developments on their territory do not affect or create damage to other states, hence the thin line between a wrongful act and liability. Nevertheless, if one takes such a perspective, the damage aspect becomes very important and, thus, the causal effect must be taken into consideration as well. This prompts the question of whether it is possible to link

[19] Nafees Ahmed, Refugees: State Responsibility, the Country of Origin and Human Rights, 10(2). APJHRL, 1, 1-22 (2009).
[20] *Id*.

the damage (e.g. economic and political burdens, the host state's opening itself up to incursions, etc.) to the refugee flow itself.[21]

State responsibility is not the only possible basis for a legal claim to compensation. One could also resort to objective liability in the sense that a State of origin, whatever its human rights record, is duty-bound to repair the damage caused to other States by a massive influx of its nationals into, their territories. Some authors have suggested that the Trial Smelter case[22] could be used as the starting point for this approach.[23]

Of these two aspects of state responsibility, the liability aspect has been criticized by refugee lawyers as implying a conception of refugees as a type of pollution. Conversely, the damage aspect has been explored in international law from the perspective of the environment and environmental damage. Moreover, if the situation has involved conflict between the host state and the refugee-producing state, it is necessary to look more closely at a different field of international law, one that offers a framework for addressing the post-conflict situation, reparations, etc.: namely, the framework of humanitarian law.[24]

Humanitarian Law

The framework of humanitarian law offers guidance with respect to situations in which conflict has occurred between the host state and the refugee-producing state. Apart from the original act that created the refugees, refugees can also be generated by the conflict itself so that the host state ends up having its own quota of refugees generated by the conflict, thus creating a set of duties for the host state. The refugee framework describes these duties and considers whether or not during negotiations refugees should be returned or only when conditions are stable. There are also additional duties under Human Rights Law relating to the mass expulsion of aliens. It becomes useful, then, to conceive of refugees as

[21] Refugees and host countries in international law, report of a consultation workshop held in Minster Lovell on 7-8 Sep 2002, organized by the Royal Institute of International Affairs and The Centre for Lebanese Studies.
[22] Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941).
[23] Coles, G.J.L., State Responsibility in Relation to the Refugee Problem, with Particular Reference to the State of Origin 4-8 (Geneva 1993).
[24] Refugees and host countries in international law, report of a consultation workshop held in Minster Lovell on 7-8 Sep 2002, organized by the Royal Institute of International Affairs and The Centre for Lebanese Studies.

wearing many hats simultaneously: refugee individuals under human rights law and aliens under aliens law. Each set of laws entails its own set of duties. Aliens Law highlights the question of protection and whether the host state can pick up the claim of the refugees.[25]

Treaty Law

As part of the negotiation process, what role can host states play? How do they fit into the settlement of the dispute itself? Such questions call attention to the framework of treaty law. Because the position of the host state in the negotiations affects the situation, are they third party to an, eventually, bilateral agreement? To what extent can the negotiators affect the rights and obligations of third parties or the negotiating process? Do the rights of host states remain the same whether or not the refugees on their territories have been accepted? The host state can also be a party to the negotiations if a UN process has taken over, resulting in the number of negotiating partners being extended and the host state acting as a member of the international community. The international community also has its own rights and duties. What its position is in an eventual dispute settlement, either bilateral or multilateral, makes an important difference. It is also important to identify the constraints on the negotiators arising from the host state positions.

As to the particular forum used, different forum may be explored for different questions depending on whether the host state and the refugees are engaged in a set of bilateral negotiations or whether the host state remains part of a larger multilateral process. There are also judicial forum that could be utilized like the International Court of Justice (ICJ), a logical forum.[26]

IV. Right of Host State to be Compensated by Origin States

Within the broader context of international law, the origins of a refugee situation – in particular in cases when these origins involve any breach in international law – affect the positions both of host states and of the states from which refugees are fleeing. It is within this framework of traditional international law that the issue of Palestinian refugees and host countries must be understood. With regard to the question of the rights of host states, it is helpful to take an indirect approach because the rights of host states are influenced by a consideration of the causes of

[25] *Id*.
[26] *Id*.

the refugee situation and the circumstances surrounding it. Not all refugee flows have the same sorts of origins (e.g. volcano, war, famine), and therefore the specific cause of the refugee flow may affect the legal rights and duties of both the states from which the refugees are fleeing and the states in which they are arriving.[27]

A. Duty of the Host State to Receive the Refugees

This question should be considered against the background of the traditional rules of international law concerning states' rights with respect to the reception of individuals. The general rule assumes that the state has a duty to receive on its territory those of its own nationals who have been excluded from other countries. Conversely, the state does not have a duty to receive aliens into its country – such a decision remains a matter of choice. This distinction has an effect not only on the initial duty of the state to receive the refugees but also on the consequences that follow a state's acceptance of refugees onto its territory.

Once a host state has accepted refugees onto its territory, it becomes privy to a bundle of assorted rights. First, the host state has the right to require that the state from which the refugees came accept the return of the refugees. This 'right of return' consists of two specific elements: (1) the right against the expelling state that it should take the refugees; and (2) the right against the individual to expel him/her back to the state from which they came. Thus, the right of return can be exercised at the state level as well as in relation to the individual.[28]

Besides having the right to return refugees to the countries they came from, the host state has the right to require compensation for (a) the damage incurred by the individual refugees, who have suffered the upheaval of displacement and individual losses; and (b) losses incurred by the state itself, such as the operation of refugee camps, infrastructure costs, and other such costs that the presence of the refugees has caused. In this context, it is possible to see the link between such compensation and the initial legality or illegality of the movement of the refugees in the first place.

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[27] Refugees and host countries in international law, report of a consultation workshop held in Minster Lovell on 7-8 Sep 2002, organized by the Royal Institute of International Affairs and The Centre for Lebanese Studies.
[28] *Id*.

In addition, there are two complicating factors to be considered:

1. 'Rule of nationality of claims': For a state to put forward a claim in respect of damage to an individual, the individual must have the nationality of the state putting forward the claim. In addition, the Rule is usually regarded as requiring not only that the claimant state is the state of nationality at the time it put forward the claim but also that it was the state of nationality at the time the loss was suffered.

2. Voluntary acceptance of refugees: Another issue to take into consideration is whether or not the host state's rights remain the same if the host state has voluntarily accepted the refugees into its territory (as opposed to doing so in pursuance of a duty). Or, in other words, if one allows someone into one's house, can the host be said to be voluntarily accepting responsibility for what the guest may do in his house?

The final set of questions for which the international legal framework provides a necessary perspective relates to the modalities of pursuing whatever remedies one might want to pursue. We must draw a distinction between states that have concluded treaties relevant to that question and others for which no relevant treaties exist. For example, there is a provision in the Jordanian/Israeli treaty providing for the establishment of a Claims Commission to deal with financial claims. Even when there is a treaty, however, unless the treaty states that only its own procedures apply, there are a number of other procedures available in international law that one must examine to determine which, if any, could produce results or would be appropriate channels through which to seek results. Such procedures vary widely from negotiation up to the International Court of Human Justice.

This is not to say that only one procedure should be considered to deal with the entire problem. It would be reasonable to deal with certain aspects by way of negotiation (i.e. political problems) and others through arbitration. All issues need not be solved in the same way. Lastly, any procedure trying to seek remedy must also take into account the question of a timetable. Not all procedures available in the international legal framework are expeditious and such variations should be taken into account when determining how to proceed.[29]

[29] *Id*.

B. The Implications of the Right to Compensation

The fact that there are millions of refugees may lead one to wonder whether an individual right to file claims for compensation would be available only to the few wealthy enough to obtain legal counsel and pay for the costs. Even if the costs were minimal, there might well be too few courts to handle all the cases. More importantly, compensation practice might jeopardise the fundamental right to asylum through its emphasis on State of origin responsibility. Garvey writes that 'freedom of emigration from one's own nation is a fundamental human right and a norm of customary international law', and 'any inhibition of refugee flow at the source suggests violation of the refugees' right to seek and enjoy asylum."

Enforcement of the right to compensation could lead to the State of origin attempting to contain those it was persecuting, rather than to a fundamental change in the behaviour of the State of origin and to greater respect for human rights.

Finally, there is the question whether compensation in any way affects or changes the deeper systematic flaws in society which gave rise to refugee flows. Assuming that refugee flows are the result of human rights abuses, would the enforcement of compensation obligations only reinforce the status quo of fundamental injustice, instead of changing the root cause of the problem? Perhaps the enforcement of the right to compensation is in itself only an ameliorative solution for a much deeper problem which requires fundamental political change and punishment of the perpetrators on the part of the State of origin. For example, in Chile, the Rettig Commission was established by Pinochet's new government to establish 'reconciliation, truth, and justice' by investigation of human rights abuses, publishing them, and giving reparation to those wronged. In this instance, 'the question of financial compensation ... is considered by many to be insulting', because many of the perpetrators and former torturers are still in power and unpunished. In Chile, monetary compensation for gross human rights violations 'is humiliating and too easy a way for the State to dispose of its responsibility." Rather than bringing justice to the victims in this case, compensation serves to merely 'cover up' the State's wrongs and to reinforce the status quo.

V. Conclusion

The thrust area of this research is to put some light on the right of refugee hosting countries as to regulate the refugee flow and to protect the right of refugees. Responsibility sharing is a core principle of International responses to refugee crises. There must be a holistic approach to international burden sharing that will enhance the protection of refugees as well as the host community. It is very significant to guarantee full, flexible and predictable funding for refugees protection and meaningful financial support to countries hosting large numbers of refugees.

Right to compensation of the refugee hosting countries as a means of enforcing justice and of preventing future refugee flows is the prime concern of this study. Looking at the gigantic complexities in legal implementation, evaluation, and application of the right on behalf of refugees and host States, it is difficult to be hopeful about this approach as a new, effective weapon for large scale prevention of mass refugee flows. However, this does not mean that the right should not be developed. On the contrary, in principle and theory, the right and duty of compensation in the refugee context are justified and should be further developed. The enforcement of the right to compensation would be strengthened if the act of producing refugees were to be formally declared as an international wrong. The right to compensation itself will not be able to deal with the root causes of refugee flows which are political and responsible largely to fundamental abuses of human rights by the States of origin. Yet, institution of the right to compensation as a legal norm in the context of the current refugee movements is one safeguard, and may serve as a political 'check' against future injustices committed by nation-States against their own citizens. The pressing need for preventative measures to be applied towards refugee flows calls for the implementation of the right to compensation in international law and for the political will to enforce it.

The Law on Acquisition of Indian Citizenship - A Godsend Avenue or Quagmire for Refugees and Migrant Population in North East India

Sriparna Rajkhowa[1]

Abstract

Citizenship is associated with certain prized rights on those conferred with on those legally qualified through the process of acquisition. This is all the more so in respect to refugees and stateless persons. Despite India lacking in an effective legal regime on refugees and stateless persons, such persons have been able to obtain citizenship. The author addresses the issue of citizenship in a holistic manner both from a theoretical perspective and implementation of the law through the application of the domestic legal regime which has been subjected to amendment from time to time.

The issue is being addressed in the context of domestic and international imperatives also explores the pragmatic aspects and weaponisation indulged in.

The principle of jus soli and gradual acceptance of the jus sanguinis being invoked has facilitated the process, befitting a section of the refugee population across the country and the North Eastern states in particular. In addressing the issue, apprehensions and regional compulsions shredded with historical factors have also been taken into account in the context of influx and delicate balance prompting concerns and contestations on the issue. These and other relevant and related concerns having the propensity to counter balance the fragile socio-cultural factors have also been addressed.

Key Words: Citizenship, Refugees, Statelessness, Illegal Migrants, Registration, Naturalisation

I. Introduction

India post partition has been thriving as a peaceful and successful democratic entity. Into 75 years of regaining independence from colonial rule, the state has

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witnessed progress and development, particularly viewed in the context of her immediate neighbours in South Asia. The resilience witnessed in the wake of the tragic events during partition depicts much of the ancient cultural ethos, customs and her rich traditions.

The event leading to partition forced many to relocate on account of communal frenzy. Their faith, religious beliefs and language led to much sufferings, harbouring bitter memories. Many among them were reduced to penury having to leave behind their hearth and homes, some even surviving on the indescribable scars of traumatic experience. Many were witness to ghastly killings of their near and dear ones. Those who considered others as brethren suddenly had to adjust in new settings[2] adopting India citizenship, embracing feelings of one ancient nationality.

Post- independence, the country came to have international borders surrounded by seven countries and significantly impacted by regular inflow of people[3] who migrated from these places to India, on different grounds. Yet, during those days of much hatred, a silver lining was witnessed, in that humanitarian concerns prevailed, leading to accommodation of people during partition who became refugees overnight.

The situation of influx continued during the initial years of independence and much beyond, posing much concern for the underlying designs of spreading unrest and proselytization. One among the reasons for cross border flow of peoples in huge numbers happened to be the porous landlocked and riverine borders, especially in the North Eastern States. The ethnic identity and linguistic similarity or commonality furthered the migrant inflow. The settlers who came to Assam prior to independence from East Bengal facilitated the process.[4] Two factors in the main contributed to such illegal migration, namely, the constitutional mandate of grant of citizenship[5] and the country not being a party to the 1951 Refugee Convention.[6] Another contributing factor facilitating the

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[2] Territories falling within Pakistan.
[3]Among these, due to longstanding friendship with Bhutan and Nepal, the people from those countries however stand on a slightly different footing.
[4] The avowed aim of the Muslim League to settle more religious minorities in the state with the motive to include Assam in Paris tan through demographic change.
[5]Part II, Articles 5-11 0f the Constitution of India.
[6]Convention Relating to the Status of Refugees, 1951.

perennial inflow happened to be the lack of any domestic legislation or for that matter a comprehensive policy governing refugees or migrants. Hence, claiming migrations as legal or illegal refugees became a matter of debate for quite some time.

It is in this context that the issue of grant of citizenship prompted much debate and discussions involving wide ramifications. Therefore, the author ventures to discuss and analyse the provisions for grant of citizenship to people from other countries, who claim to be refugees or having the character of asylum seekers or stateless persons.

Towards enabling a proper appreciation of diverse aspects of citizenship and the legal and constitutional provisions governing grant of citizenship, a brief reflection is ventured into. The following paragraphs therefore intends to address the conceptual and theoretical dispositions governing citizenship besides addressing the constitutional mandate as incorporated by the founding fathers.

II. Conceptual Position

The concept of citizenship is regarded as being quite complex; without any definitive explanation, it bears much significance in the contemporary world,[7] therefore identified philosophically as a powerful idea The claim for citizenship or the status of being a citizen, apart from clothing and facilitating special treatment as a full member of the society, is considered an enabling right in itself, particularly in the legal, political and social sphere. Besides providing one a prized identity , it arms the individual with state protection, both within and beyond frontiers. Apart from xenophobic attitudes in Western countries[8]the concept extends from migration, residence to the ballot, besides issues of polity like equality of treatment of citizens. Though identity may be capacious in certain jurisdictions, its application however remains narrow.

However the concept of it being based upon status in the Greek *polis*[9] or Roman[10]*res publica* has given way to a much wider concept of citizenship,

[7]Veera Ilona Iija, An Analysis of the Concept of Citizenship: Legal, Political and Social Dimensions, Masters Thesis, Dec, 2011.
[8]*Ibid.*
[9] Said to have first emerged between 600-700**.**
[10] Emerged around 500 with citizenship being recognized to have a legal status.

providing for a certain status in countries governed by the rule of law. It therefore mandates for abiding by certain obligation towards the process of availing the appurtenant rights. Citizenship has been stated by Avishai Margalit and Joseph Raz as a "[q]alification for membership … usually determined by non voluntary criteria. One cannot choose to belong. One belongs because of who one is".[11]It brings about a sense of patriotic feeling to the society they belong to. This becomes very much pronounced in case of war, invasion or unrest in a country as evidence of patriotic feeling and identity of being a national, very much expound themselves.

III. Broadening Horizon

Now- a- days the concept of citizenship is associated with gaining membership by birth, though most nation-states have some alternative mechanisms through which the membership can be acquired.[12] It may be stated that to a certain extent the concept of citizenship depends on the manner the different aspects are perceived. The liberal concept of citizenship draws within its fold the actualisation of social justice based on equality, in the context of a colour blind law, drawing in the concept of individualism. However, a new idea has emerged through the concept of global citizenship evolving the concept of inclusion and wider community identity that may be identified with the comity of nations.

A political scientist or a sociologist may address the concept of citizenship through another prism. It is viewed as a framework associated with individual autonomy and political democracy with a connection between present times with the ancient era.[13] Therefore, considering the present objective of naturalisation, the conceptual aspect as discussed above is considered to be sufficiently delineated in the present context.

IV. The Theoretical Underpinning

From the days of Aristotle to the present, much light has been thrown on significant trends that have taken place on the concept and theoretical underpinnings. At times this has been very much pronounced, on other occasions

[11]Margalit, A. & J. Raz, *National Self-Determination,* THE JOURNAL OF PHILOSOPHY, 87 (9) 439–461, at 447. (1990).
[12]*Id* . at 5.
[13] A. Acharyaa , Citizenship in a Globalizing World, 2012, 27, Pearson India Education Services Pvt. ltd,

much subtler. The difference and contestations become perceptibly visible from the different theories having unique foundational basis. In this regard the aspects of policies and principles, though the associated objective of goals and morals as propounded by Dworkin throw much light.[14]Despite their significance the theoretical reflections are being touched upon in brief, as the prime objective of the present endeavour is to analyse the legal and constitutional provision related to process of acquisition of citizenship through naturalization. Leading theoretical foundations have been identified with that of the Marxist concept,[15] that of the German philosopher Hegel's idea extending to the family, the civil society and the state, apart from the liberal theorists associated with the Western liberal traditions along with the fundamental rights and liberties in a sovereign state. The liberals came to be identified with the utilitarian's Bentham and Mill who propounded the concept through individual liberty, political participation and apportionment of property. Other theories identify citizenship through the concepts of political, social and legal points of view or for that matter aspects of multi-cultural citizenship or feminist concept which are kept outside of the present purview.

The evolving nature of citizenship, particularly in liberal capitalist democracies has been highlighted by T H Marshall.[16] His authoritative exposition finds adequately expressed in his publication on 'Citizenship and Social Class' wherein he traced the evolution of the concept as understood in a capitalistic state based upon his thesis that such capitalism evolved and underwent a transformation over time into social system based on class structure providing for democratic citizenship.[17]This according to him changes and adjustments was called for to reduce class inequity as the concept of citizenship as earlier propounded became mutually inconsistent.

The impact of the different theories has influenced the process of the development of the citizenship debate. Yet, its importance emerges from the legal recognition, for in the ultimate analysis the assertion of the right depends on the extent of

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[14] Ronald Dworkin, *Taking Rights Seriously*, 83,1977 Gerald Duckworth &Co Ltd.

[15] True citizenship can never deliver in a society driven on class distinction or division. Identifying liberal democratic citizenship to be bourgeois Marx advocated a social revolution aimed at class abolition.

[16] *Supra note*.6.

[17] *Id*.

recognition by the legal regime. It is primarily through law that the rights and obligations relative to citizenship between the state and its citizens get recognized and promoted in facilitating substantive equality; yet aspects of exclusion are witnessed in many jurisdictions. It is in this context that citizenship and the prevailing rule of law determines that actuation of this prized legal right which in itself happen to be a facilitative right, rather providing for a fulcrum of rights.

Dispensations confronted with crucial and critical issues very often have to respond to situation in crisis ridden societies, at times plagued by ethnic, social divide. Coupled with challenges related to minorities, religious and appurtenant issues require prompt and pragmatic response. In such situations application of the citizenship laws pose challenges that call for practical measures in providing for equal treatment in contrasting situations. This is all the more crucial as manifestation of other rights depend on the true implementation or exposition of the citizenship rights. At times the disconnect with the rights of non-citizens or those citizens on the wrong side of the law have the propensity of leading to humongous issues , especially at the international level.

V. Pathways to Citizenship

A person may acquire citizenship primarily under four or five situations. The modes depending on the constitution and laws of a sovereign entity may be associated with the place of birth or that of sanguinity by blood. It may either be by naturalization or through matrimony. In addition certain countries provide for grant of citizenship through investment, also identified as economic citizenship.

A. Citizenship by *Jus Soli*

Citizenship by birth is undoubtedly fairly simple with only circumstances or factors like that of parents being diplomatic representatives, ones born to enemy forces in hostile occupation of territory or with different nationalities normally being excluded from the process of grant of citizenship at the time of the birth of the infant. There may be a situation where a person resides temporarily in a state without owing any allegiance; although being akin to a citizen without being so. Similarly the situation may be somewhat complex in the event of determining

the status of asylum seekers and refugees.[18] An alien can obtain citizenship later on by fulfilling the stipulated conditions of the country concerned.

The significance of the principle of *jus soli*, 'meaning right of the soil' referred to "birthright citizenship" which is identified through birth within national boundaries, or subject to jurisdiction of the state, lies in ensuring that nobody is to be considered as being stateless *de jure*. In the United States of America it "allows for a more expansive legal inclusion of racial and ethnic immigrant minorities into the national community.[19] It therefore is considered to be the preferred mechanism in recognizing citizenship, irrespective of the citizenship of parentage. However, it becomes imperative to ensure careful recording of birth as in situations it may become very essential to a claim for citizenship or identity. Hence, the need for proper documentation emerges. However, *jussoli* should not be precarious as in that event as per international law it becomes well neigh possible to prove statelessness.

B. Citizenship by *Jus Sanguinis*

In certain countries, in contrast to *jus soli* citizenship of a child is determined through parentage. This is known as *jus sanguine*, also termed as derivative citizenship, where it is determined on the basis of blood relation. Citizenship is traced to blood relationship, that is through parentage or blood decent. In such situations citizenship is determined through the generational lineage. In certain jurisdictions factors like domicile establish the claim of citizenship. In situation where parents are not married certain difficulties surface and is addressed according to the law of the country concerned. In a number of jurisdictions in such situations the citizenship of the child is considered on the basis of the mother's citizenship, primarily based on the nativist policies reflecting the gender asymmetry.

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[18] Subhram Rajkhowa & Sriparna Rajkhowa, *Citizenship Through Naturalisation Qua Refugees and Stateless Persons, Gauhati University Journal of Law*, Vol Xiii,7, 2019-20.

[19]T. RICHARD & IV MIDDLETON ,*THE OPERATION OF THE PRINCIPLE OF JUS SOLI AND ITS AFFECT ON IMMIGRANT INCLUSION INTO A NATIONAL IDENTITY: AN ANALYSIS OF THE UNITED STATES AND THE DOMINICAN REPUBLIC*, VOL 13, NO 1, RUTGERS RACE AND THE LAW REVIEW, 69-96, FALL 2011.

C. Citizenship by Naturalisation

A person may obtain citizenship through the process of naturalization. Under the extent law of a country it results in the change of political status of an individual that may be migrant centric or relate to migrants in limbo. Therefore, it may be termed as the legal process that helps in facilitating the right to acquire citizenship by non- citizens .It also has the propensity of bearing international ramifications. This may be possible on the event of fulfillment of certain conditions or qualifications, though at times grant of citizenship may be belied due to inherent policies of exclusion in the face of limited choice.

Naturalisation has come to be identified in an increasing manner with immigrants, mostly with respect to lawful permanent residents as in the case of the United States of America. It therefore vastly impacts upon the lives of immigrants through permissible standard administrative processes, meeting legal naturalization requirements determined by the state. In the case of India, the claim may be set forth by a foreigner, normally not being an illegal immigrant with the requirement of being an ordinarily resident for 12 years. The purpose of such naturalisation facilitates immigrant integration. Yet the recent developments in the country that will be alluded to later, reflects the profanity of conflicting concerns of impacting the delicate balance, despite the state nuanced perspective. In other words, the feeling of structural imbalance raises delicate issues prompted by migrant centric concerns like acculturation and social cohesion. Of course, the policies of the state determines the rates of naturalization. It can be said to be the culmination of state control over migrants' access to citizenship that according to Carens[20] constitute the most secure legal status for migrants and significantly their life chances and those of their descendants.

D. Citizenship by *Jus Matrimonii*

Jus matrimonii, that is citizenship by marriage appears to be quite normal but at times certain issues emerge. Citizenship on account of marriage depends upon the laws prevailing in respective countries. Earlier in respect of foreigners it was the recognized practice that upon marriage the woman was identified with the nationality of her husband. This was recognized on the basis of reciprocity

[20] J H Carens, *Aliens and Citizens: The case of open borders*. THE REVIEW OF POLITICS 49(2): 251-2 73, 1987.

resulting in loss of her original nationality and consequent rights in her country of origin. In certain instances, it is provided that on marriage between couples belonging to different countries, the citizenship of the husband is recognized, whereas in other jurisdictions, the wife may have the option to continue with the citizenship of origin. However, in most cases, the person moving into the said country, particularly after the second world, could seek to obtain citizenship as per established procedure of naturalisation as a consequence of marriage. Yet some states provide for automatic conferment of nationality consequent upon marriage. With regard to *jus matrimonii*, Robin Cohen has observed as follows:

> For some countries, automatic citizenship is conferred on the production of a marriage certificate. For others, spousal possibilities for a foreign partner include easier paths to unfettered residence rights or an accelerated period of naturalization. However, in many jurisdictions there is no recognition of gay marriages or civil unions, let along looser arrangements like partnering or co-habitation agreements.[21]

Perhaps the most important challenge to the matrimonial principle is the criminalization of individuals who have married for the purpose of evading immigration and naturalization laws.[22]

E. Citizenship by Investment

Yet another mode of acquiring citizenship is by investment as an alternative opportunity. This can also be termed as economic citizenship or Olympic certificate. This in a way amounts to sale of citizenship to the global elite, many of whom scout for favourable tax regimes in return for investment. According to Kalin such countries targets individuals with exceptional skills, funds or talents, or with a particular religious or ethnic belonging.[23] Such a provision exists in some countries that are aimed at capital contribution. This however attaches certain conditions. In respect of a European country such grant provides the additional privilege available to members of Schengen countries. However certain

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[21] *Citizenship: from three to seven principles of belonging* , Vol. 28, Issue 1, JOURNAL FOR THE STUDY OF RACE, NATION AND CULTURE, , 139-146, 2022.
[22] *Ibid.*
[23] Christian H Kälin, *"Facilitated Naturalization and Citizenship-by-Investment." In Investment Migration Programs 2021 – The Definitive Comparison of the Leading Residence and Citizenship Programs*, 20–29. New York: IDEOS. [Google Scholar].

countries require relinquishment of citizenship of their countries of origin. Many of the countries follow a very strict due diligence process requiring an ability to contribute economically but ensure that such applicants have a clean record without any criminality.

V. The Constitutional Provisions Relating to Citizenship in India

Keeping in view the objectives at hand, the pivot around which one needs to gain a proper perspective of the grant of citizenship is the process of naturalization in the context of refugees. Therefore, a look at the provisions of the constitution and relevant laws are considered to be necessary. In this regard it would be instructive to touch upon in brief the deliberation of the Constituent Assembly in the context of conceptualization of the relevant law.

The Constituent Assembly was confronted with the question of citizenship and divergent views were placed on the draft provisions. [24] A reading of the proceedings reveal that prior to arriving at a consensus, a number of drafts were presented. Aspects like religious, ethnic and hyper-nationalistic considerations led to contested debates , primarily relating to article 5, for its lack of exclusive and preferential provisions on religious lines regarding the declaration as to who shall be the citizens of India.[25] Dr P S Deshmukh proposed introduction of a provision laying down that "every person who is a Hindu or a Sikh by religion and is not a citizen of any other State, wherever he resides shall be entitled to be a citizen of India"[26]but the same was rejected. Consequently, Part II of the Constitution stood adopted.

VI. The Modus Operandi-Dynamics and Discomforts

The Modus Operandi for obtaining and acquiring citizenship came to be adopted sometime later based on the relevant provisions in the shape of articles 5 – 11 of the Constitution. Yet, the it is considered essential to refer to the provisions in brief. It has been provided that a person born and resident in India subject to

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[24] The debates continued from 10th to 12 August, 1949. However, all the 21 amendments moved to draft article 5 and 6 were negatived.

[25]Citizenship Debate in the Constituent Assembly (accessed on 10.6.2022 at 10.17pm) *https://iasbaba.com/2021/12/citizenship-debate-in-the-constituent-assembly/.*

[26] *Ibid*.

fulfillment of certain condition could be a citizen of India.[27] So too, persons resident in India whose parents were born in India could be a citizen.[28]Likewise persons resident in India for more than five years since the commencement of the Constitution could also become citizens of the country.[29] A further provision related to those persons resettling to India from Pakistan after 1st March, 1947 as well as persons migrating to India before 19th July, 1948 or those who came afterwards and been resident in India.[30] Moreover it has been provided that in respect of persons resident outside India, either of whose parents or grandparents were born in India, could also be regarded as Indian citizens.[31]

From the above it is very much evident that people of the identified categories who migrated to India at the relevant time could also become citizens of India. This has obviously been provided due of historical aspects arising out of the complex nature of mass migration occasioned by partition. But the details were required to be formulated through legislation that only came about in the year 1955.The interregnum witnessed a few measures. By way of illustration mention may be had of the Immigration (Expulsion from Assam) Act, 1950. This piece of legislation was occasioned by the alarming gravity of the situation in Assam resulting from immigration of foreigners to Assam. As a response to the alarming situation the Act was enacted enabling deportation of such illegal immigrants. It provided for wide powers to official to initiate action ordering the expulsion of certain immigrants whose stay in Assam was considered to be detrimental to the interest of the general public of India or to some specified categories of people.[32]It also contained provisions for penal provisions against persons harbouring such immigrants. The Act delineated a distinct demarcation between undesirable immigrants and somewhat desirable immigrants.[33] Another important step taken in respect to the state happen to be the preparation of National Register of Citizens in the year 1951.

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[27] Article 5 (a) of the Constitution of India.
[28] Article 5 (b).
[29] Article 5 (c).
[30] Article 6 (b).
[31] Article 8.
[32] Immigrants (Expulsion from Assam) Act, 1950.
[33] N G Mahanta, Citizenship Debate Over NRC & CAA, 115, 2021 Sage.

It may before relevance to mention that while discussions were going on in the Constituent Assembly on the issue of citizenship Jawaharlal Nehru expressed his view in the year 1948 that granting of citizenship to migrants from Pakistan to India on the basis of some identified criteria would be impossible to be examined separately.[34] Therefore the permit system was introduced on the basis of three identified criteria.- temporary permits for a month or two, a continuing permanent that did not entitle a man to settle but remain for business purposes and the third category permitting permanent stay.[35]

VII. The Legal Landscape

Citizenship being a subject in the Union list only parliament has the competence to enact legislation on it. According, in terms of the mandate under Article 11 of the Constitution, parliament enacted the Citizenship Act, 1955. In view of its significant bearing on regulating the acquisition and termination[36] of citizenship, the salient provisions are enumerated in brief.

The law provides for acquiring citizenship by birth,[37] decent,[38] registration,[39] naturalisation[40] and incorporation[41] of territory. Section 6A[42] came to be inserted

[34] *Id*, 163.
[35] *Id* 164, Nehru during CAD, 12 August, 1949, pp 398-401.
[36] Includes provisions for renunciation and deprivation.
[37] Section 3 of the Citizenship Act, 1955.
[38] *Ibid*, section 4.
[39] *Ibid*, Section 5.
[40] *Ibid*, Section 6.
[41] *Ibid*, Section 7.
[42] Citizenship Amendment Act, 1985. Therein it has been provided that (2) Subject to the provisions of the sub-sections (6) and (7), all persons of Indian origin who came before the 1st day of January, 1966 to Assam from the specified territory (including such of those whose names were included in the electoral rolls used for the purposes of the General Election to the House of the People held in 1967) and who have been ordinarily resident in Assam since the dates of their entry into Assam shall be deemed to be citizens of India as from the 1st day of January, 1966.
(3) Subject to the provisions of sub-sections (6) and (7), every person of Indian origin who-
(a) 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
(b) has, since the date of his entry into Assam, been ordinarily resident in Assam; and
(c) has been detected to be a foreigner,

by way of an amendment to give effect to the provisions of the Assam Accord. Till 1987 the country followed the principle of *jus soli*. Thereafter, an amendment was effected providing that at least either parent was required to be an Indian citizen. The mother came into the picture as earlier no such provision was available. The law provides that subject to fulfillment of the stipulated conditions a person qualifies to seek citizenship by registration on the grounds of their Indian origin with requirement of residence in India or outside undivided India or by virtue of being married to an Indian. It has further been provided that a person can apply for citizenship through naturalization following due procedure as laid down under the Act and relevant rules. A change was effected through an amendment in the year 2003 that any child born after that year to parents, in the event of any one parent happening to be an illegal migrant would stand disqualified to be considered as a citizen by birth. Hence, the route to citizenship through illegal migration was considered a disqualification that includes a child being an off spring of such parents.

Foreigners Act adopted prior to independence continued to remain in force in determining identification of the status of such persons and being subject to deportation. Along with the Passports Act of 1967 the central government has been conferred with the power to address matters including regulating entry, exit and residence of foreigners within the country. However, in respect of Assam The IMDT Act till such time it was declared void by the Supreme Court in the Sarbananda Sonowal case eclipsed the Foreigners Act in the State of Assam. The citizenship law witnessed amendments on a number of occasions in 1986, 1992, 2003,2005, 2015 and 2019 gradually introducing the principle of *jus sanguinis*.

A reading of the developments of continued immigration over the years to the North East, predominantly into Assam with purported designs at religious and cultural invasion prompted there measures as will be evident from the debates in the Constituent Assembly and at forums presaging such discussions. Considering

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shall register himself in accordance with the rules made by the Central Government in this behalf under section 18 with such authority (thereafter in this sub-section referred to as the registering authority) as may be specified in such rules and if his name is included in any electoral roll any Assembly or Parliamentary constituency in force on the date of such detection, his name shall be deleted therefrom.

the purport of the present write-up, other by way of mention further incursion on the issue is deliberately refrained from.

In the year 2015 and 2016 notifications were issued leading to exemption of certain groups of illegal migrants from the Foreigners Act and the Passports Act and these have a significant bearing on acquiring of citizenship.

A. International Legal Regime on Refugees and Domestic Concerns

In any conflict situation, whatever be the motive or intention, it is often seen that the lives of the common people are vastly impacted upon. Although all are affected, women and children suffer the brunt of violations imperiling their lives. Such situation often leads to displacement and forced migration, people being compelled to move beyond their national frontiers. The sufferings of people of unmitigated dimensions having to leave their hearths and homes at times separated from their families, particularly during the world wars are a grim reminder of the predicament they were faced with in the face of persecution and genocide.

The world community responded by setting up the institution of the Office of the United Nations High Commissioner for Refugees as well as the Convention Relating to the Status of Refugees, 1951 through the Conference of Plenipotentiaries followed by the Protocol of 1967.Its significance lies in the universally agreed definition on Refugees, with the convention itself regarded . Dr Sadako Ogata, the then United Nations High Commissioner for Refugees,[43] termed the convention as an outstanding achievement in the field of humanitarian law that calls for international cooperation and burden sharing. Based on the principle of non-refoulment, the convention defines a refugee as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".[44] Non-

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[43] Foreword to THE REFUGEE CONVENTION, 1951 THE TRAVAUX PREPARATOIRES ANALYSED WITH A COMMENTARY BY DR PAUL WEIS, (accessed on 11, Jul, 2022 at 8 PM), *https://www.unhcr.org/4ca34be29.pdf.*

[44] Article 1 of the Convention.

refoulment, [45]the core principle considered to be *jus cogens* is based on the recognition that those facing serious threat in the country of origin should not be sent back.[46]

India is home to refugees' form Sri Lanka, Tibet, Afghanistan, and Myanmar, besides illegal migrants from Bangladesh. India is yet to become a party to the Refugee Convention[47] though it is on the board of its Executive Committee .On the other hand the country does not have a legal regime on refugees . As on 2021 the country was estimated to have around 400000 refugees with about 46000 refugees and asylum seekers in the country as on January 2022 registered with the UNHCR. Afghan and Myanmar refugees comprise the majority of registered refugees against a global projected figure estimated at 102 million people of concern including stateless and those under forced displacement.[48] Refugees account for about 30 million worldwide that comprised about 26.4 million a year back.[49] The international migrant population as per Global Migration indicators for 2021 was estimated at 258 million with 135 million women and 40.9 million children.[50] The figures are based on the figures arrived at through Big Data computation. Due to the war in Ukraine the figure is likely to be much higher this year.[51]It has been incorporated as an integral part of the global sustainable development.

Apart from the Stateless, Asylum seekers, migration of people particularly in the past was also accounted by genocide and ethnic cleansing leading to mass exodus. Migration may be attributed to various factors. These may be occasioned by porus borders, historical reasons based on migration patterns, economic reasons as well as prompted by cultural and linguistic factors. Similarly, people from theocratic stated may under compulsion have to leave their country of origin. This was very

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[45] However certain restrictions apply in case of offenders and those with serious criminal antecedents.

[46] *supra note* 17, 13.

[47] presently 128 countries are party to the Refugee Convention.

[48] UNHCR the Global Appeal, https://www.unhcr.org/globalappeal2022/ accessed on 11.6.2022 at 9.34 pm

[49]https://www.refugeecouncil.org.au/howany.refugees/#:~:text=UNHCR%20most%20recently%20estimated%20that,and%20over%2026.6%20million%20refugees. accessed on 11.6.2021 at 10.46 pm.

[50] Global Migration Data Portal.

[5151] The exact figures for the year are announced on the 20th June, every year.

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much in evidence during ancient times when power was being exercised on the basis of theocratic beliefs. All these people often initially seek refuge and later on seek citizenship in destination countries. Gaining citizenship by these categories of people are prized highly as it leads to their integration, thereby providing them with a sense of security to lead life anew.[52]

Despite a high population density and the absence of any legal regime governing refugees, the country has been granting citizenship to such people over the year through primarily the government has been fairly laid back in taking effective measures. In fact in most cases their initial refugee status very much depends on adhocism, based on merit and circumstances of individual cases, resulting in differential yardstick and treatment primarily based on a standard operating procedure in contrast to Chins and Chakmas as well be seen later. The magnitude of the problem has been occasioned due to the prevalence of low intensity conflicts and disturbed governance in some of the neighbouring countries coupled with concerns at fundamentalism and theocracy. Apart from people fleeing from any form of persecution other factors including economic migration has occasioned such influx resulting in the hosting of millions of illegal migrants. As for Nepal and Bhutan the special arrangements facilitate movement of peoples, hence do not strictly be considered as illegal migrants.

The gravity of the situation in India is accounted for refugees and illegal migrants from countries like Pakistan, Bangladesh, Sri Lanka and other neighbouring countries have their presence in India. The affinity in language, religion and culture, particularly of the Bangladeshis and Sri Lankas raise difficulty with respect to identification as many mingle with the local population avoiding the refugee camps which compounds matters further.[53] So far the North Eastern States are concerned, they are home to illegal migrants from Bangladesh and refugees from Myanmar and Tibet. The Chakmas are mostly stateless persons and have a considerable presence in Arunachal Pradesh, Tripura and Mizoram. However, the most pressing problem in the country happens to be that of the illegal migrants from Bangladesh. It may be pertinent to mention that as per draft NRC of 2019 the total number of non-citizens or illegal foreign nationals

[52] S*upra note* 17, 20.
[53] *Supra note* 17, 27.

comprise 1.9 million.[54] It is in this context the extent and expanse of the problem emerges, calling for being adequately addressed.

The existing laws of the country call for such person being detected and deported after following the due process of law. As Bangladesh denies the emigration from that country it becomes a big problem for the state to surmount the same. Addressing the issue in proper perspective calls for an adequate understanding in historical context The same is therefore being advanced in brief before addressing the issue in the context of the North East.

The influx of peoples from East Bengal during the pre- partition days continued perennially for over a century. Much was occasioned by political considerations to impact upon the population structure of the state though the purported plea was to provide for agricultural labourers. As revealed from the Census data the population in several districts new settlers gradually began to increase more than proportionately and a in a few districts they even outnumbered the local population.

The situation in Assam and other states of North East India is very much complex in relation to other parts of the country. Here, due to the international border that the states share there is an increased propensity of immigration. This has largely been facilitated by the disturbed situation in countries like Bangladesh and Myanmar. As discussed earlier, there has been a perennial migration of Muslims from former East Pakistan and now Bangladesh. This has been occasioned by geo political considerations pre-partition since the past 100 years or more. Coupled with economic migrants from the country encouraged due to better opportunities and secured shelter have found easy access. The country being a theocratic state many people belonging to the minority communities, particularly those professing the Hindu faith have had to surreptitiously cross over the borders and mingle with people speaking the same dialect, professing same religious belief. In the context of Myanmar, the failed democracy coupled with ethnic divide have forced many to cross over the porous international border. The affinity of language, ethnicity and religion to a certain extent furthered the cause of illegal migration. It has to be remembered that the before the introduction of federal structure under the

[54]Accessed on 11 Jul 2021 at 10.06 PM, https://www.indiatoday.in/india/story/nrc-final-list-how-and-where-to-check-your-name-on-assam-national-register-of-citizens-1593695-2019-08-31.

Government of India Act, 1935m Burma happened to be a part of India. The Tankhul Nagas have effective presence in Myanmar. so is the case with the Chins and Brus many of whom have been forced to cross over mostly illegally due to the persecution of the religious and ethnic minorities in Myanmar. They have affinity of cultures and customs with people across the border, particularly in Mizoram. Tripura too which is surrounded by Bangladesh on three sides have witnessed a grave problem of influx leading to a change in demography and consequently political power wherein the indigenous Kok Boroks comprise a deplorable minority. Moreover, the presence of Chakmas who migrated due to certain developments in the Chittagong Hills Tracts both prior to and post-independence of Bangladesh have made the situation of states like Tripura and Arunachal in particular much vulnerable.

The influx from the Autonomous Region of Tibet that China lays its claim upon have led the Buddhist owing allegiance to the temporal head, the Dalai Lama have crossed over to India in good numbers. Of course in their case the policy of the government of India differs from that being followed in respect of the other migrants who have come over to India. It is in the above context that the present analysis is ventured in the context of grant of refugee status *vis -a -vis* illegal migrants.

Under the law, illegal migrants are required to be deported following due procedure. In the absence of any domestic law and the country yet to be a party to the Refugee Convention and that on Statelessness, the government is found to adopt a policy of adhocism. Hence, allegation has been leveled against the government in accepting some while denying refugee status to others. A case in point relates to denial of refugee status to Rohingiyas whereas earlier Burmese nationals were considered for such refugee status. Of course, as mentioned earlier a claim of application has to be based non only exclusively on humanitarian considerations but as per the laid down or policy followed in practice. While demand are there for their repatriation, others hold the view that considering their plight in their countries of origin they be provided protection as refugees and also granted citizenship by registration and naturalization.

The situation of those having migrated long back seem to be even more perilous being either stateless or being regarded as non-citizens. Their status has been recognized under the UN Declaration on non-citizens. Despite law and order being a state subject, granting of refugee status has ramifications for the country

concerned, hence considered to be within the domain of the Central government. Hence, the authority or prerogative to grant refugee status lies with the centre.

B. The Constitutional Text

It has been stated above that the country is neither a party to the refugee convention nor that to the convention on statelessness. Yet due to the constitutional dictates under article 51 she has an international obligation to fulfil.[55] Similarly the country being bound by the International Bill of Human Rights has an obligation to promote the rights contained therein unless she has entered into any reservation Moreover there are certain provisions in the constitution that are available to both citizens and non-citizens. Such provision are therefore made also available to the migrants who are entitled to seek legal redress regardless of their status. The relevant provisions in the Constitution of India apply to the refugees in the same manner as the Indian Citizens. Article 21 of the constitution relating to the right to life and personal liberty therefore can be availed by refugees. There are provisions in the Indian Constitution that apply to the refugees in the same manner as the Indian Citizens. Firstly, it applies Article 21 to the refugees as it states the Right to life and personal liberty. It is useful to all the people whether they are citizens of India or not

Other related important constitutional provisions include article 14 that provides for the right to equality.[56] The usage of the word ‘ person’ against citizen makes the intention of the founding fathers abundantly clear to include both citizens and non-citizens.

C. The Applicable Law

As seen above, the country relies on the Foreigners’ Act, 1946 and the Passport (Entry into India)Act, 1920 to address the legal issues pertaining to the determination of refugees. Of course policy decisions find reflection in the notifications issued from time to time.

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[55] Article 51 c- Article 51 c forming part of the Directive Principles of State Policy requires the State to foster respect for International Laws and Treaties.

[56] Article 14 of the Constitution of India provides for equality before law and equal protection of law to every person.

Refugees in North East India

For the purpose of the present exercise aspects of grant of refugee status with regard to Brus and Chins of Mizoram is being taken up followed by the influx Rohingiyas to the state . Thereafter the issue related to the Chakmas and Tibetans are being dealt with. Illegal migration from Bangladesh is being discussed in the context of the latest amendment to the citizenship Act touching upon the NRC as well. However, the formalized institutional structure already being considered earlier, further discussion on the same is consciously being excluded from the present enquiry.

a. Mizoram

Mizoram has a 510 kilometer long international boundary with Myanmar.[57]Due to historical ties there is an arrangement permitting the Mizos and Chins to enter each others territory without visa upto a distance of 16 kilometres. this in other words accommodate limited free passage between Mizoram and Myanmar. This drives home the fact of close affinity between the peoples across the border.

A Brief about the Chins and their relation with the Mizos

Some tribes collectively identified as Zo, predominantly inhabitants of the mountainous Chin Hills region in North Western Myanmar .These Chin tribes share same ancestry with Mizos and marriages between Mizos and Chins are quite common. They too follow Christianity and both these tribes also call themselves as one people. Mizos are also connected with a revered religious lake by Mizos called Rih Din in situated in the Chin state of Myanmar . In the year 1988, during an anti democratic crackdown in Myanmar , the Chin refugees have travelled to Mizoram across the Tiau Rover and settled in Champhai District in India and have been integrated into their society.[58]

Due to the disturbed situation in Myanmar about 300 chins have crossed over to Mizoram. the government of Mizoram in apprehension of the persecution of

[57]Accessed on 1st Mar. 2022, 5,34P.M.), https://www.mea.gov.in/Portal/ForeignRelation/Myanamr_Feb_2016.pdf.

[58]Accessed on 2nd Mar.2022, 5'40 P.M.) https://www.researchgate.net/publication/254307342_Chins_in_Mizoram_The_Case_of_Borders_Making_Brothers_Illegal, April 2012, Journal of Borderlands Studies 27(1), Sahana Basavapatna

the chins for professing Christianity by the military regime in Myanmar have provided shelter[59] to such people in contrast to the Rohingiyas. However the problem has arisen recently[60] with the influx of the Rohingiyas who have not been granted shelter by the government terming them as being family like.[61]This was done despite instructions to send back all th immigrants following the coup in Myanmar. As they belong to Myanmar neither such or migrants refugees are entitled to claim citizenship under the citizenship amendment Act of 2019

The government of India has expressed reservations on the latest move by the state government,. This has brought to the fore the differential treatment in respect of recognition of certain classes of people as refugees.

Similarly the Chakmas and the Hajongs who happen to be Hindus and Buddhist had to flee the Chittagong hills tracts for fear of persecution on the ground of religion and language as alleged, as well as the commissioning of the Kaptai Hydro Electric project, initially during the period between 1964 and 1966, that is prior to the formation of Bangladesh. a part of a group of tribes who were collectively called the Jummas ,and who were the indigenous people of Bangladesh[62] However the government of Bangladesh deny their migration as they were not in the said territory when the country gained independence. These people profess Hindu faith strictly speaking without being recognized either by Bangladesh or by India fall to be classified as stateless persons under international law. Living in Arunachal Pradesh for about 6 decades , the Chakmas ,according

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[59] Accessed on 1st Mar. 2022, 11’05A.M., ttps://theprint.in/india/why-mizoram-sees-myanmar-refugees-as-family-close-ethnic-ties-that-have-survived-a-border/627009/,
Why Mizoram sees Myanmar refugees as ‘family’ — close ethnic ties that have survived a border, Pia Krishnankutty, Bismee Taskin

59 Accessed on 1st Mar.,2022, 9’14 A.M, http://economictimes.indiatimes.com/news/india/mizoram-issues-ids-for-myanmar-refugees/articleshow/90786334.cms?from=mdr, Mizoram issues IDs for Myanmar refugees, Bikash Singh.

[61] Accessed on 1st Mar, 2022 , 5’15A.M , ttps://indianexpress.com/article/india/change-policy-on-myanmar-refugees-mizo-mp-in-rajya-sabha-7231692/, Change policy on Myanmar refugees: Mizo MP in Rajya Sabha, Dipankar Ghose.

[62] Accessed on 2nd Mar. 2022, 747 P.M, https://www.survivalinternational.org/tribes/jummas.

to the census in 2011 were around 47, 471 in number.[63] The Chakma Development Foundation in India located in New Delhi has states the figure in today's time to be about 65,000 .Out of these 65,000, it is being said that 60,500 are citizens by birth virtue of Section 3 of the Citizenship Act 1955(after being born in 1987 and as descendants of those born before 1987).[64] In fact, way back in 1996 the Supreme Court[65] directed the government to not expel or relocate the Chakmas from their land and process the applications of around 4,462 Chakmas to grant them Indian Citizenship [66] besides issuing directions to process all the pending applications for grant of citizenship. It reiterated the same in 2015 *interalia* observing that the process should be completed within three months. Their demand for extension of the Citizenship Amendment Act, 2019 has remained so till date. The government of Arunachal Pradesh and the local people there feel that the demography of their state is affected due to the increasing Chakma population and they having to share the limited resources of the land with the Chakma and Hajongs creates socioeconomic issues.[67]

It may be stated that the policy of the government with regards to the Tibetans has been different. Consequent upon their persecution in Tibet, the Dalai Lama the temporal head of the Buddhist sect in the country along with a number of his followers who entered the then North East Frontier Agency, present day Arunachal Pradesh in the year 1959. They were immediately granted asylum by

[63] S Rajkhowa & S Gope, *Citizenship in the Context of Refugees and Internally Displaced People in the North East India,* Paper presented at National Seminar on Citizenship at Jorhat Law College, Apr. 23-24, 2022.

[64]*Accessed on 7th Mar, 2022, 12'05 P.*M, *https://economictimes.indiatimes.com/news/india/nhrc-seeks-report-from-centre-arunachal-govt-on-racial-profiling-of-chakmas-hajongs/articleshow/89123066.cms?from=mdr, NHRC seeks report from Centre, Arunachal govt on 'racial profiling' of Chakmas, Hajongs , Bikash Singh*

[65]in *National* Human Rights Commission vs. State of Arunachal Pradesh & Anr (also called the Chakma Refugee case) AIR1996 SC1234.

[66]https://thewire.in/politics/chakma-issue-roils-arunachal-as-supreme-court-decrees-end-to-their-statelessness, Chakma Issue Roils Arunachal as Supreme Court Decrees End to Their Statelessness, Sangeeta Barooah Pisharoty.

[67] *supra note* 62.

the Indian Government and relief operations were kick-started[68]and subsequently permitted to establish their government in exile at Dharamshala.

It cannot but be gainsaid that the most complex issue in the North East has been that of the Bangladeshis. As discussed earlier their continued infiltration has a historical past aimed at expansionism. However post liberation of East Pakistan perennial illegal immigration has been taking place almost on a daily basis . This led to measures at bringing about a National Register of Citizens in 1951, Another was proposed in 1965 though it did not materialize till such time the Supreme Court monitored process resulted in the final draft of the NRC in 2019.It was identified that 1.9 million people were unable to establish their citizenship despite the liberal policy to produce any of the22 documents leading to claim of citizenship. Since the matter of illegal migrants has already been discussed a brief reference is being made here. The figure arrived at is disputed since some feel that the abnormal increase of such people in certain vulnerable districts are not properly reflected whereas others feel that many claims have been unjustifiably rejected. Political consideration at claims and counter claims have been witnessed. These however does not diminish the sincerity of the entire exercise at the instance of the apex court.

VIII. Conclusion

It has been observed that the Citizenship Act of 1955 has been subjected to amendment on six occasions. The latest in the year 2019 evoked much reaction. While he purpose of the amendment has been to consider those person for citizenship who have entered into India prior to 31st December, 2014, the registration of such persons being confined to the identified minorities that too from Pakistan, Afghanistan and Bangladesh has been viewed rather skeptically by some. The logic behind keeping the exercise restricted to the countries mentioned above, leaving out Sri Lanka, Myanmar in particular has been attributed to an underlying current of faith. Similarly, the issue of the Ahmadiyas has also been viewed with some concern.

The necessity or justification of the said amendment has been looked upon with much apprehension in Assam in particular. For one the reduction in the period of residence in India has not been very much justified. The concerns

[68] *Ibid.*

emanate further from the fact that economic migrants who have infiltrated for better prospects should not have been treated at par with people genuinely facing persecution in the countries of their birth. Furthermore, the tribal states being left out of the purview of the amendment as that of the Sixth Schedule areas. This will lead to concentration of people in the plains district of Brahmaputra and Barak valley; consequently, resulting in further wedge of the populace. This will be detrimental to the economic, social and political spheres pertaining to the local people. Moreover, it does not provide any assurance of the misuse of the provision or its relaxation in future.

So far the illegal migrants happen to be concerned, it has been a godsend opportunity being rewarded with citizenship and for other identified persons a facilitative process without having to be accorded such recognition of being recognized as a refugee and facing the possibility of having to return to their country of origin in the event of changed situation. This prompts one to ponder whether through the present amendment the issue of citizenship has been weaponised. This though gains currency in the rather subtle shift that the policy of the government that has been witnessed. If one relates to the pronouncement of leaders and the government, one would realise that the shift in the stated observation has brought about a very crucial change in the manner the shift has been occasioned. Apart from the shift from *jus soli* to *jus sanguinis*, the present amendment has facilitated the process of obtaining citizenship. In the long run the portends may lead to demographic and linguistic implications on diverse aspects on the nation.

It may further be observed that the process of deportation of economic migrants not be occasioned to the identified categories. Much of the pain and efforts leading to the tripartite Assam Accord too would result in a goby. It remains to be seen to what extent the rules as a when framed would facilitate an unhindered process.

The country would have been better served both domestically and at the international forum if the government would have come out with a law on refugees rather than such piecemeal legislative measures. Further its standing at the UNHCR would have been enhanced. Instead the present exercise has come in for criticism which could have been avoided and the necessity of rebuttal would not have arisen.

The Role of Persuasive Legal Instruments for the Recognition of LGBTQ Rights in India

Prerna Lepcha[1]

Abstract

Gender identity is one of the most fundamental aspects of life. The time has come that one must realize that gender identity cannot be categorised singularly to one's orientation which may be associated with his or her birth. Gender identity and sexual orientation is not only limited to the intimate lives of the individual but it impacts everything such as their family, professional, social and educational life. Therefore, gender identity and sexual orientation has to be connected with the human rights perspective to avail all the rights that is being guaranteed to a human. It is only then the basic rights of being a human can be realised by all irrespective of their identity or sexual orientation. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. However, for the LGBTQ rights in India, the realisation of them being human and should be treated equal in dignity and rights was far from the truth until the year 2018. It was only in September 2018, the Supreme Court delivered a historic ruling legalising LGBTQ rights and partly holding Section 377 of the Indian Penal Code as unconstitutional. The colonial-era sodomy law violated the basic tenets of the constitution i.e., right to equality, right to privacy, and right to live with dignity. The right to life and personal liberty is a constitutionally guaranteed right that lays stress on the judicial recognition of such rights as an inextricable component of Article 21 of the Constitution and denial of it leads to discrimination which would offend Article 14 of our Constitution. Therefore, keeping in view the rights guaranteed by the Constitution of India, the rights of the LGBTQ community received the legal recognition in 2018. The LGBT rights in India would have not seen the light of the day if it was not looked into through the constitutional and human rights perspective. However, in recognition to the rights of the LGBTQ in India that stands today is

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also due to the role that has been played by the persuasive legal instruments such as international conventions, foreign judgments, etc.

Keywords: *LGBT rights, Persuasive Legal instruments, Human rights.*

I. Introduction

Gender equality is a fundamental human right which provides a necessary foundation for a peaceful, prosperous and sustainable world. In terms of gender equality, there has been progress over the last decades with regard to the position of women however speaking of third gender their position remains stagnant. Laws are discriminatory and social norms remain pervasive, and therefore their sexual orientation and gender identity continues to be underrepresented.

Transgender is the umbrella term used for LGBTQ community members who are popularly known as homosexuals as well. The existence of homosexuals in our community is not a new phenomenon. They are in existence since early times but they were never recognized in the society as that of men and women. Therefore, the fight for the rights and recognition of the homosexuals has been a long one.

Speaking of gender justice, the conventional view is that it has always been the debates about equality between men and women but one must realize that it must not only refer to equal treatment of men and women but it should refer to all irrespective of the gender. If the society is to progress, then without gender justice it cannot take place. Everyone should be treated with equal dignity. Gender justice concerns all aspects of human life. It provides a framework for human rights where equality, empowerment to all gender and identities leads to societal transformation.[2]

Since, early times the gender inequality is well-known issue which is prevalent in society throughout the world where we have been more concerned about women. Today, the fight for gender equality is not restricted to men and women alone. Speaking of gender inequality in India, especially with regard to the homosexuals, it has mainly been due to the presence of draconian law Section 377 of the Indian Penal Code that they were not considered as equal and denied various rights which are essential to regulate the everyday affairs of life. In our country these group of

[2] (last visited Aug 27, 2022), https://lawcorner.in/all-about-gender-justice/.

people has always faced harassment, discrimination, the threat of violence. Due to the social stigma attached to their sexual orientation, it is often found that the majority of people belonging to this community hide their sexuality out of fear of losing their job, fear of discrimination and violence.

II. Gender Identity

"What's in a name? That which we call a rose by any other name would smell as sweet."

-Shakespeare[3]

The basic sense by the above phrase conveys that what really matters is the essential qualities of the substance and the fundamental characteristics of an entity but not the name by which it or a person is called. However, this saying does not go well with the attitude of the people towards LGBTQ community, what really matters in the today's world is identification to exercise the basic human rights. Therefore, taking into consideration various forms of discrimination faced by the LGBTQ community, the Court in *National Legal Services Authority v. Union of India,*[4] held that this community must be represented as a "Third Gender" to exercise various rights guaranteed by the Constitution of India.

The Supreme Court of India in the landmark third gender case held that right to choose gender is a human right from which many other rights flow. The court also held that the word person used under the Article 14 and 21 of the constitution of India is gender neutral. They are entitled legal protection of laws in all spheres of activity which includes employment, healthcare, education, etc.

The Court in the third gender case upheld the rule of law by advancing justice to the class who are deprived of their legitimate natural and constitutional rights. It was also observed that by social justice and equality one must understand that it to be present in the true spirit of the constitution enshrined in the preamble.

In *National Human Rights Commission v. State of Arunachal Pradesh,*[5]the court observed that India is a country governed by the rule of law and our constitution

[3] (Last visited Aug 27, 2022), https://main.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf.

[4] (2014) SCC SC 328.

[5] (1996) 1 SCC 742.

confers certain rights on every human being. Also, every person is entitled to equality before the law and equal protection of the laws. Thus, it becomes clear that the rights conferred by the Constitution of India are applicable to all irrespective of the gender.

III. Rights of Third Gender through the Lens of Human Rights

The central idea of human rights rests on the premise that all humans are equal. Thus, all humans have equal dignity and should be treated equally. If by any means the dignity of the individual is undermined, then it is considered as a violation of the principle of equality and paves the way for discrimination. Speaking of homosexuality, it was also regarded as a mental disorder until 1990.[6]

The preamble to the Universal Declaration of Human Rights, 1948 mandates that the foundation of freedom, justice and peace in the world can take place only when recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is done. Article 1 of the UDHR states that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Although the first article of the UDHR itself speaks of equality in dignity and rights and to act towards one another in a spirit of brotherhood, the attitude of the society was never in consonance with the UDHR mandates.

According to the provisions of the UDHR, everyone is entitled to all the rights and freedoms without any distinction,[7] right to life, liberty and security of person,[8] right not be subjected to torture or to cruel, inhuman or degrading treatment or punishment,[9]right to recognition everywhere as a person before the law,[10]equality before the law and equal protection of the law without any discrimination,[11]right to the protection of the law against such interference or attacks.[12] Therefore, all

[6] (Last visited Aug 27, 2022), https://www.unfpa.org/events/international-day-against-homophobia-transphobia-and-biphobia.
[7] Universal Declaration of Human Rights, 1948, Art. 2.
[8] Universal Declaration of Human Rights, 1948, Art. 3.
[9] Universal Declaration of Human Rights, 1948, Art. 5.
[10]Universal Declaration of Human Rights, 1948, Art. 6.
[11] Universal Declaration of Human Rights, 1948, Art. 7.
[12] Universal Declaration of Human Rights, 1948, Art. 12.

the rights enumerated above specifically under the UDHR becomes applicable to every human beings without any discrimination.

IV. Constitutional Provisions

The preamble to the Constitution of India mandates justice socially, economically, and politically and equality of status for all irrespective of gender. The Constitution of India under the Articles 14 and 21 guarantees right to equality and equal protection before the law. The basic premise of equality under the Constitution of India is that the sex of an individual is irrelevant to exercise their fundamental rights. Under the directive principles of state policy, it is also the duty of the state to ensure welfare of the people irrespective of the gender. It is evident from the various constitutional amendments that with the advancement in the society the Constitution of India provides for the special provisions if needed.[13]

In *National Legal Services Authority v. Union of India*,[14] the Supreme Court of India ruled that the rights and freedoms of transgender people in India are protected under the Constitution. The court held that the word "person" used under the Article 14 and 21 of the Constitution of India is gender neutral and covers transgender who are neither male nor female. In September 2018, the Supreme Court also decriminalised adult consensual same-sex relationships. These two landmark judgments are comprehensive both in terms of recognition of constitutional rights and in empowering LGBTQ community as well. Both judgments mark an important moment for LGBTQ rights that not only reversed the colonial-era law but also ordered that LGBTQ Indians be accorded all the protections of their constitution. This was a welcome victory after a long battle fought for the recognition of third gender in the society but it does not necessarily mean that LGBTQ people in India are fully free or perceived as equal among their fellow citizens as they are still underrepresented.

The step towards gender equality in the society has been made with the decriminalisation of the colonial era law but there is still much that remains to be done if the civil rights of LGBTQ persons in India are to be protected. In the Third Gender Case the Supreme Court accorded that the LGBTQ community has the

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[13] INDIA CONST. Art. amended by The Constitution (Ninety Third Amendment) Act, 2005.

[14] A.I.R. 2014 SC 1836.

absolute and inalienable right to define themselves in their own terms and have the right to express their identities without fear of violence or retribution. We must realize that all human beings hold the basic human rights and needs to be recognized as such within the societies to live in.[15]

The impact of non-recognition of the LGBTQ community properly and treating them as minuscule population are many as they have been facing discrimination and disaffection from their family and friends, invisibleness and harassment at school which may take toll on their mental health, dropping on their school, and homelessness etc. This discrimination affects the main social good such as education, employment, health care of the LGBTQ people.

Although the LGBTQ community has still not reached its full potential, the Indian judiciary with the help of various constitutional provisions, international instruments and foreign judgments, etc. has to some extent played pivotal role for the representation and recognition of LGBTQ community in the society. The steps taken by the Supreme Court of India in 2014 and 2018 towards third gender in the case of *National Legal Services Authority v. Union of India*,[16] is that the rights and freedom of transgender people in India were protected under the constitution and in the case of *Navtej Singh Johar v. Union of India*,[17] the court decriminalised the colonial ban on gay sex.

V. Role of Persuasive Instruments in Recognition of LGBTQ Rights in India

The Constitution of India provides for fundamental rights and directive principles of state policy for the betterment and welfare of the people. Time and again it has been amended to ensure such rights of the people and duties of the state in safeguarding those rights. The Indian Constitution guarantees fundamental rights to safeguard each and every individual who is the citizen of India under various provisions. Article 14 provides right to equality and equal protection to all citizens. Article 15 and 16 prohibits discrimination on the grounds of religion, race, caste, sex or birth place. Thus, the Constitutional provisions clearly mandates that gender-based discrimination are unreasonable and nobody can be discriminated on the basis of sex. As article 19(1)(a) provides that all citizens of

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[15] Zainab Patel, The long road to LGBT equality in India (2019), https://www.undp.org/india/blog/long-road-lgbt-equality-india.
[16] (2014) 5 SCC 438.
[17] (2018) 1 SCC 791.

India have the right to freedom of speech and expression, thus the LGBTQ community has every right to defend their rights to express their gender identity by virtue of this article. The Article 21 of the Indian Constitution which provides for protection of life and personal liberty is of widest amplitude where within the ambit of right to life and personal liberty, it protects gender privacy, identity and integrity.[18]

Despite such Constitutional provisions it took so long to realise and recognise the rights of the LGBTQ in India. It was only after the landmark judgment of 2014 that they received the identity as a third gender in the country. To receive this identity, the Court relied on various foreign judgments and international instruments. As our Constitution provides that it is only in the absence of a contrary legislation, the rules of international law are given importance and taken into consideration. The reliance on persuasive instruments can be made by the court by virtue of Article 51[19] and 253[20] of the Constitution of India.

In *Kesavananda Bharati v. State of Kerala*,[21] the court in view of Article 51 of the constitution of India, the court held that due regard be given to the international conventions and norms when there is no inconsistency between the international and domestic laws. In *Apparel Export Promotion Council v. A. K. Chopra*,[22] the Court held that in cases involving violation of human rights, the High Courts and Supreme Court of India is obliged to apply international instruments and conventions when there is no inconsistency between the international law and the domestic laws. Therefore, the discrimination and non-recognition of the LGBTQ in the society was in violation of the human rights principles. In *S Jagganath v. Union of India*,[23] the Court held that international agreement would prevail and override any inconsistent State laws.

In *National Textile Workers' Union v. P R Ramakrishnan*,[24] the Supreme Court observed that "if the law fails to respond to the needs of changing society, then

[18] https://www.legalserviceindia.com/legal/article-7932-lgbt-rights-in-india.html (last visited Aug 27, 2022).
[19] INDIA CONST. Art. 51.
[20] INDIA CONST. Art. 253.
[21] (1973) 4 SCC 225.
[22] (1999) 1 SCC 759.
[23] (1997) 2 SCC 87.
[24] A.I.R. 1983 750.

either it will stifle the growth of the society and choke its progress, or if the society is vigorous enough, it will cast away the law, which stands in the way of its growth."[25] Therefore, in the absence of municipal laws, the Article 253 of the constitution enables the Parliament to legislate the laws implementing the international instruments.

The court took cognizance of various persuasive legal instruments in the light of the above judgments and referred to international instruments as well as foreign judgments for the recognition and representation of LGBTQ rights in India. Such as the Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966, the Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity, the United Nations Convention on Torture and Other Cruel Inhuman and Degrading Treatment or Punishment.

The court took note of the US Supreme Court decisions for the recognition of the rights of the LGBTQ community. For instance- the case of *City of Chicago v. Wilson*,[26] where the Court struck down the municipal law prohibiting cross dressing. Similarly, in *Doe v. Yunits*,[27] the court held the right of a person to wear school dress that matches their gender identities as part of protected speech and expression. The Supreme Court of India also took reference of the decision of the Supreme Court of Nepal where in the case of *Sunil Babu Pant v. Nepal Govt.,*[28] the recognition to the third gender as equal to men and women of the country was highlighted to exercise the fundamental rights guaranteed to the citizens of the country.

Likewise, the judgment of the Supreme Court of Pakistan[29] has also been referred where the protection of life, liberty and dignity of the individual not limited to men and women but to third gender as well was considered.

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[25](last visited Aug 27, 2022), https://www.news9live.com/kerala/law-while-changing-with-social-needs-should-acknowledge-technological-advancements-kerala-hc-73892.html.

[26] (1978) 389 N.E. 2d 522.

[27] (2000) WL 33162199.

[28] 2008 2 NJA LJ 262: WP No. 917 of (2007).

[29] Mohd Aslam Khaki v. Senior Supt. of Police (Operation) Constitution Petition No. 43 of (2009).

In *Dudgeon v. United Kingdom,*[30] the European Court of Human Rights made the following observations with respect to homosexuality that the members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts. But when the consenting adults alone are involved then that cannot on its own warrant the application of penal sanctions against them.

In *Ang Ladlad LGBT Party v. Commission of Elections*,[31] the Supreme Court of the Republic of the Philippines observed that the expressions concerning one's homosexuality and the activity of forming a political association that supports LGBT individuals are protected as well.

The case of *Mosley v. News Group Newspapers Ltd.*,[32] has been relied on to highlight that the emphasis for individual‘s freedom to conduct his sex life and personal relationships as he wishes, subject to the permitted exceptions, countervails public interest.

In *Navtej Singh Johar v Union of India*[33] the Supreme Court consisting of five judges bench delivered a historical verdict on sexual orientation in which the homosexuality is partially de-criminalised as under section 377 of IPC, 1860. However, the court observed that the acts which involves force relating to sex with minors, non-consensual sexual acts, and bestiality remains a criminalized offense. In delivering this historic judgment the court took into consideration the various provisions of the Indian Constitution. For instance- the support of article 19 of the Constitution of India was taken as it gives right to express sexual orientation freely. Likewise, the article 21 of the Constitution of India as right to life and liberty include privacy, dignity and autonomy.

In *Suresh Kumar Koushal Vs. Naz Foundation,*[34]the Court held that homosexual act is an criminal offense where only the Parliament have power to decriminalised it and the right to privacy cannot cover the homosexual act and re-criminalised homosexuality. The court held that LGBT community constituted a minuscule population and therefore did not deserve constitutional protection and stated that

[30] App No 7525/76, [1981] ECHR 5.
[31] G. R. No.190582, Supreme Court of Philippines (2010).
[32] (2008) EWHC 1777 (QB).
[33] (2018) 1 SCC 791.
[34] (2014) 1 SCC 1.

Section 377 of IPC did not suffer from the vice of unconstitutionality. To this disregard this remorseful judgment, the statement made by the Justice Indu Malhotra of the Supreme Court of India[35] can be noted that history owes an apology to the members of LGBT community and their families, for the delay in providing redress for the dishonor and avoidance that they have suffered through the centuries is very much true.

However, in *K.S. Puttaswamy v. Union of India*,[36] the nine judges' bench of the Supreme Court of India held that the minuscule population of LGBT cannot be the ground to deprive them of the basic fundamental rights. The Sexual orientation is an essential attribute of privacy which is protected by various articles of the Constitution of India. The limitations on the fundamental right cannot be held acceptable even if it is a few as opposed to a large number of people. Therefore, no one shall be subjected to a hostile treatment and the judgment given in the case of *Suresh Kumar Koushal v. Naz Foundation,* was rectified henceforth.

In *National Legal Services Authority v. Union of India,*[37] the court held that the non-recognition of the identity of the third gender was in violation of Article 14, 15, 16 and 21 of the Constitution of India. The Supreme Court of India held that the members of LGBTQ community must be treated as a "Third Gender". The Court also directed that the government should make proper policies for the LGBT community in the light of Articles 15(2) and 16(4) to promote equal opportunity in education and employment. They shall be placed as an economically and socially backward class to receive the benefit of reservation in government jobs and educational institutions both. The Court also took cognizance that a difference between one's birth gender and identity is not essentially a pathological condition.

In *Naz Foundation Government v. NCT of Delhi,*[38] the High Court of Delhi held that Section 377 of IPC, 1860 arguments supported decriminalisation, not legalisation, and imposed an unreasonable restriction over two adults engaging by mutual consent intercourse in private. The court also stated that a part of

[35] (Last visited Aug 27, 2022), https://economictimes.indiatimes.com/news/politics-and-nation/history-owes-apology-to-lgbt-community-and-kin-justice-indu-malhotra/articleshow/65708442.cms?from=mdr.
[36] (2017) 10 SCC 1.
[37] (2014) 5 SCC 438.
[38] (2009) SCC Del 1726.

section 377 of IPC which criminalised the homosexual act needed to be declared unconstitutional. The first case where the court de-criminalised the homosexuality in India. The court in this case considered that the basic fundamental rights enshrined under Articles 14,15,19 and 21 of the Indian Constitution is violated due to the criminalization of homosexual act under section 377 of IPC. As according to Article 21 of the Indian Constitution nobody can enjoy their life without dignity and privacy.

V. **Conclusion**

Our society has never realised the trauma or pain undergone by the members of the transgender community until the landmark judgments of 2014 and 2018. But with the growing awareness amongst people and easy accessibility to information and technology LGBTQ citizens in our country are no more a "minuscule minority" and recognition has been achieved to some extent due to both national binding laws as well as persuasive legal instruments. Due to such recognition today, they have a voice that is strong and refuses to be silent any longer in their efforts to reclaim equality. As India being a diverse country with such high illiteracy and being the second largest populous nation the attitudes towards the LGBTQ vary vastly. This further adds complexities to make people understand the gender identity and sexual orientation. Thus, until and unless the government gives the LGBTQ people in India an equal status, a just and fair struggle for social recognition by LGBTQ will go on.

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Groundwater Management under the Indian Legal Framework: Challenges and the Way Forward

Neelam Lama[1]

Abstract

About 89 per cent of the world's fresh water resources are found in groundwater, but over the past few decades, groundwater extraction has dramatically increased, having a detrimental effect on aquifers. India is the biggest users of groundwater in the World, over 230 cubic kilometers of groundwater is used per year. As a result, more and more aquifers are being exploited to an unsustainable level, and the nation frequently experiences drinking water shortages. This article focuses on the groundwater laws that apply in India. It also examines legal approaches in groundwater law and its challenges in this contemporary India where groundwater is a dwindling resource.

Further this paper highlights the measures taken by the central government in order to protect groundwater resources and argues that the existing framework governing groundwater is based largely on principles developed during the 19th century. In the light of this, the author argues that a new set of principles should be established that acknowledge the shared nature of groundwater and the human right to water, as failing to do so will violate the right to access water, and in turn, the right to life under Article 21 of the Constitution. Therefore, there is an urgent need to change the current situation.

Key words: Groundwater management, Sustainable development, India, Central Ground Water Board, Fundamental right.

I. Introduction

Groundwater is India's lifeline, it has been so for the last four decades in all sub-sectors including irrigation, rural and urban domestic supply and also to industrial and commercial sectors. For instance, groundwater supports around 62 per cent of the water needed for agriculture, 85 per cent of the water needed for rural water

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supply, and 45 per cent of the water needed for urban water supply.[2] However, this primary source of readily accessible freshwater is reaching unsustainable levels of exploitation. According to the 2021 CAG study, groundwater extraction in India rose from 58 to 63 percent between 2004 and 2017, exceeding the rate of groundwater recharging.[3] Precipitation is the method where groundwater can be recharged but due to climate change, there is irregular rainfall which affect the recharge potential, and posing a serious threat to the quantity and quality of groundwater. An assessment was made by the **Central Ground Water Board (CGWB),** it was found that many places are overexploited, and the majority of the places were also reported as critical and semi-critical.[4] Moreover, aquifers are also running dry in the most densely populated and economically prosperous regions. In addition to that, groundwater resources will be more severely strained by climate change in the near future. Thus, groundwater is the main source of water for all main water uses and needs to be given the policy attention.

II. Status of Groundwater Depletion in India.

Groundwater is the water present beneath the earth's surface in soil pores spaces and in the fractures of rock formations, it makes 30 per cent of the freshwater supplies. However, India has a real problem when it comes to groundwater, Indians withdraw groundwater higher than the replenishment. India is the largest user of groundwater and uses an estimated 230 cubic kilometres annually, or more than a quarter of the world's total.[5] The use of groundwater has grown significantly over the last few decades, and it is now the backbone of the country's food and drinking water security. It makes India the most groundwater-stressed

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[2] Report of the Comptroller and Auditor General of India on Ground Water Management and Regulation, (Jul. 25 2022, :00PM), https://cag.gov.in/webroot/uploads/download_audit_report/2021/Report%20No.%20 9%20 of%202021_GWMR_English-061c19df1d9dff7.23091105.pdf.

[3] Purnanjali Chandra and Sindhuja Janakiraman , *Groundwater Regulation: A Challenge to make the 'Invisible Visible' in India*, WRI India, (May 27, 2022, 9:29 PM), https://wri-india.org/blog/groundwater-regulation-challenge-make-%E2%80%98invisible-visible%E2%80%99-india

[4] Purnanjali Chandra & Sindhuja Janakiraman, *Supra note* 3.

[5] *Id.*

region in the world. It accounts for around 25% of the world's groundwater extraction.[6]

Today India has surpassed both the USA and China as the amount of groundwater used annually has now climbed to 260 cubic kilometres.[7] The viability of agriculture, long-term food security, livelihoods, and economic growth will all be seriously impacted by this. In October 2005, the Planning Commission established an expert panel to assess the groundwater situation, led by Kirit Parikh, a member of the commission's energy and water committee. It was estimated that by 2050, groundwater demand will certainly outpace supply and the main reason is urbanisation and industrialisation.[8]

Globally, groundwater is also the most stressed resource and for irrigation, it takes 70 per cent of available freshwater.[9] In driers countries like Chile and Sudan, 90 per cent of freshwater is used in farmland and in India, over 50 per cent of all irrigation linked freshwater withdrawals are from groundwater reserves.[10] Groundwater is primarily recharged in monsoon months from June to September but precipitation levels vary substantially with India's western region receiving less than 600 mm of rainfall. As a result, Rajasthan, Punjab, Haryana and Delhi are classified as critical regions having overexploited stages of groundwater extraction especially since most of these are intensively cultivated areas withdrawing high levels of groundwater.[11] These states consume more

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[6] *Id.*

[7] The World Bank, *India Groundwater: A Valuable but Diminishing Resource*, (May 30, 2022, 9:30 PM) https://www.worldbank.org/en/news/feature/2012/03/06/india-groundwater-critical-diminishing

[8] S. V. Suresh Babu, *Planning Commission report on groundwater downplays industrial exploitation*, DOWN TO EARTH, (Jul. 15, 2022, 8:00 PM) https://www.downtoearth.org.in/news/planning-commission-report-on-groundwater-downplays-industrial-exploitation-6655.

[9] 688 billion cubic metres: India's water withdrawals for agriculture are the highest in the world, Down to Earth
(Aug 7, 2022, 09:30 AM), https://www.downtoearth.org.in/news/water/688-billion-cubic-metres-india-s-water-withdrawals-for-agriculture-is-the-highest-in-the-world-60967

[10] *Id*.

[11] Vishwa Mohan, *Delhi, Punjab, Rajasthan and Haryana headed the Latur way as groundwater extraction soars*, THE TIMES OF INDIA, Apr 17, 2016, (Aug 02, 2022, 11:30 P.M).

groundwater than their rechargeable limit every year which makes them more vulnerable to water scarcity. Groundwater condition is also not uniform across the country. Therefore, the areas are divided into three categories based on groundwater levels: **overexploited, critical, and semi-critical**.[12]

Overexploited	**Critical**	**Semi-Critical**
It is the situation when groundwater extraction exceeds recharging.	It is the situation when the groundwater extraction rate is 90-100% of what is recharged	It describes situation where extraction rates are between 70% and 90% is semi-critical.[13]

States that extract less than 50 % of groundwater are considered safe these include **West Bengal, Chhattisgarh and Tripura**. And those like **Tamil Nadu, Uttar Pradesh & Himachal Pradesh** which extract more than 50 % of their groundwater are semi-critical. The stage of ground water extraction is over 100% in **Delhi, Haryana, Punjab, and Rajasthan**, which implies that groundwater use exceeds annual extractable ground water resources in these states.[14] But India's North-East states extract the least groundwater i.e. less than 12 % because a larger part of these states especially rural areas are more tribal dominated and traditional farming practices are still followed. There are also relatively high rainfall areas and large local water systems existing which provide water for irrigation. Therefore, these places are called non-critical in terms of groundwater depletion.

Besides the general problem of decline in groundwater resources there are other specific problems in India. For example, there is arsenic contamination in West Bengal, fluoride contamination in North Gujarat and southern Rajasthan, and Saline ingress in Saurashtra, Gujarat. Overall, 386 districts in India have

https://timesofindia.indiatimes.com/city/delhi/delhi-punjab-rajasthan-and-haryana-headed-the-latur-way-as-groundwater-extraction-soars/articleshow/51860478.cms.

[12] National Compilation on Dynamic Ground Water Resources of India, 2017, (Aug 17, 2022, 09:30 AM) http://cgwb.gov.in/GW-Assessment/GWRA-2017-National-Compilation.pdf.

[13] *Id.*

[14] National Compilation on Dynamic Ground Water Resources of India, 2017, *supra note* 12.

excessive nitrate levels, followed by 335 districts with fluoride, 301 districts with iron, 212 districts with salinity, 153 districts with arsenic, 93 districts with lead, 30 districts with chromium, and 24 districts with cadmium. The groundwater in many places contains more than one, two, or three hazardous substances.[15] Reports have made it clear that practically every district is dealing with problems with both the supply and quality of water.[16] Currently, the largest issue India has ever seen is the unplanned and irrational use of water by individuals causing the groundwater table to decline more quickly.

These widespread problems that India is facing currently are due to the failure to adopt an integrated approach to groundwater resources. Therefore, there is an urgent need to have efficient groundwater management and sustainable development of this dwindling resource. However, the government has introduced legislation, policies to protect and preserve this critical resource.[17] In the following section, the author has highlighted the existing legal framework that has been introduced by the government to address the challenges of groundwater use.

III. Groundwater management under the Indian legal framework

A. Position of Groundwater Rights under Common Law Principle

There is currently no central law in India to regulate and control groundwater. The groundwater regulations in India are based on the legal principles evolved by the British Courts, known as the common law principle.

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[15] Vishwa Mohan, *Across India, high levels of toxins in groundwater*, THE TIMES OF INDIA, Jul. 31, 2018, (Aug 02, 2022, 11:30 P.M) thttps://timesofindia.indiatimes.com/india/govt-body-finds-high-levels-of-groundwater-contamination-across-india/articleshow/65204273.cms.

[16] PRS INDIA, *Overview of Groundwater in India*, (Jan. 10, 2022, 01:33 AM). https://www.prsindia.org/administrator/uploads/general/1455682937~~Overview%20of%20Ground%20Water%20I ndia.pdf.

[17] Farzin Naz and Jayanta Boruah, *Groundwater Management Under Indian Legal Framework*, Vol. 1: Issue 1, INDRAPRASTHA LAW REVIEW (2020) (May 27, 2022, 9:29 PM), https://indraprasthalawreview.in/wp content/uploads/2020/10/ggsipu_uslls_ILR_2020_V1-I1-06-farzin_naz-jayanta_boruah.pdf.

Private Rights in Groundwater

Rights to groundwater is derived from both the statutory as well as common law principles. The common law principles recognises landlord natural rights over groundwater which means the landlord can extract an unlimited quantity of groundwater and is also not responsible for any damage caused to water resources as a result of his over-extraction. This legal principle is *cuis est solum, eius est usque ad coelum et ad inferos* which means that property holders have rights not only to the plot of land itself, but also to the air above and the ground below.[18] Based on this principle, the court held in **Acton's Case**[19] that groundwater, unlike surface water: "falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is sold rock, or porous ground, or venous earth, or part soil, part water. The person who owns the surface may dig therein and apply all that is there found to his purposes with his free will and pleasure. Similarly, based on the same principle, there is a British-era law called the **Indian Easement Act of 1882** where the landowners have the right to collect and dispose of groundwater within their limits. This law is the main source of understanding of the current legal position on groundwater in India. Section 7 (g) the Indian Easement Act 1882 implicitly recognises the position of law to be same as that of the common law. This formulation also found judicial favour in some of the pre-independence decisions, most notably in *Kesava Bhatta v. Krishna Bhatta*.[20] Section 7 of the Act allows the absolute ownership of the land owner and is allowed unlimited withdrawal of ground water which leads to water overuse. Even today the Easement Act based on the common principles are part of groundwater law in India. As a result, landowners have gained influence over water rights, however it becomes difficult to regulate. Therefore, the Indian courts applied the public trust doctrine, another important doctrine in the landmark judgements keeping the importance of the local self-governing bodies in decision making. The public trust doctrine was founded on the idea that certain common properties such as rivers, seas, forests and the air were held by the state in trusteeship for the free and unimpeded use of the general public. The state, which holds the natural waters as a trustee, is duty bound to distribute or utilise the waters in such a way, that

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[18] OXFORD DICTIONARY OF LAW (8th ed. 2014).
[19] Acton and Blundell and another 152 E.R. 1223 (1843).
[20] Karathigundi Keshava Bhatta v. Sunnanguli Krishna Bhatta (1946) 1 MLJ 131.

it does not violate the natural right to water of an individual or group and safeguards the interest of the public and of ecology or nature."

Over the years, the doctrine was applied more extensively by the Court through a series of decisions mostly in the context of the right to access and use water bodies, parks etc**. (M.I Builders Case, 1999;[21] Intellectuals Forum Case, 2006[22])**. The Single bench of Kerala High Court in the **Plachimada case**,[23] held that groundwater cannot be treated as private property, but in the public interest, it should be held by the state in public trust. The common law principle cannot be applied in this contemporary time where bore wells and heavy-duty pumps have been introduced. However, the decision of the Single Bench of Kerala was set aside by the Division bench on the public trust doctrine as stated in M.C Mehta case.[24] However, the Division bench has ruled that right to draw water should be within reasonable limits. Therefore, after this case, if the unlimited withdrawal is done then it can be actionable under the law of torts. Therefore, judiciary has played a pivotal role in ensuring access to water to everyone.

B. Indian Constitution and Groundwater Management

In India, water law is largely state-based. This is because the Indian constitution has adopted the government of India Act, 1935 which essentially gives power to the states to legislate on this matter. Water is a state subject[25] which means it belongs to the states and it has the responsibility to regulate and manage water including groundwater. However, "Entry 17" is subject to provisions of "Entry 58" List I of the Seventh Schedule i.e. Union List. Therefore, water also falls within the ambit of Parliament. In the public interest, Parliament can use its legislative and executive authority over groundwater.

Based on the Supreme Court's orders, **Central Ground Water Authority (CGWA**) a statutory body was established under Section 3 of the Environmental (Protection) Act 1986. It has given power under section 5 of the act to regulate groundwater abstraction, and its usage, and to monitor how well groundwater management plans are being implemented. Every two years, groundwater

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[21] M.I Builders v. Radley Shyam Sahu AIR 1999 SC 2468.

[22] Intellectuals Forum, Tirupathi v. State of A.P. & Ors Appeal (civil) 1251 of 2006.

[23] Perumatty Grama Panchayat v. State of Kerala 2004, (1) KLT 731.

[24] M. C. Mehta v. Kamal Nath, (1997) 1 SCC 388.

[25] INDIA CONST. Entry 17 of List II in Seventh Schedule.

resources were to be evaluated by the Central Ground Water Board (CGWB). Since then the CGWA has been regulating ad managing groundwater extraction in those States and Union Territories which do not have legislation on groundwater. Recently, the guidelines were notified by the CGWB which seeks to remove lacunae in the regulation by prescribing a minimum environmental compensation of ₹1 lakh for industrial, mining and infrastructure users for extracting groundwater without a no objection certificate (NOC). The central ground water authority has directed that the misuse of potable water will be a punishable offence in India. Punishable with a fine of Rs. 1 lakh and imprisonment for 5 years.[26] Hence, the states and Union territories were requested to review their regulations.

Besides this, amendments 73rd and 74th to the Indian Constitution[27] extend vast power to panchayats over water resources, minor irrigation, water management and watershed development and fisheries. There is also a fundamental duty to both the State and the citizens under Article 48A and Article 51A(g) to protect and improve the environment. The Judiciary approach has also been in favour of clean water and a clean environment for all the citizens of India. Initially, the Constitution nor any other legal document recognised the right to water as a basic right. However, considering the importance of freshwater, its scarcity and the injustice implicit in the legal regime, the judiciary occasionally construed **Article 21** to include the right to clean water and a clean environment as a fundamental right. Right to water was acknowledged as a fundamental right in the well-known case of *Subhash Kumar v. State of Bihar***.**[28] As a result, the Right to Water has been highlighted in numerous judicial rulings and is now considered to be the law of the land. For example, the Kerala High Court ruled that the over-pumping and distribution of water violated Article 21 of the Indian Constitution in the case of *Attakoya Thangal v. Union of India*[29]. The administrative officials of Lakshadweep Island agreed to supply water by drilling wells in this specific situation to meet the rising demand for drinkable water. Petitioners on the ground

[26] Central Ground Water Authority, (Aug 7, 2022, 09:30 AM), http://cgwb.gov.in/CGWA/Documents/Draft%20revised%20guidelines%202017(24.7.2017).pdf.
[27] INDIA CONST. art. 243G and 243W.
[28] Subhash Kumar v. State of Bihar, AIR 1991 SC 420.
[29] Attakoya Thangal v. Union of India, 1990 (1) K.L.T. 58.

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contested this agreement, arguing that it violated Article 21 owing to the excessive pumping there was the unavailability of groundwater in the islands and the risk of excessive pumping bringing complete depletion and significant disruptions to the freshwater balance.

Additionally, the court ruled in *Gautam Uzir & Associates v. Gauhati Municipal Corp*.[30]that the municipal corporation was in charge of providing clean drinking water and had a duty to investigate the dearth and impurity of potable groundwater.

Hence, a new body of environmental law has emerged as a result of the Supreme Court's interpretation. The judiciary has frequently ruled that every State is bound by the right to water as the supreme law of the land.[31] India has successfully imposed a ban on illegal extraction of water and whenever needed has come forward to protect this precious resource with the help of judiciary. This newly recognised right is crucial and directly related to management and groundwater preservation.

However, despite these legal developments that are pertinent to groundwater management, the colonial law i.e. **Indian Easements Act of 1882** continues to be the primary law that governs water relations, including the groundwater allocation regulations. The Indian Easements Act effectively treats groundwater as private property and grants the owner the "right to collect" any groundwater beneath his or her property. This colonial principle cannot be implemented in a country like India where water scarcity is a significant issue and also caste-based discrimination is predominated in India. This legal reality restricts the right of landowners and leaves out a vast number of people with no land, particularly the rural poor and the Dalits. Though the caste system is legally banned it is still in practice in many parts of the country. The Dalits do not have access to water as they are denied entry into areas where the upper caste controls the community wells. There have been many instances where a Dalit has been killed or mercilessly beaten. Recently in Rajasthan, a nine-year-old child was beaten to death by his upper-caste Hindu teacher for touching a water pot of upper Hindu.[32]

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[30] Gautam Uzir &Anr. v. Gauhati Municipal Corp., 1999 (3) GLT 110.

[31] INDIA CONST. Art. 141.

[32] *Rajasthan: Dalit student beaten to death for touching water pot of upper caste*, HINDUSTAN TIMES (Aug 14, 2022, 09:40 PM),

There are end number of discrimination and violence faced by Dalits while collecting water because mostly they are depended on privately owned water sources usually owned by upper caste individuals.

This unfairness in law has made the condition more vulnerable, particularly in the rural areas and mostly the Dalit women bear the brunt of it because carrying water for a family is a women's duty in third world countries like India. The concept of private property right over groundwater resources needs to be abolished. There has been a legislative trend in many countries around the world to make groundwater a public resource. In countries like Australia, Indonesia and Peru groundwater is considered a common pool resource and now it is under a public domain.[33] Similarly, the same trend of bringing private waters into a public domain legislatively and abolishing riparian rights has been adopted by many developed and developing countries and it should be adopted by India as well.

IV. Government Policies and Groundwater Models on Groundwater Management: A New Paradigm for Groundwater Regulation

In the 1960s, the Indian economy was booming, and water management was meeting those needs. At the same time, though India was gaining wealth but the water-related problems were increasing. To address the issue of water, a series of changes were made at the national and state levels.[34] The Central Government of India took significant measures by adopting model groundwater bills and national water policies in an effort to reduce the disparity in water distribution. In pursuance of this initiative, various state governments have enacted groundwater legislation over the years. Hence, attracting a specific degree of uniformity in the creation, administration, and use of groundwater resources.

A. Government Policies Related to Groundwater

National Water Policy 2012

The first national state policy stating that water is a prime natural resource, a necessity for all living things, and a valuable national resource was adopted in

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https://www.hindustantimes.com/cities/jaipur-news/rajasthan-dalit-student-beaten-to-death-for-touching-water-pot-of-upper-caste-101660451656553.html.

[33] M.S. VANI, GROUNDWATER LAW IN INDIA: A NEW APPROACH, SAGE publications (2009).

[34] Farzin Naz and Jayanta Boruah, *Supra* note 18.

1987.[35] It prioritises drinking water over all other uses, for both people and animals. The policy calls for an integrated and coordinated development of surface and groundwater as well as limitations on the exploitation of groundwater through regulation. Despite having the policy, India's groundwater was facing challenges the policy has some deficiencies. Therefore, the 1987 Policy was modified but with much the same views.[36]Additionally, it emphasised the necessity of groundwater resource regulation and to prevent overexploitation prevention to ensure that overuse does not go beyond recharging limits. However, this policy was merely suggestive, and groundwater management approach was hazy. Therefore, the Ministry of Water Resources issued a new **National Water Policy, 2012**[37] to meet the challenges in the water sector. To achieve total food security and sustainable groundwater management, the policy correctly emphasises the management of groundwater as a common resource by the state under the doctrine of public trust. The new NWP addresses issues relating to water scarcity, planning, and management of water resources. The policy will set new guidelines for states to adopt, but it is left to the states to use these guidelines.[38]

The Groundwater Sustainable and Management Bill 2016

Since the widespread introduction of mechanised pumping devices during the 1960s caused a sharp rise in groundwater consumption and a sharp decline in water tables, there has been a demand for groundwater law reform. This caused the Indian government to realise the requirement for a legal framework regulating groundwater. In 1970, a Model Bill for groundwater was adopted. Although this model law has undergone multiple revisions (1992, 1996, and 2005), the essential structure proposed in 1970 has been kept.[39] In its most recent, the Groundwater

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[35] National Water Policy, 1987, (May 27, 2022, 09:30 AM) http://cgwb.gov.in/documents/nwp_1987.pdf

[36] Press Information Bureau, Government of India Ministry of Water Resources, (Aug 12, 2022, 01:30 P.M) https://pib.gov.in/newsite/PrintRelease.aspx?relid=90775.

[37] National Water Policy, (Jun 27, 2022, 09:30 AM), http://cwc.gov.in/sites/default/files/nwauser/nwp-lectnote6.pdf.

[38] Bharat Lal Seth, *National Water Policy, 2012 silent on priorities, Down To Earth*,10 Feb 2012, (Aug 15, 2022, 08:30 A.M),https://www.downtoearth.org.in/news/national-water-policy-2012-silent-on-priorities--35952.

[39] Philippe Culet, *the Groundwater Model Bill: Rethinking Regulation for the Primary Source of Water,* Vol. 47, No. 45, ECONOMIC AND POLITICAL WEEKLY, p. 43, (2012), (Jul 10, 2022, 09:30 A.M).https://www.jstor.org/stable/pdf/41720352.pdf.

(Sustainable Management) Bill, 2017, was adopted to better suit our needs. All the laws are aimed at regulating the use of wells through licensing. This bill is not completely based on the legal framework of 1970 and for the first time suggested groundwater should be protected at the aquifer level. The National Aquifer Mapping and Management program (NAQUIM)[40] is being implemented by the Central Ground Water Board (CGWB) to facilitate the sustainable management of groundwater resources. The Groundwater (Sustainable Management) Bill was introduced in line with the national water policy guidelines.

The bill acknowledges groundwater as a fundamental right and a public trust.[41] The Bill also expands on the decentralisation mandate and aims to provide local bodies with regulatory authority over groundwater resources. The groundwater resource will get benefitted from the proposed new framework because there is the inclusion of groundwater security plans and significant local involvement. Therefore, the groundwater will be used responsively and people and the state will play an active role to use groundwater and safeguard it for present and future generations. The new bill acknowledges the incorporation of protection principles, such as the precautionary principle, which were missing from water policy. [42]

The Central Government has released updated groundwater use regulations. The new guidelines make it essential for existing industries, commercial units, and large housing societies to get a no objection certificate, and also forbid new industry and mining projects in over-exploited zones (NOC). However, the domestic consumers including armed forces, farmers, and micro & small enterprises that withdraw up to 10 m3 water per day are exempted from the requirement of a no objection certificate from the CGWB.

On February 11, 2020, the Act was passed by Uttar Pradesh Cabinet, presided over by Chief Minister Yogi Adityanath, based on this bill, which is a progressive

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[40] Aquifer information and management system, Central Groundwater Board, https://www.aims-cgwb.org/

[41] Model Bill for the Conservation, Protection, Regulation And Management Of Groundwater, 2016, Sec 9, (India) http://jalshakti-dowr.gov.in/sites/default/files/Model_Bill_Groundwater_May_2016_0.pdf.

[42] *Id*. sec 10.

step in the groundwater regulation to raise the state's declining groundwater level.[43]

Therefore, all the states need to reform their groundwater law because inaction only increases existing inequalities in access to groundwater. It's high time for the State to act as a public trustee of groundwater, to make sure that groundwater is protected, conserved, regulated and properly managed.

IV. CONCLUSION

It is beyond doubt that the regulation of groundwater is of the utmost importance, especially in an era where limited water resources are available. However, one of the biggest challenges for sustainable management of groundwater comes from overexploitation and overuse, and India is the biggest user of groundwater in the World. In India, the amount of groundwater resources that are currently available has significantly decreased. It is anticipated that soon groundwater access will be impossible in many of the nation's largest cities. In addition to this, water is constitutionally a 'State' subject under the List II of the Seventh Schedule of the Constitution. Therefore, the central government role is limited and can only provide guidelines in the form of water policies and model bills. Accordingly, the central government has prepared Model legislation since 1970s for the regulation of groundwater and had issued fresh guidelines from time to time. The States are advised to adopt them. Unfortunately, till December 2019, only 19 states have taken action to enact legislation for groundwater, the remaining states/UTs had not taken any move to enact legislation on groundwater.[44]

The recent string of occurrences suggests that States are hesitant to pass legislation to control the use of groundwater. In order to enact a law on this matter, the Indian Parliament must utilise Article 252 of the Indian Constitution if this situation persists. Nevertheless, a better course of action would be to have a

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[43] The Uttar Pradesh Ground Water (Management and Regulation) Act, 2019 Act, 13 of 2019 (India), https://prsindia.org/files/bills_acts/acts_states/uttar-pradesh/2019/2019UP13.pdf.

[44] *Only 19 states have legislation for management of ground water*: *CAG*, BUSSINESS STANDARD, Jun 22, 2022, (Aug 22, 2022, 12:30 P.M) https://www.business-standard.com/article/current-affairs/only-19-states-have-legislation-for-management-of-ground-water-cag-121122200018_1.html

cooperation between the states and states need to treat groundwater problem seriously. They need to encourage people at village level or ground level to understand the importance of groundwater and encourage people on use of local tanks, rainwater harvesting. To spread awareness about water conservation the Ministry of Housing and Urban Affairs, formulated a **Model Building Bye Laws (MBBL)** 2016 which requires all buildings with plots larger than 100 square meters to submit a proposal for rainwater harvesting.[45] This feature has been adopted by many States and Union Territories (UTs). Therefore, proper groundwater resource conservation is urgently needed since groundwater degradation violates the fundamental right to water enshrined in Article 21 of the Constitution. As far as the current groundwater law is concerned, the Indian Easement Act must be reformed because the decade-old law is inappropriate for solving the present-day problems.

Groundwater cannot be an element of land ownership in these contemporary challenges. However, there has been improvement in India's groundwater management. The government of India has launched the **Atal Bhujal Yojana,** which will help seven Indian states**-** Haryana, Gujarat, Karnataka, Madhya Pradesh, Maharashtra, Rajasthan and Uttar Pradesh from 2020 to 2025 to conserve groundwater. In addition to this, **Jal Jeevan Mission** was launched in August 2019, aims to give every rural home a tap connection by 2024.[46]It is therefore necessary to reconsider groundwater regulation and give adequate policy attention to safeguard this finite resource.

[45] Ministry of Jal Shakti Report on Groundwater Depletion*, supra note 44.*

[46] *Id.*

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Pollution and Environment: A Study of Environmental Protection with Special Reference to the Role of Indian Judiciary

Shubhajeet Shome[1]

Abstract: Pollution has been a major concern for the world today. Pollution has reached a critical level in India, especially in urban areas. Various NGOs and other Governmental organizations, ranging from the common individual are functioning relentlessly hard to protect the environment. The role of the judiciary in India is also undeniable and very significant. The Indian judiciary has been playing a very important role towards environmental sustainability and in protecting the environment. At different times Indian judiciary has taken up various environmental-related cases. The judgments of different cases have shaped the nature and pace of environmentalism in India at different times. This article focuses on pollution levels and sustainability in India. The role of the Indian judiciary in the protection of the environment has been closely examined. Various major environmental cases have been analysed by the author. The paper analyses the present situation of environmentalism in India and concludes with some scope for further research.

Keywords: Sustainability, Hazardous waste, Water pollution. Air pollution, The Environment (Protection) Act, Indian Judiciary

I. Introduction

Pollution has reached a critical level in present-day India. The pollution level has risen in various parts of India, especially in urban areas. Though pollution is not only a big issue for India this has become a worldwide phenomenon. Pollution may hamper the growth and development of developing nations whose economies depend on natural resources. Human and economic development efforts have a large negative impact on the environment. Environmental degradation such as poor human health, lack of freshwater resources, and fisheries as a result of air

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and water pollution degradation of forests.[2] In order to meet the need of a huge number of people, especially in the developing world, livestock production and intensified crop combined with incentives have contributed to increasing production of organic and chemical waste, biodiversity and natural resources loss.[3] Developing nations are suffering from explosive population growth, inadequate water resources, and nature unfriendly agriculture causing severe environmental problems. Environmental pollution in developing countries is very rigorous leading to disabilities, poor health and high mortality rate.[4]

Sustainable development is a concept which has been given importance in recent times. Sustainable development was described in 1987 by the Brundtland commission report as a development process which states that the requirements of recent time have to be fulfilled in such a way that future generations must not be deprived.[5] Natural resources must be used in such a way that they should fulfil the requirements of the present time as well as the need of the future. The next generations should not be deprived of the use of natural resources. According to the 2011 Human Development Report, HDI would decline by 8 per cent from the margin line for South Asia by 2050.[6] As in the case of severe environmental degradation, HDI would fall up to 15 per cent from the estimated baseline. As far as environmental pollution issues are concerned, India is one of the most polluted countries. Major cities in India are considered the most polluted cities in the world.

II. Environmental Degradation

Environment refers to the physical surroundings of an individual of which he/she is a part and his/her activities such as physical functioning, production, and

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[2] Judith Banister, *Population, Public health and The Environment in China*, 156 THE CHINA QUARTERLY, 986, 986-1015 (1998).

[3] Ruoh-Rong Yu & Cyrus Chu*, Population Dynamics and The Decline in Biodiversity*, 28 POPULATION AND DEVELOPMENT REVIEW 126, 130-143 (2002).

[4] Michael Greenstone & Rema Hanna, *Environmental Regulations, Air and Water Pollution and Infant Mortality in India*, 10 AMERICAN ECONOMIC REVIEW 3038, 3043-3072 (2014).

[5] BRUNDLANT COMMISSION, OUR COMMON FUTURE (1987), (Last visited Dec. 28, 2021), https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf .

[6] UNITED NATIONS, HUMAN DEVELOPMENT REPORT, (2011) (last visited Dec. 28, 2021), https://hdr.undp.org/en/content/human-development-report-2011.

consumption are dependent. Physical environment refers to air, ecosystems, water, natural resources etc. The physical environment can be of two types natural environment and man-made environment. Uncontrolled human activities such as rapid urbanization, deforestation, and unbridled use of natural resources have a tremendous negative outcome on the environment.[7] Environmental pollution refers to the deterioration of natural resources. Human activities have promoted severe conditions that have turned out to be very dangerous for every living being. Excessive vehicles and processing plants, factories have been generating toxic gases in the environment which is causing air pollution. Urbanization and industrialization are rapidly contaminating wellsprings of water and wetlands. The smoke is being heavily discharged by vehicles and factories containing Chlorofluorocarbon, nitrogen oxide, carbon monoxide and other harmful particles which is making the air polluted.[8]

Environmental degradation has a very severe effect on individuals and populations. Toxic air pollution creates serious respiratory problems like asthma, pneumonia and others. Thousands and millions of people are known to have died due to the indirect effects of air pollution.[9] Metropolitan cities of India are having serious air pollution and pollutant concentrations exceed the limit considered safe by the World Health Organization (WHO). When the level of air pollution rises drastically, some harmful substances are added to the environment like Residual Suspended Particulate Matter (RSPM), Suspended Particulate Matter (SPM), Carbon Monoxide (CO), Nitrogen Dioxides (NO2), Sulphur Dioxide (SO2), lead etc. The increase in harmful pollutants deteriorates urban air quality which threatens thousands of lives and many more to suffer from lifelong diseases. Constant environmental pollutions cause water pollution and pose threat to the health of millions. Drinking water is a growing problem in urban areas in India. Water erosion is the most prevalent reason for land degradation. Constant demands for energy, food, and housing have considerably degraded India's environment. The increase in population creates huge pressure on land

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[7] C.M. Lakshmana, *Population, Development and Environment in India*, 11 CHINESE JOURNAL OF POPULATION RESOURCES, 203, 207-210 (2013).

[8] Swati Tyagi et.al., *Environmental Degradation: causes and Consequences*, 81 EUROPEAN RESEARCHER, 221, 221-224, (2014).

[9] Rajiv Chopra, Environmental in India: Causes and Consequences, 11 INTERNATIONAL JOURNAL OF APPLIED ENVIRONMENTAL SCIENCES 1593, 1594-1601 (2016).

intensification. The natural resources of the world are being destroyed to meet the constant needs of the people. Use of pesticides, HYV seed, fertilizers herbicides is having an intense effect on health.

III. Pollution in India

Air pollution is a massive threat to the livelihood of the citizen of India. Of the 30 most polluted cities in the world, 21 cities belong to India.[10] 13 cities of India out of 20 cities in the world are considered to have the highest annual level of air pollution.[11] According to the Smart Air survey, the top 20 most polluted cities in 2022 in India are following[12]

Rank	**City**	**PM 2.5** ($\mu g/m^{3)}$
1	Faridabad	228
2	Ghaziabad	162
3	Gurugram	151
4	Noida	147
5	Baghpat	145
6	Kalyan	138
7	Bhiwandi	136
8	Moradabad	134
9	Muzaffarpur	130
10	Dharuhera	129
11	Meerut	119

[10] HELEN REGAN, 21 of the world's 30 cities with the worst air pollution are in India, CNN, Feb. 25, 2020.
[11] Sheena Scruggs, *India's air pollution, health burden get NIEHS attention*, NIEHS https://factor.niehs.nih.gov/2018/9/feature/3-feature-india/index.htm (Last visited Jan.5, 2022, 8:10 PM).
[12] DHARIYAS, *20 most polluted cities in India*, SMART AIR (Jan. 9, 2022, 8:20 PM) https://smartairfilters.com/en/blog/20-most-polluted-cities-in-india-2021

12	Agra	117
13	Rohtak	114
14	Ankleshwara	98
15	Durgapur	96
16	Kurukshetra	95
17	Yamuna Nagar	94
18	Prayagraj	93
19	Delhi	91
20	Patna	89

According to World Health Organization, up to 40 micrograms per cubic metre is safe by Indian standards. But the air quality of most of the Indian cities is very unhealthy and dangerous to the people. The Health Effects Institute (2018) finds that coal is a big reason and a source of fine particulate matter (pm 2.5) in India today.[13] Many other reasons like fuel and biomass burning cause thick smog in urban areas in India. Traffic congestion and greenhouse gases emission heavily contribute to air pollution in the country.[14] Another big reason for this problem is the way the trees are being cut down and the rapid deforestation is causing a devastating effect on the environment.

Around 80% of India's water is severely polluted due to the littering of filthy garbage, the dumping of untreated sewage into the rivers and other water sources. This serious water issue has led to severe health issues among the people in India because the majority of the people rely on their water usage on their water sources.[15] India suffers from unbridled growth of urbanization, unauthorized slums and good drainage facility. India has a huge slum population living in

[13] Anissa Suharsono et al., *Tackling Air Pollution in India*, 4 JSTORE 8, 8-11 (2019).
[14] United Nation Environment Program, Emission Gap Report, (Last visited Feb. 10, 2022 7:15 PM), https://www.unep.org/resources/emissions-gap-report-2019.
[15] Anna Sharudenko, *How water Pollution in India Kills Million*, BORGEN MAGAZINE, July. 14, 2020, https://www.borgenmagazine.com/water-pollution-in.

congested areas without basic living facilities. These areas are dominated by tanker mafias. Their businesses are run illegally in these areas. Septic tanks are used illegally by the mafias. Septic tanks are filled with water from wells, lakes and sold by the mafias. They charge an unaffordable cost for supplying drinking water.[16] Contaminated wastes from various factories and industries are dumped directly into rivers, and lakes which cause severe water pollution and this is detrimental to the whole human society. The Central Pollution Control Board (CPCB) 2018 identified 351 polluted river stretches in India. The CPCB found that 31 states and Union territories (UT) had rivers and streams that don't meet the water quality standards [17] Harmful wastes from Industries and agricultural sectors are disposed of heavily in the rivers and lakes in India. Some rivers are considered sacred by the majority population in India. Social and religious functions like bathing, ashes of a dead body, and animal bathing are done in the rivers. Filthy garbage disposal in rivers is very common. The lack of Governmental actions is responsible for the water quality degradation in India.

Soil pollution is also another reason which is very prevalent in India. Soil pollution causes huge negative health on the people of India. India's urban areas are suffering from hazardous waste, agricultural waste, industrial waste, bio-medical waste etc leading to massive environmental pollution.

Hazardous waste has been defined by The Ministry of Environment, Forest and Climate change of the Government of India as any kind of waste which can harm the environment or health whether autonomously or in contact with other substances due to its strange physical, chemical or biological composition.

Sources and the possible effect of hazardous waste are mentioned in the following table[18]:

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[16] *Id*.

[17] Shreya Verma, Behind Polluted Indian River Stretches, Inadequate Sewage Treatment, DOWN TO EARTH, July. 15, 2021), https://www.downtoearth.org.in/blog/pollution/behind-polluted-indian-river-stretches-inadequate-sewage-treatment-77957.

[18] Srinet Kothwale, The Hazard of Hazardous Waste Management in India: A Legal Overview, LAW ARTICLES (July. 12, 2019) http://www.legalservicesindia.com/law/article/1246/14/The-Hazard-of-Hazardous-Waste-Management-in-India-A-Legal-Overview.

Hazard Classification	Characteristics	Sources	Impact on Environment & Human Health
Oxidizing	Such waste may yield oxygen and can help in the combustion of other substances	Chemical Units, Pesticides, Power Plants, etc	Loss of crops, serious water pollution, serious effects on aquatic life, etc
Flammable/ Explosive	These kinds of waste may harm the environment by causing harmful gases at high pressures and temperatures or by fire hazards	Biomedical research facilities, colleges and university laboratories, offices, hospitals, nuclear power plants, etc	Air Pollution, Fire, Explosion, etc
Infectious Substances	These wastes contain microorganisms and are responsible for diseases in animals or humans.	Healthcare sections, Research institutions, Drugs manufacturing units, Bio-tech laboratories etc	Loss of fertility of the land, water contamination, Contagious diseases,
Poisonous (Acute)	These wastes are highly risky and poisonous that can lead to death or	Chemical Industries, Radioactive and	Loss of productivity of land, Behaviour abnormalities,

	severe injury to health	Nuclear Units, etc	Physiological malfunctions
Eco-toxic	These wastes may cause instant or delayed negative affect on the environment or health by means of noxious effects and /or bioaccumulation upon biotic systems.	Bio-Technology Industries, R & D Units, etc	Genetic mutations, Physical deformations, Birth defects, etc
Corrosives	These wastes are chemically charged and can seriously damage flora and fauna and other materials that come in their immediate exposure.	General Manufacturing Units	Loss of productivity of materials, Water contamination, etc
Organic Peroxides	These are organic wastes containing bivalent-O-O- structure and may undergo exothermic self-accelerating decomposition.	Plastic and Rubber Industries, etc	Water Pollution,
Toxic (Delayed or Chronic)	All these waste materials can have a delayed harmful effect if they enter into skin such as carcinogenicity	Chemical and Pharma Units, Fertilizers Units, Tanneries, etc	Soil contamination, loss of production, etc

Civil society is perceived, and understood as a voluntary association of individuals with common interests. The associations are above the individual and below the state.

b) Civil society is construed as an antecedent to the formation of a state.

c) Civil society is expected to transcend state and the nation.

d) Civil Society needs supervision and protection of State for its pragmatic functioning.

e) A state must have a minimum control over civil society.

f) Civil society must the independence for its efficient working as the mandate.

g) Civil Society is also placed in contrast with State. It is considered as a saviour from a totalitarian state.

h) It is also seen as a furtherance of neo-liberal agenda through "good governance."

Civil society is perceived, and understood as a voluntary association of individuals with common interests. The associations are above the individual and below the state.

IV. Role of Indian Judiciary

The judiciary is an integral part of government and has many responsibilities in administering justice to the people. Our constitution provides the Right to life and personal liberty under article 21, which emphasises that "No person shall be deprived of his life or personal liberty except according to a procedure established by law". The Indian judiciary is the custodian and guardian of the constitution and has been adequately protecting the right of the people in a positive manner. The role of the judiciary in saving the environment is undeniable. Public Interest Litigation (PIL) has been one of the main vital developments in the Indian judiciary in recent years towards environmental protection. Writ petitions under Article 226 and Article 32 are the right to constitutional remedies that have been accepted in the form of PIL by the High Court and the Supreme Court. The constitutional sanction of the PIL was accepted in the 42nd Amendment Act 1974, which added 39-A to the Indian constitution to provide free legal aid with equal

justice. The system of PIL has encouraged and empowered many NGOs, voluntary organizations, and individuals to help affected persons who are helpless and unable to seek justice. Eminent people like M.C Mehta, Justice Kuldeep Singh, and Justice Ashok Desai have acknowledged judicial activism in the field of environmental protection. But it is true that judicial activism has many shortcomings, executive laxity and apathy towards the environment which cannot be provided just by judicial activism.

In *Subhas Kumar v. State of Bihar*[19], The Supreme Court of India considered air and water as an inalienable and indispensable part of "life" under article 21 of the constitution. Rural Litigation and Entitlement Kendra case Dehradun vs State of UP[20], The Supreme Court of India held that safeguarding and protecting the rights of the people to live in a healthy environment has to be done even if it has some economic cost. Supreme court has given a verdict in Vellore Citizen case[21] while explaining the importance of environment and health that there should be a harmony between development and the environment. Supreme Court also held that there should be green benches in dealing with matters and issues related to the protection of the environment. Court also held that it is international environmental law where people who are affected from the environmental point of view will be compensated by the polluting party for repairing natural harm.

A landmark judgement was given by the Supreme Court in *M.C Mehta v. Kamalnath & others case*[22] by enumerating the Public Trust Doctrine on the principle that certain natural resources like water, air, sea and forests have immense importance to people and it would be unjustified to make these natural resources a subject of private ownership. Another historic judgement was given by the Supreme Court in *Narmada Bachao v. Union of India and Ors*[23]. The court upheld that water is a fundamental and primary necessity for humans and an indispensable part of article 21 as a human right and right to life.

The power of The Supreme Court to grant compensation to victims of environmental degradation was determined in the Delhi Gas Leak case[24]. The

[19] Subhash Kumar v. State of Bihar, AIR 1991 SC 420.
[20] Rural Litigation and Entitlement Kendra v. State of U.P, AIR. 1985 SC 652.
[21] Vellore Citizens Welfare Forum v. Union of India, AIR 1996 SC 2715.
[22] M.C. Mehta v. Kamal Nath, (1996) 1 SCC 388.
[23] Narmada Bachao Andolan v. Union of India. (2000) 10 SCC 664.
[24] M.C. Mehta v. Union of India, (1987) 4 SCC 463.

court can grant remedial recoup for a proven infringement of a fundamental right (Article 21). The Supreme Court has given the judgement due to the unbridle hazardous activities by the industries which are affecting severely common people and this judgement brought radical changes in liability and compensation laws in India. In Charan Lal Sahu case[25], Supreme Court emphasized on the wholesome environment which is an essential part of the right to life guaranteed by Article 21. Court further stated that violation of the fundamental right to life and personal liberty through environmental degradation would be considered environmental pollution.

Bhopal gas leak disaster in 1984 in which over 500,000 people were directly exposed to highly toxic gas. Thousands of people died due to toxic gas inhalation. It is considered one of the worst industrial disasters in the world[26]. Supreme court in its famous judgement of the Bhopal Gas Tragedy case[27] established a trend of Absolute Liability without any exemption. In the judgement, the apex court stated that any enterprise which is involved in an unsafe pursuit which may suffer anyone in the activity of such dangerous exposure to gas, the particular enterprise is strictly obligated to recoup everybody to the victims of such accident and such risk is not subject to any kind of exemptions.

In Ratlam Municipal Council vs Shri Vardhichand & Others[28], The Apex court stated that environmental damage will be seen as a Public nuisance and any responsible public authority cannot run away from its responsibilities of providing public health. Ratlam municipality was ordered to take immediate action on pollution and contamination in the street. Court also upheld the provision of basic sanitary facilities and services for its inhabitants within a six months period.

Dehradun Valley Litigation case in 1987[29], the Supreme Court upheld the balance of environmental and ecological integrity against the demands of industries of forest resources. M C Mehta filed a writ petition in the Supreme Court in 1985 to highlight the growing pollution of the river Ganga by industries and

[25] Charan Lal Sahu Etc. v. Union Of India And Ors, AIR 1989 SCR 597.
[26] Bhopal Gas Tragedy, The Times of India, Oct. 25, 2016, https://timesofindia.indiatimes.com/topic/bhopal-gas-tragedy.
[27] Union Carbide Corporation v. Union of India, AIR 1990 SCC 273.
[28] Municipal Council, Ratlam v. Shri Vardhichand, AIR 1980 SC 1622.
[29] Rural Entitlement Litigation Kendra v. State of Uttar Pradesh, AIR 1985 SC 652.

municipalities situated on its banks. The apex court gave a historic judgement in 1987 to close and shut down various polluting tanneries near Kanpur.

Apart from MC Mehta v Union of India, there are other important judgements regarding pollution control in India. Ajay Construction vs Kakateeya nagar Co-op Housing Society Ltd[30], is a case related to improper draining which resulted in the pollution of water. MC Mehta vs the State of Orissa[31], the Orissa High Court dealt with the issue of providing a sewage system when the medical college complex took its shape. In Mandu Distilleriesn Pvt Ltd vs MP Pradushan Navaran Mandal[32], Bhopal, Madhya Pradesh High Court's Indore Bench is of the view that the direction to close a polluting industry without notice cannot be sustained.

Regarding Air pollution Chaithanya Pulverising Industry vs Karnataka Pollution Control Board[33], Court was dealing with the issue that whether a polluting industry was to be prohibited from carrying on its activity or not. In Murali Purushothaman vs Union of India[34], Court directed the state government to commence centres for measuring carbon monoxide and other pollutants emitted from automobiles. In MC Mehta v Union of India, Court directed to conversion between diesel vehicles to CNG vehicles to protect Delhi from pollution hazards.

Regarding hazardous waste, in Indian Council for Enviro-Legal Action vs Union of India[35], The Supreme Court examined the grave pollution of a village, caused by the trial run of 'rogue' industries and held that it was a case where the principle of absolute liability for damages should be applied. In Obayya Pujari v Member Secretary, KSPCB, Bangalore, the Karnataka High Court asked for the identification of 'safer zones' to which stone crushing units should be relocated. In Wing Commander Upal Barbara v State of Assam,[36] the Guwahati High Court looked into the hazards of plastics. The Court is of the view that legislation on this aspect is necessary.

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[30] Ajay Constructions And Etc. v. Kakateeya Nagar Co-Operative., AIR 1991 AP 294.
[31] M.C. Mehta v. State of Orissa And Ors, AIR 1992 Ori 225.
[32] Mandu Distilleries Pvt. Ltd. v. Madhya Pradesh Pradushan Niwaran, AIR 1995 MP 57.
[33] Chaitanya Pulvarising Industry v. Karnataka State Pollution, (1987) 1 KAR 928.
[34] Murali Purushothaman v. Union Of India And Ors, AIR 1993 Ker 297.
[35] Indian Council For Enviro-Legal v. Union Of India And Ors Etc., AIR 1996 SCC (3) 212.
[36] Utpal Barbara v. State Of Assam And Ors., AIR 1999 Gau 78.

In 1992 Supreme court delivered a historic judgement against vehicular pollution. Four-member bench suggested some measures for the nationwide control of vehicular pollution. Court gave importance to the use of lead-free petrol in the nation and upgrading the usage of another mode of fuel for vehicles. Since 1995 onwards catalytic converters have been fitted to all new cars in India and the use of CNG in transportation has been promoted in Delhi and other cities.

V. Conclusion

Protecting the environment is one of the prime duties of human beings. People can only live peacefully and blissfully if they have a pollution-free environment. Man must understand that no matter how far he reaches the peak of civilization, overall development cannot be possible in a polluted environment. Various NGOs, and organizations are relentlessly working toward the protection of the environment. The Indian judiciary is effectively playing a very crucial role to save the rights of the people from environmental pollution. The right to a healthy environment is recognised as a fundamental right under article 21. A corresponding duty is imposed on the state and other citizens under directive principles and fundamental duties to protect and improve the environment. Public participation in environmental decision-making has been the subject of debate for a long time in the country. In the last two decades, environmental law has been coherently developing in India. Higher judiciary as The Supreme Court and High Courts have taken many crucial initiatives to establish environmental laws in the country. Public Interest Litigation (PIL) has been an effective tool in this regard. The main reason behind adopting the measure of PIL is to give more access to people to ensure justice. PIL has ensured that justice shall not be denied to the needy one who can not afford the money or finances to fight in Court for their rights. In the present time, the Supreme Court has expanded the understanding of environmental rights. Due to the effective effort of the judiciary, many new environmental laws have been in operation now, especially under Article 21, Court has broadly interpreted the right to a healthy and pollution-free environment. The leading role of the judiciary of the country in protecting the environment is showing a bright light of hope for the nation.

Constitutional Morality and Judicial Appointments in the Higher Judiciary

Paras Chaudhury[1]

Abstract

The constitutional structure of this great country is sui generis and the tool to meet the ends of, values and rights cherished in the preamble. It has stood the test of time and has been very capable and reaffirming in achieving the ends to a great extent. But we still have miles to go. The constitution makers believed that what is sine qua non for the subsistence of the system is independent judiciary. Ergo, greater the stress on its need less it is. The central edifice of the concept of judicial independence is the appointments to the higher judiciary.

Keywords: *Constitutional Morality, Judicial Pronouncements, Judicial Appointments*

I. Introduction

Constitutional morality primarily means utmost loyalty and commitment to the fundamental principles of constitution.[2] One must understand, it is not following the black letter of law blindly but achieving the utilitarian motives by perfect harmony between individual and societal interests.[3]

The usage of word morality has been seldom in our constitution. In fact it has been used only on four occasions; two times in article 19, one time in article 25 and once in article 26. The phrase has become common as of late especially in judgement of surrogacy, speech, sexual orientation etc. Still it was not a common term in constituent assembly debates and discussions. Of the few mentions of it, one reference appears more important than others; it was made

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[2] Constituent Assembly Debates – *Vol. VIII*, THE LOK SABHA OF INDIA (05/07/2021 01:38 PM), http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C25051949.html.

[3] UPENDRA BAXI & N.M. TRIPATHI, COURAGE, CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES; (1st ed. 1985).

by Dr. Ambedkar in his speech on 4th November, 1948. Dr. Bhimrao Ambedkar's assessment of this topic was that constitutional morality exists when there is perfect harmony between the government institutions and the people of India; as well as when there is non-violent resolution of disputes between the institutions and the people. Dr. Ambedkar was of the view that constitutional morality is necessary to exist universally because even a powerful minority can upset the established order.

According to Grote as quoted by Dr. Ambedkar, constitutional morality means respect for authority and at the same time people must be conferred rights, such as right of free speech and actions, shielded from non-arbitrary, unjust and vague decisions. Grote further went on to elaborate the concept of constitutional morality in the terms that constitutional morality is of 2 types. Firstly where the constitutional morality is confined to the black letter of constitution and hence the rights and values not mentioned in constitution did not find place, in this form of constitutional morality. He put up an example for the same in the form of right of non-discrimination which if not mentioned in some constitution it was not supposed to be part of the constitutional morality of the country.

The second form of constitutional morality is where there is prominence given to the conventions and protocols by black letter of law conferred discretionary powers or remained silent thus laying the scope variations in black letter of law. The purpose of Grote's History of Greece was to protect the democracy of Greece from the strong criticism of the critiques of highest repute including Plato and Thucydides. He wanted to explain why the constitutional morality has found strong basis of existence in Greek's democracy. Furthermore, he said that the constitutional morality was met with some success on two occasions firstly in aristocratic combination of liberty and self-restraint practiced in the British regime in 1688 and second in American Constitution. This was sure to worry the geniuses of Dr. Ambedkar stature who felt that the experiment of constitutional morality in India could fail because it was a new concept and it may take some time to absorb in country with such wide diversity.[4]

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[4] Archit Shukla, *Doctrine of Constitutional Morality*, PRO BONO INDIA (15/06/2022 08:38 AM),

These fears of the Dr. Ambedkar proved to be real and tangible. The concept of constitutional morality was doomed to fail, the same moment when the second judges case, over ruled the verdict given by Hon'ble Justice P. N. Bhagwati in first judges case[5], if it was not for the resilience of Indian democracy. The first judge's case lay unequivocally and clearly manifested the intention of constitution makers in following words: "All the organs of government have equal say in the judicial appointments to higher judiciary. There is no question of primacy of one over the other. Had the constitution makers intended primacy to Chief Justice of India in judicial appointments they would have used the word concurrence and not consultation."

He further elaborated and said "though there might be instances where bending the constitution might seem justified, but that would be rewriting the constitution in the garb of interpretation." One thing is for sure from this, what can be impeccable process of appointment, is debatable? But the constitution makers did not intend the power to be vested in any one organ.

II. Historical Background of Judicial System and Judicial Appointments in India

The Indian Judicial system is one of the oldest judicial systems. There is no other judiciary which can claim to be structured and ancient than Indian one. The Indian judicial systems and mechanism of appointments can broadly be divided into 3 periods, chronologically divided as follows:

A. The Ancient Period

In ancient India the rule of law was implemented with full force and vigour. No one was above the law. Even the king was considered subject to the principles of law. Violations of which even by the king were grounds of removal. The highest standards of integrity, honesty, independence were maintained which are not sidelined, hitherto.

The Indian judiciary was subject to hierarchical divisions with the chief justice (Praadvivakka) at the top of affairs. The appointments were made by the King. The decrees and orders made by junior courts were subject to appeal before courts

https://www.probonoindia.in/IndianSociety/Paper/136_ARCHIT%20Doctrine%20of%20Constitutional%20Morality.pdf.

[5] S.P. Gupta v. Union of India, AIR 1982, SC 149.

placed higher in hierarchy. Moreover the disputes were settled in accordance with the principles of natural justice similar to the principles governing court proceedings today.[6]

B. The Medieval Period

After the end of the rule of King Harsha, there is period of enigma of which not much is known, mainly because of the fact that the empire after King Harsha disintegrated into many small kingdoms. But there is substantial evidence to corroborate the fact that the judicial system which existed for thousands of years and had rooted itself in the Indian sub-continent, continued to exist. This is all the more evident from the fact that commentaries like Mitakshara and Shukraneeti Sar had P.A.N. India presence and authority. Then came the Mughal regime, which brought with it new system of judicial administration and traditions which were implemented uniformly throughout the kingdom.

The values, rights and principles including that of justice that we so much cherish today reached its epitome during Mughal Empire. The standards were set high by none other than Prophet Mohammad himself. No one was above law, it is proved by the fact Qadi was subject to law and not the King. The traditions that we cherish reached the high during the first four Caliphs. The Qadi was appointed by the Caliph Umar. It is reported of him that caliph had a personal case against a Jewish national. The case was reported to Qadi appointed as aforesaid, which when turned up for hearing the caliph appeared. On seeing Caliph the Qadi stood up out of sheer respect and honour. This act of Qadi was considered unpardonable and was considered sufficient of his unbecoming to hold that post. Such was the standard of integrity and honesty maintained at that time.

C. The Present Period

At the top of the present day judicial system is the Supreme Court and the state judiciary is headed by High Court which administers both the state law and union law within the local territory of the state.[7] Like during Maurya Empire there is

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[6] Justice S.S.Dhavan, The *Indian Judicial System: A Historical Survey*, ALLAHABAD HIGH COURT (13/06/2022 04:03 PM), http://www.allahabadhighcourt.in/event/TheIndianJudicialSystem_SSDhavan.pdf

[7] M.P.Singh, *Securing The Independence Of The Judiciary-The Indian Experience*, MCKINNEY LAW (21/05/2022 12:08 PM), https://Mckinneylaw.Iu.Edu/Iiclr/Pdf/Vol10p245.Pdf.

hierarchical arrangement of Courts in every district in the order starting with Judicial Magistrate Second class, Judicial Magistrate First class, Chief Judicial Magistrate, Assistant District and Sessions Judge, Additional District and Sessions Judge and District and Sessions Judge as its head, which works under superintendence and control of the respective High Court.

Now coming on to the appointment of judges in present time with sharp focus on historical development of the judicial appointment process in India. One of the most discussed, debated and analyzed topic of judicial system in India is the judicial appointments to the higher judiciary. The judicial appointments to higher judiciary were in nascent stage but the ground work was laid down in Government of India Act, 1915. The provisions regarding appointment of judges in higher judiciary were laid down in the chapter IX of the Act. The power to appointment was conferred solely on Her Majesty. The willingness of the Secretary of State in Council was required to set, amend or vary the salary, allowance, pensions etc. of the Judges. The eligibility conditions for the appointment of judges to the high court were set out as follows:

1. Lawyer of England or Ireland or a Member of the Faculty of Advocates in Scotland of not less than five years' experience, or
2. An Indian Civil Servant of not less than ten years' experience and having for at least three years served as, or exercised the power of, a District Judge, or
3. A person having held judicial office not inferior to that of a Subordinate Judge, or a Judge of a Small Cause Court, for a period of not less than five years, or
4. A person who has been an advocate of a High Court for a period of not less than ten years.

The eligibility conditions set out in the Act paved the way for the appointment of judges from Indian origin; particularly the last two conditions. Further the Act established a quota for the appointment to take place form bar and the appointment to take place from the Indian Civil Service was set out at two third and one third, respectively. The tenure of the Judges was for term of Her Majesty's pleasure. The high praises through the self-proclamations by British jurist for having implemented a judiciary in its colony on terms of British

judiciary was subjected to strong condemnation on the grounds such as the tenure was for Her Majesty's pleasure, the pays and perks decided by executive and even on the ground that executive had a quota in appointments.

The faults of the Government of India Act, 1915 were sought to be rectified by the Government of India Act, 1935. First of all it proposed to establish Federal Courts in Addition to the High Court. The eligibility for the post judge in these courts was that the Advocates practicing in England, India, Ireland and Scotland including Indian Civil Servants and the judicial officers in British India were eligible and given the opportunity of being appointed in one these courts. Also it changed the tenure from being during His Majesty's Pleasure to 60 years and moreover it changed the functionary who could change the pays and perks from Secretary to State in Council to His Majesty himself.

III. Constitutional Morality in Judicial Appointments as Envisioned by Constituent Assembly

Coming over to the constitutional morality in judicial appointment process to higher judiciary as viewed by the constitution makers, the underlining feature of pre independence period was that the appointment should have been made by the executive and there was no checks and balance. We needed a process which incorporated checks and balance. With this in mind Sapru Committee was established in 1945 which recommended that, "the appointments of Justices to the Supreme Court and High Court should be done by the President in consultation with the Chief Justice of India and in appointment to the High Court in consultation with the Chief Justice of that High Court and the head of the state concerned."

Once the framing of constitution started in the constituent assembly the Union Constitution Committee established an *ad hoc* committee to consider the issue. The adhoc committee recommended that, "the power judicial appointments to the supreme court should not be vested with any one organ of government." For the aforementioned purpose the committee recommended two ways for the appointment. One, that the President must in consultation with the Chief Justice of India, except in case of appointment to the office of chief justice nominate the name to, seven to eleven member committee consisting Chief Justices of High Court, Members of Parliament and Law officers of the Union. The other method

was that the committee will recommend three names to the President who in consultation with the Chief Justice appoints one of them.

Sir B. N. Rau, the constitutional advisor to the constituent assembly submitted the memorandum of Union Constitution partly agreeing with the recommendation of the ad hoc committee that the appointment to the post of Supreme Court Judge must be made by the President which must be approved by not less than two thirds of the majority of Council of State. Moving ahead on the similar line the Union Constitution Committee also departed from the recommendations of the *ad hoc* committee established for the same purpose and held that the appointment to the office of Supreme Court Judge must be made by the President in consultation with Chief Justice of India and such other judges of Supreme Court and High Court as may be required for the purpose. [8]

The Provincial Constitution Committee which made recommendations for the appointments to the post of High Court Judge recommended that the appointments should be made by the President in consultation with the Chief Justice of that high court and Governor of the respective state. The recommendations by the Union Constitution committee and provincial constitution committee were accepted by the drafting committee and were incorporated in draft constitution.

It was Justice H. J. Kania, Chief Justice of Federal Court among others who expressed and gave first opinion on the provisions of the judicial appointments to the higher judiciary in draft constitution. He expressed reservations about the draft that there are some strong chances of interference of the provincial politics in the appointment process. He further made recommendation the appointments made to the high court must be made in direct consultation of the Chief Justice and Governor thus narrowing the chances of involvement of state home ministry in the entire process and thus excluding the interference of domestic politics.

Soon after that there was a meeting held between the Chief Justices of the Federal Court and High Court which thoroughly examined the process of appointments to the judiciary and prepared a memorandum suggesting changes to the above mentioned provisions. They suggested that such appointments should be made after consultation with the Chief Justice of that High Court and the Governor of

[8] Constituent Assembly Debates - *Volume VIII*, THE LOK SABHA OF INDIA (18/04/2022 3:24 PM), http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C26051949.html.

respective state which must be subjected to the concurrence of the Chief Justice of India before the appointment by the President. This according to them was important to exclude local politics in judicial appointments and ensure judicial independence.

They further went on to recommend that the appointments to the judgeship must be barred for the persons having held the post of cabinet minister in state government. But all in vain as nothing received the approval of the draft constitution committee despite similar recommendations from other places of high repute as well. But this like every other decision of draft committee was reasoned out before rejection on the grounds that the judicial appointments must be subject to wider consultations and the once merit has been recognized nothing should stand in way to ensure predominance of merit in such appointments. Moreover the recommendations of the memorandum were rejected as they failed to provide contingency plan in case of difference in opinion between Chief Justice of High Court and Chief Justice of India.

There were some last minutes changes proposed by drafting committee which suggested that the appointments to the office of Supreme Court Judge should be made in accordance with the Instrument of Instruction. The Instructions mandated that the appointment must be made after and upon the advice of the Advisory board which shall consider the names given to it by President after consultation with all the judges of Supreme Court and all Chief Justices of High Court. The board then shall discuss the names proposed by the President in consultation with the Chiefs of High Court and Supreme Court Judges. The advice of Board will partially be bounding as President should make the appointments in accordance with the advice. However, the President to strike out certain names as well but in that case the President needed to file a memorandum in Parliament stating the grounds taken into consideration rejecting the candidature. As far as regards the constitution of the board is concerned it will consist of not less than 15 members of Parliament. However, the idea never fructify as the last minute recommendation were dropped before being finalized by the draft committee itself.

All the debates, discussions and deliberations which were made in the constituent assembly regarding the process of appointment either directly or through the various committees could be subsumed into 3 to 4 broad ideas. First and foremost idea considered was that judicial appointment to higher judiciary should be made

by the President without any restrictions and limitations to such power. The second procedure considered was that can the appointments be made by the President subject to the approval of Council of state? There was another question, which rose in the assembly that, should the appointments made by President be subjected to be made after having concurrence with the Chief Justice of India? Yet one other proposition was that whether the mode of appointment should be made subject to recommendations of the Judicial Appointment Commission. The recommendations by the commission may be made to president either on the names suggested to it by President in consultation with Chief Justice of India or the it may propose the names to President who would make the appointments subsequently.

Coming on to the grounds of decision, which guided the final accepted set of procedure to be followed or raison d'etre of the process adopted. All these modes of selection were rejected on one ground or other. Taking them one by one;

1. The first process of appointment discussed was conferring all powers on the President similar to that of U.K. This was rejected on grounds that the Indian democracy is not as mature as U.K.'s and such experiment is most likely to fail.

2. The next idea which was considered is the idea of approval by the legislature. It was considered to be too cumbersome and likely to bring in political considerations and politics in the appointment process. This could seriously damage the independence of judiciary and ergo liable to be rejected.

3. Subsequently the use of word concurrence was put on the table. The opinion of the Chairman of the drafting committee Dr. B. R. Ambedkar was that there is no question that the Chief Justice of India is man of highest repute and status but he is a human being with all the prejudices, biases and may also err. Moreover it was said that by using the word concurrence we will give the power to Chief Justice of India which we are not willing to give to the President or the Government of the day.

4. Yet another point to be considered was that whether the appointments should be made in accordance of recommendation of the Judicial Appointment Commission. This was rejected on the grounds that it will make the process cumbersome and bring in immature politics.

So the Constitution adopted a middle way by selecting the Judges in a way that there was no legislative interference and no supremacy to anyone organ and at the same time the process was not cumbersome and there was little to no politics involved.

IV. Essentials of Constitutional Morality and the Collegium System

As we all know that the concept of Constitutional Morality was propounded by the British Classist George Grote in nineteenth century in his book titled as "A history of Greece".[9] In the words of Grote there are two essentials of the concept, without which it cannot exist and the entire concept of constitutional morality in that jurisdiction can be considered to be a sham or hoax.

Such is the importance of these concepts that nothing even close to constitutional morality in real sense can exist without the two. One might be curious what they may be? They are: Plurality and Self-restraint. The next part of this research paper will primarily focus on these two concepts and how they relate, affect and change the entire paradigm of the judicial appointments to higher judiciary and how the absence of these two nullify the presence of constitutional morality in judicial appointments. Explaining the concept of constitutional morality, I will also touch up upon the constitutional roots of the judicial appointments when I talk about right to equality as a fundamental right and judicial activism.

A. Plurality and Judicial Appointments

Once the collegium system was established there were high hopes and equally high anticipation that how will this experiment never heard or practiced off before will turn out to be? Nevertheless I don't think that anyone disputes that this system is not impeccable but at the same time it is also true that to a great extend the system has ensured judicial independence (beside other positive attributes) though coupled with other independent factors the state of affairs such as pendency of cases alone is pitiful. The later point has been reiterated in the famous case of Lok Prahari v/s Union of India. In this case the Supreme Court went one

[9] Nusrat, *Constitution, Constitutionalism and Constitutional Morality*, THE LEGAL SERVICE INDIA (07/06/2022 01:18 PM), http://www.legalserviceindia.com/legal/article-4939-constitution-constitutionalism-and-constitutional-morality-in-india.html.

step ahead and held that *ad hoc* judges should be appointed to deal with the high pendency of cases.

Another such major lacuna, shortcoming or pitfall whatever one may call, of the present system applicable in the judicial appointments to the

Higher judiciary is that the there is a lack of plurality and the right equality is not applicable is strict sense of the term. Right to equality, as guaranteed by part III of Indian Constitution, from article 14 to 18 and even finding its place in preamble in form "Equality of status and Opportunity" is missing in the present system of appointments.

First things first, talking about plurality. As talked about earlier the judicial appointments were not really able to keep up high hopes. [10]This is all the more evident and relevant in the present context of Plurality. Plurality refers to the multifarious nature of the masses, especially in India, which must find a role in judicial appointments. To begin with the His Excellency Hon'ble President of India Mr. K. R. Narayanan while signing the warrant of appointment in November 1998, felt it important that the certain sections of society are underrepresented in some similar words such as: "The Collegium system must ensure representation of under or unprivileged sections of the society as the S.C.'s and S.T.'s in particular constitute about 25% of the population and are grossly under represented. Vacancies and under-representation of the feeble sections of society is not unison with constitutional mandate especially in light of humongous pendency of cases."

After the views were conveyed to the Chief Justice of India through proper channel and it saw the light of day it was defended by the hon'ble C.J.I. on similar terms as follows:

"The constitutional mandate warrants the requirement of merit to be predominant consideration in respect of all the other formalities and concepts and we have strictly and sincerely adhered to the principle enshrined in our constitution. An

[10] Dr. Anurag deep, Sambhavi Mishra, *Judicial appointments in India and the NJAC Judgement: Formal Victory or Real Defeat*, MANUPATRA (05/06/2022 11:35 AM), http://Docs.Manupatra.In/Newsline/Articles/Upload/88BE1E36-4D87-4B24-9C29D565D0D368A0.%20 Judicial%20Appointment%20in%20India%20_Civil.Pdf.

error in appointment will be more dangerous than vacancy as such". The Chief Justice of India said that they choose quality over quantity for more reasons than one.

The recommendations of the President were taken positively, by and large. Some claimed that President, wanted reservation for S.C. and S.T. community, in garb of under representation, in appointments of judges to courts of record. All such claims were strongly rebutted and didn't find any ground amongst Indian critiques. However nobody spoke of against merit but some spoke that the under-representation must be tackled with, immediately.

Alongside the comments and national sentiment, theory of judicial appointment to higher judiciary also supported the remarks of President for plurality and diversity of India as it must find proportionate maybe not exact but somewhat adequate representations to the S.C., S.T. and women to begin with.

The fact of the matter is that in democracy such as Indian one, has three organs broadly speaking and each organ must have representations from all corners of our great country. The executive and legislature follows the principle of plurality leaving a question mark for the same, when it comes to the Judiciary. The idea that judiciary only adjudicates the dispute between two parties and does not litigate is not well founded in present days where it not only adjudicates but also litigates both law and policy. Such decisions when made by the judiciary it must also be subjected to same democratic norms as the other two organs of the government are made bound to follow. The democracy mandates and manifest on several occasions that if not same but similar principles must be made applicable to judiciary. For this underlying purpose it is necessary that the judiciary should follow them but must be elected similarly. But what is important is representation. One of the brightest scholars covering the domain of representation of diversity in judiciary, Shetreet's reference and his perception on this is of utmost importance. He said:

"The judicial appointments must be reflective of the social, geographical, communal and other diversity to ensure that various sections of the society find fair and adequate representation. The idea of fair representation is not something vague and finds rationality in existence on more than one ground as judiciary is also an organ of the government and not merely an adjudicatory body. The fair reflection must also be ensured for the purpose of upholding and maintaining the

somewhat fragile public confidence and moreover on the basis of requirement of balanced panel for socially sensitive issue. Furthermore he said that the judges represent their culture, value system and background inter alia. This becomes crucial when the panel decides an issue and thus the judiciary reflects narrower set of fundamental principles and values, if it is not diverse."

There is legitimate basis for the inclusion of the diversity or fair reflection principle as it is also required for the non-violent settlement of issues or one the ideals of constitutional morality as reflected by the Dr. Ambedkar as well.[11] These are not just views of a person but reflection of broad ideas of number of scholars and the international bodies.

One such reference can be taken of the Singhvi and Montreal declarations on independence of judiciary as the same held that judiciary must be reflective of the society it represents and thus the diversity in judicial appointments is a must.

The right to equality is provided in part-III of the constitution from article 14 to 18 have an underlying purpose as provided in preamble, also is to ensure that, equality of status and opportunity is guaranteed to one and all. With this aim in mind the article 14 lays down that there will be equality before law and there shall be equal protection of laws. Equality before law is negative in essence as it means that everyone will be treated equally and no one is above the law. On the other hand the concept of equal protection of the law, provided equals will be treated equally and unequals will be treated unequally and thus the state is enabled to make laws for special treatment of unequals to make the disadvantaged equal to the advantaged lot.

It is in the later part of article 14 it is said that the equality before the laws enables for reservation and the other provisions for upliftment of the poor and weak, though it is directly provided in article 15(4) and article 16(4).[12] These provisions envision and enable a judiciary that is reflective of the plurality of the nation. Ergo

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[11] Hrishika Jain, *Towards A Model Of Judicial Review For Collegium Appointments: The Need For A Fourth Judges' Case?*, MANUPATRA (8/06/2022 02:28 PM) , http://docs.manupatra.in/newsline/articles/Upload/5A8B9F32-62A5-4CF1-B663-AFBAF25D7CCB.pdf.

[12] K. V. Vishwanathan, *Judicial Review: Activism and over reach*, NATIONAL JUDICIAL ACADEMY INDIA (15/06/2022 10:58 AM), https://nja.gov.in/Concluded_Programmes/2021-22/P-1287_PPTs/1.Judicial%20review%20-%20Activism%20and%20Overreach.pdf.

it is the interface between judiciary and constitutional guarantee of equality and thus the judicial appointment process is deep rooted in our constitutional framework. The right to equality from article 14 to 18 provided, for representation of masses and plurality and at the same time does not affect independence of judiciary. Such is the geniuses of our constitutional law maker.

Moreover, there is a heavy responsibility upon the judiciary to ensue inter-alia that it is inclusive and even though they may be self-appointed it represents masses and is not a closed group of people appointing and delegating their duties arbitrarily and on vague principles. If it can take the burden of appointing, it must take responsibility and act with highest standards of conduct and behavior. It should also envision and plan for the achievement of the social revolution as envisioned by the constitution makers through task of appointment at hand.

B. Interface of Self-restraint and Judicial Activism

Recent times have seen a tremendous increase of demand at the hands of judiciary to protect and provide human rights to the poor, deprived, exploited and weaker sections of society. Such demand when met, by the judiciary is termed by those who criticize it, as judicial activism. The heart of the matter underlying criticism is that the function assigned to legislature and power given to the executive is exercised by the judiciary and is thus running the nation.[13]

But this argument does not have a strong basis because we must understand when it is that the judiciary performs such function or exercises such power? When does, the need to perform such duties arise? It is when the legislature fails to meet the constitutional goals within such time which will be considered reasonable by any standards or when the need is so grave and requiring dire action on the part of legislature that overlooking it would mean loss of life or property of temporal nature which cannot be suitably compensated or made good the loss suffered.

Moreover, such power is also exercised when the executive performs its duty callously or with indifference towards consequence or when the executive is insensitive to the needs of the society at large or even of one individual.

In such circumstances, can we expect the judiciary to be mute spectator or let me put it in another way, suppose a hypothetical situation, were a person is missing

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[13] S. Sahay, *Judicial accountability: Issues*, SAGE PUBLICATION (20/05/2022 1:15 PM), https://journals.sagepub.com/doi/abs/10.1177/0019556119990311.

for last seven years and no one, who would have heard from him had he been alive has not heard from him. His wife is in a destitute state, lacking means of subsistence and she needs death certificate for various reasons to name one let's say to receive pension of his husband. The district authorities are denying issuing the certificate in absence of proof of death or directing it to issued by other districts authority. What can a person in such circumstance do, besides approaching the court? And if court in such situation issues the direction to provide the petitioner with certificate of death, is it activism or just exercising the power conferred on it by the constitution. There can be far graver the circumstance and greater the needs of society. In the above example the power is exercised by the judiciary which was in essence to be exercised by the executive. But executive failed to do the same and thus violated the constitutional mandate and judiciary as a watchful guardian of constitution made the executive of day to do only what they are supposed to do. Needless to say that such exercise of power would not have arisen, had the executive had not acted indifferently to the needs of the victim.

This is not only morally and legally correct on the part of the judiciary to do so but also required and need of the hour to avoid and prevent despotism on one hand and violent uprising on the other. Need not to mention that such state of affairs will uproot the constitutionalism and the rule of law itself. Thus Judicial Activism is both justified and required for our existence, as one nation.

However this is also equally true that if judicial activism is one side of the coin and we flip it, the other side bears the name of judicial restraint upon it. The judge while performing his functions should not delve upon the goals enshrined in preamble to such an extent that he goes on to achieve them on his own with no bounds whatsoever. What I mean to say is that it should not be judicial adventurism which it court pursue. There is an invisible line which shall not be crossed as there is always possibility of judiciary creating rights which cannot be enforced i.e. without remedy for them. There are limits to what judiciary can achieve and judicial process must act within bounds and exercise self-restraint.

The doctrine of separation of power is also important to mention here. It is part of the basic structure of constitution and need be arise it can rescue from the maize of judicial activism and judicial restraint. Reference of Montesquieu is worth mentioning here he said that, "The separation of power is important as without it there can be no liberty. The division of powers between legislature and judiciary

is of utmost importance because if power is given to the judge to legislate then he can be an oppressor and there will be rule of arbitrariness".

On the basis of these arguments it can be said that judicial restraint is very much required. Though it can be justified at the time of second judge's case but it will not be right to say that it will always be right to have of judicial appointments through collegium system only. No doubt independence of judiciary is important it can be secured through other ways as well. After all it is not India alone which can boast of independent judiciary. In fact when independent and strong judicial system are talked about the names that pop up are U.S., U.K., Germany etc and none of them have collegium system to ensure independence.

C. Access to Justice

Justice and law are closely related to one other. Such is the co-relation between them that one cannot exist without other. According to some scholars the relation between the two is that of a pen and ink. One won't work without other. They went one step ahead and said that the law without justice is blind and justice without law is lame. Law, justice and judicial appointments are intrinsically related to each other.

Having said that, time and context is right to mention the maxim of Ubi jus ibi remedium which means "where there is a right, there is a remedy". This maxim is the foundation of the entire procedural law and justice delivery system let alone the concept of access to justice. With access to justice the first thing that crops in mind is the means to avail justice. But it not such a limited concept, it is much more than that. It include the number of courts, quality of lawyers, independent judiciary, public interest litigation, factors affecting access and list goes on.

According to Prof. Upendra Baxi access to justice signifies ability to participate in judicial proceeding. Such ability may be restricted by any means or hurdles. This is if we touch the subject superficially, but when we go in depth we realize that the concept is broader and even brushes upon the distinction between absolute justice and ideal justice. What they mean is justice for one may be its denial to

another. This is corroborated by almost universally accepted claim, that no right is absolute.[14]

Having applied and provided absolute justice for everyone would mean giving equal treatment to everyone even the unequals or where the freedom of speech and expression is put to no limits even where it injures others. But that can't be done. Every wish of everyone cannot be fulfilled. Every right of each individual cannot be guaranteed fully. There has to be restriction which are just, fair and reasonable. This is the difference between absolute and ideal justice.

The process of judicial appointment and concept of access to justice are connected to one other from different viewpoints, perspectives and inter-linkages. Firstly talking about access to justice in traditional sense the access to justice is linked with judicial appointments as the process of appointment of judges will provide both quality and quantity of judges which is first thing when someone wants access to justice or start of for the relief through the justice delivery system.[15] Then it is linked to judicial appointments intrinsically as the judicial appointments are a means and ends to ensure judicial independence. If the selections are made on merit, they are representative of diversity in society, constitutes impartial and unbiased minds with impeccable character then the access to justice will be easy, less cumbersome, cost effective, speedier among other things and moreover it will increase the faith of masses in judicial system.

Furthermore the concept of access to justice is linked with the judicial appointment mechanism in this way as well; absolute justice is an illusion and unachievable as there might be restrictions which cannot overlooked and no matter how much development has taken place and whatever maybe standard of living and what may be level of value system prevalent we can have ideal justice were rights are conferred but with restrictions.

On similar if not on same grounds we can have judicial appointment process which provides for access to justice in ideal sense of the term both by providing

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[14] Domenico Francavilla, *Diversity and the Judiciary in India: Supreme Court judges in Indian society*, THE OPEN UNIVERSITY (28/05/2022 11:58 AM), https://core.ac.uk/download/pdf/302353916.pdf.

[15] Justice N. Jagannadha Rao, *Access to Justice*, DELHI HIGH COURT (10/06/2022 12:16 PM), http://www.delhihighcourt.nic.in/library/articles/Access%20to%20justice.pdf.

equality of opportunity in appointment to all sections and dispensing justice to most, ideally.[16] For this, we cannot overlook merit. But we can ensure diversity. We cannot overlook integrity and honesty. But we can provide for central secretariat to ensure well-functioning democratic process and avoid delay in appointments. We cannot overlook professionalism. But we can provide transparency. We cannot overlook communication skill. But can provide for accountability. We cannot overlook administrative capacity. But we can provide for checks and balances in process. While including all these, we can exclude nepotism, dysfunctional consequences and purposeful delay in appointments.

V. Conclusion

This topic of "Constitutional morality and judicial appointments in higher judiciary" is such that the legal scholars, lawyers and judges can discuss the topic ad infinitum and still discover new dimensions.[17] The preambular glory given by the people of India to themselves aimed for a robust, liberal and adaptive constitution, which was the means for the ends of Justice, Equality, liberty and fraternity. The Constitutionalism provided gave us a system with constitutional morality being an inseparable part of the system. There is hardly any area left untouched by it, especially the mechanism for judicial appointment were consultation left the door wide open for constitutional morality to play its part with full force.

Whenever in doubt the intent of constitution makers can guide and provide us the direction for correct interpretation. The constitution makers aimed for a participative consultation process. So, why not provide mechanism for it? Lay down the ground work for it by constituting an office, well defined criteria, advanced data gathering etc in essence institutionalizing the entire process.

What comes next is the representation of marginalized, weak and women for the office of the Judge in Supreme Court and High Court. There is strong basis and demand for it as broader the diversity in the Supreme Court and High Court for

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[16] Akhil, *Access to justice*, THE LEGAL SERVICE INDIA (01/06/2022 01:13 PM), http://www.legalserviceindia.com/legal/article-4069-access-to-justice.html.

[17] Archit Shukla, *Doctrine of Constitutional Morality*, PRO BONO INDIA (03/06/2022 11:09 AM), https://probono-india.in/research-paper-detail.php?id=136.

that matter wider the perspective and value system of the Bench ensuring (without insinuating anything on the present quality) better quality of judgments.

I would like to conclude with words of Justice Brennan of US Supreme Court in following sense that, "The most adverse effect caused on the human heart is not by illness or any other adversity but the injustice which makes us bring down things. But unfortunately justice along with other values is served quickly and easily to the rich, and poor who need it are left begging at the mercy of rich and powerful. This must be avoided by providing access to justice in letter and spirit."[18]

The aim of all the high ideals and structure besides the goals enshrined in the preamble is to uphold the faith of the masses in justice delivery system, which must remain intact. Let heavens fall, but justice shall Triumph!

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[18] Justice N. Jagannadha Rao, *Access to Justice*, DELHI HIGH COURT (10/06/2022 12:16 PM), http://www.delhihighcourt.nic.in/library/articles/Access%20to%20justice.pdf.

Implementation of National Education Policy, 2020 amongst Particularly Vulnerable Tribal Groups in India: A Critical Study

Vijoy Kumar Sinha[1]

Abstract

In today's technologically evolved and scientifically advanced society, education is not a luxury exclusive to some privileged class. Instead, it is a fundamental and basic human right that everyone may exercise, regardless of caste, colour, race, sex, religion, or place of birth. When education is recognised as a human right, it means that the right to education is guaranteed to everyone without any discrimination on any ground whatsoever, that the state is under a legal obligation to respect, protect, and provide access to education, and that the state is subject to legal accountability when the right to education is violated or when access to education is denied. The National Educational Policy 2020 is the third educational policy that the government of India has introduced. The goal of this policy is to implement significant reforms in the education system of the nation in order to raise the literacy rate. Tribal people have their unique way of life, characterised by extreme disadvantages such as poverty, lack of education, and a lack of knowledge. They make their homes in the hills, often wholly or partially isolated from the rest of civilization. The Dhebar Commission designated the least-developed indigenous communities as Primitive Tribal Groups (PTGs) in 1973. The government of India rebranded the PTGs as the Particularly Vulnerable Tribal Groups (PVTGs) in 2006. Most PVTGs have common characteristics, such as a relatively small population, a lack of written language, a lack of complex technology, a slower pace of development, and a lack of urban centers. Despite the government's best efforts, many students cannot benefit from the educational schemes available to them. This paper aims to study the potential impact of the new education policy on the education of PVTGs.

Keywords: *National Educational Policy 2020, Dhebar Commission, Particularly Vulnerable Tribal Groups, Education, Human right.*

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I. Introduction

Education entails learning about and comprehending the many different areas that will be important in our everyday lives. It is important to remember that the word "education" encompasses the formal education we get in schools and the informal learning and life experiences we have had. Learning alters the way we see the world. Our education begins in the family when we are young and continues right up to the moment we die, and maybe beyond if there is an afterlife. Knowing one's rights and responsibilities to one's family, community, and nation may be significantly aided by this resource. This broadens one's perspective on the world and strengthens one's will to oppose evils such as injustice, corruption, violence, etc. It is well-known that this tool is the most powerful for enhancing our lives now and in the future. A person's self-assurance is boosted as a result, which is crucial to his or her future success.

Education is a vital human right and a crucial component of the development of a country. It is widely accepted that development objectives should be pursued so that socio-economically backward individuals can get rid of poverty and fully participate in the country's development like other citizens. Numerous international treaties on human rights have confirmed this, which includes the "United Nations Educational, Scientific, and Cultural Organization's (1960) Convention Against Discrimination in Education, the International Covenant on Economic, Social, and Cultural Rights (1966), and the Convention on the Elimination of All Forms of Discrimination Against Women (1976)". Since 2000, the United Nations has also been implementing the Millennium Development Goals to guarantee universal primary education for everyone at free of cost, irrespective of ethnic origin. The 2010 Education for All report indicates that the target has been met. Throughout India, education is offered by both the government and private sectors at three levels: national, municipal and state. Additionally, various institutions that provide vocational education have been established to address schooling demands.

Education and literacy are significant indications of tribal societies' socio-economic growth and their internal strength. Professor Amartya Sen emphasized the critical role of education in achieving equitable economic prosperity. The development of all segments of society is critical. It is critical to bring together society's underprivileged, excluded, and weaker segments. Free and compulsory education is guaranteed as a fundamental right to all children aged between six to

fourteen under different provisions of the Indian Constitution. Among all the accredited primary schools currently running in India, around 80% of them are either sponsored or managed by the government.[2] However, despite such efforts from the government, the tribal communities of India are still lagging behind the Schedule Caste community and the General population in matters of literacy and education.[3]

The Indian Constitution identifies Scheduled Tribes (STs), which constitute around 7% of the country's total population, for special consideration concerning some ethnic minority groups traditionally referred to as tribes or Adivasis.[4] In almost every state of the country, there are 573 STs.[5] Most of these communities have languages other than those spoken in their country of origin. Over 270 such languages are available. One of the characteristics of ST is that most people live in dispersed dwellings located in the country's interior, remote, inaccessible hills and forests.[6]

Tribal communities are often characterised by primitive characteristics, a unique culture, geographical isolation, reluctance to interact with the larger population, and backwardness. In addition, some tribal communities exhibit characteristics such as reliance on hunting and gathering for sustenance, pre-agricultural levels of technology, zero or negative population growth, and an exceptionally low level of literacy. These tribes are known as Particularly Vulnerable Tribal Groups (hereinafter PVTGs).

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[2] Amol Arora, *Education for all: A step by step guide to open a school in India*, HINDUSTAN TIMES (Dec. 09, 2019), https://www.hindustantimes.com/education/education-for-all-a-step-by-step-guide-to-open-a-school-in-india/story-TJxPAzV7ydkGzvfi3YEz8K.html.

[3] MONA SEDWAL AND SANGEETA KAMAT, EDUCATION AND SOCIAL EQUITY WITH A SPECIAL FOCUS ON SCHEDULED CASTES AND SCHEDULED TRIBES IN ELEMENTARY EDUCATION 17 (2008)

[4] T. Brahmanandam and T. Babu, *Educational Status among the Scheduled Tribes: Issues and Challenges,* THE NEHU JOU., Jul.-Dec. 2016 at 69.

[5]Sujatha, K., *Education among scheduled tribes*, (Jan. 12, 2023, 10:00 AM), http://www.doccentre.net/docsweb/Education/Scanned_material/analysis_Tribals.pdf

[6] KUMAR, K., CHOUDHARY, P.R., SARANGI, ET. AL.., 2005. A SOCIO-ECONOMIC AND LEGAL STUDY OF SCHEDULED TRIBES' LAND IN ORISSA 1-88 (Unpublished Study Commissioned by World Bank Washington 2005).

II. Right to Education

Since independence, the Indian government has created a number of commissions and committees to evaluate different elements of education and recommend steps to adapt education to the country's evolving needs and aspirations. The ongoing emergence of difficulties and opportunities compelled commissions and committees to conduct periodic examinations of India's national education system.

Given that the ST is one of the most marginalized and deprived sectors of Indian society, some social and economic support and development measures have been initiated. In this regard, the tribal sub-plan approach, which was created as the primary five-year plan strategy, must be referred to in particular. In the tribal sub-plan approach, primary education was prioritized along with core economic sectors. Primary education is considered essential to the comprehensive development of tribal communities, mainly to increase trust among the tribe to treat externals on equal terms because of a constitutional obligation and as crucial input.

The Constitution of India is a social document and the country's supreme law. To ensure socio- economic justice, the Constitution's founding fathers incorporated a Directive Principles of State Policy (DPSP) in Part IV of the Indian Constitution. The DPSP is not a catalogue but a principle for good governance. It requires the State to play an active role in the creation of a welfare state. The DPSP guides state officials in how to achieve the constitutional vision. One of the essential directives is the State's obligation to provide free and compulsory education to all children till the age of 14.[7]

As early as 1978, the Supreme Court of India has expanded the scope of Article 21 of the Indian Constitution. The Court stated that "the right to education flows directly from the right to life" as "the right to life and dignity of an individual cannot be assured unless it accompanied by the right to education".[8]

[7] INDIA CONST. Art. 45.
[8] INDIA CONST. Art. 21.

In Mohini Jain[9] and Unnikrishnan case[10], the Supreme Court recognized education as an implicit fundamental right. As per the court, education is closely linked to life, environmental protection, the eradication of intolerability, children's prostitution, and other related rights. The National Commission on the review of the constitution also endorsed a similar view. Consequently, by the 86th constitutional amendment in 2002, the parliament included Article 21A of the Constitution[11]. As per this amendment, every parent or guardian must provide their children with good educational opportunities. On 1st April 2010, The Right of Children to Free and Compulsory Education Act, 2009 (RTE) was passed by the parliament.[12] The Act addresses several aspects, such as the teacher's appointment, curriculum, standards, infrastructure, community participation, and the State's responsibility for primary education.

III. Particularly Vulnerable Tribal Groups (PVTGs)

The Government of India introduced a new category, PVTGs with the objective of ameliorating the situation of those communities with very low development indices. In 1960-61, Dhebar Commission[13] reported that there were disparities in the pace of progress among Scheduled Tribes. In the fourth five-year plan, a new sub-category was introduced under Scheduled Tribes to identify those tribes to have a lesser degree of development. In a later stage, according to the Dhebar Commission report and other investigations, a new sub category was established as "Primitive Tribal Groups" (PTG). To identify these groups, certain characteristics were also mentioned to include them in this sub-category. The characteristics are a pre-level of technology, a deficient level of literacy, a declining or stagnant population, and a subsistence level of the economy. If any groups are satisfied with any one of the criterion will be considered as PTG. Later, 52 communities were identified as PTG, which was made on respective state government recommendations. In the sixth five-year plan, another 20 groups were

[9] Mohini Jain v. Union of India, AIR 1992 SC 1858.
[10] Unni Krishnan J.P v. State of Andhra Pradesh & Ors, 1993 AIR 2178.
[11] INDIA CONST. art. 21A, amended by The Constitution (Eighty Sixth Amendment) Act, 2002
[12] The Right of Children to Free and Compulsory Education Act, 2009, No. 35 of 2009, Acts of Parliament, 2009 (India).
[13] National Commission for Scheduled Tribes, *First Report 2004-2005 & 2005-2006*, https://ncst.nic.in/sites/default/files/documents/ncst_reports/first_annual_report_of_ncst/PART%20I%20-%20Ist%20Report%20NCST%202004-20059484175791.pdf.

included, two more in the seventh five-year plan and one more group in the eighth five-year plan, makings 75 in total. In 2006, the Government of India renamed PTGs as "Particularly Vulnerable Tribal Groups".

In India, 7 percent of the overall population is comprised of tribal people. 15 percent of the country's land area is inhabited by tribal people.[14] They inhabit a variety of habitats, including plains, woodlands, hills, and inaccessible regions. Geographically, PVTGs are dispersed across the nation. The population of the PVTG according to the 2001 census was approximately 27,68,322.[15]

PVTGs rely on many means of subsistence, including food collection, Non-Timber Forest Products (NTFP), hunting, cattle husbandry, shifting agriculture, and artisanal activity. Their primary source of income is derived from the forest. The forest is their source of life and income. They harvest honey, gum, amla, bamboo, shrubs, fuel wood, dried leaves, nuts, sprouts, wax, medicinal plants, roots, and tubes, among other NTFPs. They collect the majority of NTFPs for consumption and sell the remainder to middlemen. The gathering of NTFPs, however, is becoming more difficult as a result of diminishing forests, environmental changes, and new forest preservation rules. PVTGs have been abused by middlemen due to a lack of understanding about the value of NTFP products.

Health is a necessity for human growth and a fundamental element of the well-being of humanity. A community's health issues are impacted by a variety of elements, including social, economic, and political considerations. Multiple factors, including "poverty, illiteracy, lack of safe drinking water, poor sanitary conditions, difficult terrain, malnutrition, poor maternal and child health services, lack of health and nutritional services, superstition, and deforestation, have contributed to the poor health status of PVTGs". In PVTGs, the average illiteracy rate ranges from 10 to 44 percent, indicating a very low state of education.

[14] Overview, https://tribal.nic.in/WriteReadData/CMS/Documents/201305031210162373115overview.pdf.

[15] Recommendations of the National Advisory Council, *Development Challenges Specific to Particularly Vulnerable Tribal Groups (PVTGs),* https://tribal.nic.in/downloads/Statistics/OtherReport/NACRecommendationsforPVTGs.pdf.

Table 1: List of PVTGs in India[16]

State / UT Name	Population (2001 Census)[17]	PVTGs Name
Andhra Pradesh and Telangana	3,34,144	1. Bodo Gadaba 2. Bondo Poroja 3. Chenchu 4. Dongria Khond 5. Gutob Gadaba 6. Khond Poroja 7. Kolam 8. Kondareddis 9. Konda Savaras 10. Kutia Khond 11. Parengi Poroja 12. Thoti
Bihar and Jharkhand	3,98,231	13. Asurs 14. Birhor 15. Birjia 16. Hill Kharia 17. Konvas 18. Mal Paharia

[16] Ministry of Tribal Affairs, Scheme of Development of Particularly Vulnerable Tribal Groups (PVTGs), , Government of India, https://tribal.nic.in/downloads/NGO/Latter-Notice/14.pdf.
[17] *Supra* note 14.

		19. Parhaiyas 20. Sauda Paharia 21. Savar
Gujarat	1,06,775	22. Kathodi 23. Kohvalia 24. Padhar 25. Siddi 26. Kolgha
Karnataka	45,899	27. Jenu Kuruba 28. Koraga
Kerala	20,186	29. Cholanaikayan 30. Kadar 31. Kattunayakan 32. Kurumbas 33. Koraga
Madhya Pradesh and Chhattisgarh	7,85,720	34. Abujh Macias 35. Baigas 36. Bharias 37. Hill Korbas 38. Kamars 39. Saharias 40. Birhor
Maharashtra	4,08,668	41. Katkaria (Kathodia) 42. Kolam 43. Maria Gond

Manipur	1,225	44. Marram Nagas
Odisha	68,745	45. Birhor 46. Bondo 47. Didayi 48. Dongria-Khond 49. Juangs 50. Kharias 51. Kutia Kondh 52. Lanjia Sauras 53. Lodhas 54. Mankidias 55. Paudi Bhuyans 56. Soura 57. Chuktia Bhunjia
Rajasthan	76,237	58. Seharias
Tamil Nadu	2,17,937	59. Kattu Nayakans 60. Kotas 61. Kurumbas 62. Irulas 63. Paniyans 64. Todas
Tripura	1,65,103	65. Reangs
Uttar Pradesh and Uttarakhand	52,653	66. Buxas 67. Rajis
West Bengal	85,983	68. Birhor

		69. Lodhas 70. Totos
Andaman & Nicobar Islands	816	71. Great Andamanese 72. Jarawas 73. Onges 74. Sentinelese 75. Shom Pens

IV. **Drop-Out Rates in School Education**

The below table represents the drop-out rates in school education for scheduled tribe students as we can see from the below table that in every year from 2015-16 to 2019-20, the overall dropout rates are getting higher when the students are getting promoted from primary to upper-primary and upper-primary to secondary level. Secondly, the dropout rates are high in girl students compared to boys, irrespective of their classes.

Table 2: Dropout rates of Scheduled Tribe Students

Year/Class	Primary			Upper-Primary			Secondary		
	Girls	Boys	Overall	Girls	Boys	Overall	Girls	Boys	Overall
2015-16	4.18	4.29	4.24	9.64	9.70	9.67	26.28	26.27	26.27
2016-17	3.91	3.96	3.94	8.60	8.69	8.64	27.15	27.85	27.51
2017-18	3.48	3.82	3.66	6.14	5.95	6.04	21.36	22.90	22.14
2018-19	5.23	5.72	5.48	6.46	6.89	6.69	23.38	26.40	24.93
2019-20	3.45	3.90	3.69	5.65	6.15	5.90	22.49	25.51	24.03

(Source: Unified District Information System for EducationPlus (UDISE+), Ministry of Education)[18]

[18] Ministry of Tribal Affairs, *Annual Report 2021-22*, (2021-22), https://tribal.nic.in/downloads/Statistics/AnnualReport/AREnglish2122.pdf.

V. National Education Policy, 2020

In July 2020, the government announced a new education policy. This is the third education policy that the government brought to raise the education standard of India. The guiding principles of the policy will serve to direct not only the education system as a whole but also the particular institutions by "recognizing, identifying, and fostering the unique capabilities of each student, achieving foundational literacy and numeracy by class 3, there will be no separation between arts and sciences, promoting multilingualism and the power of language, respect for diversity and respect for the local context, full equity and inclusion".[19]

The features of the new education policy are as follows: -

1. The current 10+2 structure will be altered to accommodate a new pedagogical and curricular restructure that will include 5+3+3+4 and encompass students aged 3 to 18. The first stage will be the foundational stage which will be divided into two parts that are 3 years of Anganwadi/pre-school school covering from age 3 to 6 years and the 2 years of classes 1 and 2, both together covering 6-8, which will be total from age 3-8 years. The second stage will be the preparatory stage, from classes 3-5, covering ages 8 to 11 years; the third stage will be the middle stage, from classes 6 to 8, covering ages 11 to 14 years, and the final stage will be secondary stage from class 9 to 12 covering age 14-18 years.[20] (Fig. 1)

Figure 1: Represents new pedagogical structure of New Education Policy, 2020 from Foundational Stage to Secondary Stage

[19] Ministry of Human Resource Development, Government of India, *National Education Policy 2020,* Government of India, (2020), https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf.
[20] *Ibid*.

2. It should be one of the key focuses of our educational system to ensure that all students are enrolled in and regularly attend the schools in which they are placed. There will be two overarching programmes that will be carried out in order to get children who have stopped attending school back to school and prevent further children from stopping attending school. The first step is to provide an infrastructure that is efficient and adequate so that all students, from pre-primary school up to grade 12, have access to an education that is both secure and interesting. The second goal is to achieve universal school participation by constantly monitoring students and their learning levels to ensure that they (a) are enrolled in and attending school and (b) have enough opportunity to catch up and re-enter school if they fall behind or drop out.[21]

3. The school's medium of instruction should be in their mother tongue/home language/regional language till grade 5, but it will be better if they can teach till grade 8 and beyond. Due to this reason, all textbooks, including science, should be made available in their local language. This should be followed in both public and private schools.[22]

4. All students must acquire specific topics, skills, and abilities to become good, successful, inventive, adaptive, and productive human beings, even though students must have a great deal of freedom in selecting their curriculum. These skills include "scientific temper and evidence-based thinking; creativity and innovativeness; a sense of aesthetic and art; oral and written communication; health and nutrition; physical education, fitness, wellness and sports etc.".[23]

A. Issue and Challenges in Implementing New Education Policy with Special Reference to PVTGs

The major problem is that mode of instruction should be in the mother tongue because the children understand better if they are taught in their language. Children who are raised in tribal groups often have the impression that the education they get at school is pointless and unrelated to their everyday lives, both intellectually and culturally. This issue was also raised in University Education

[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*

Commission which was chaired by Dr. Sarvelli Radhakrishnan, who also mentioned in his report that the medium of instruction should be in their mother tongue.[24] According to the new education policy, students should also be taught in their mother tongue till class 5. The issue is that we need teachers who can also speak their language and textbooks.

Another point to mention about implementation is in the RTE Act, it is mentioned that till primary education, the language should be in the mother dialect as far as practicable[25]. However, the subjects are still being taught in the state language, which is the issue of some children coping with the school work, which results in absenteeism, and slowly they lose interest in going to school and becomes dropout. This Act was passed in 2009, and this issue is still not resolved. Then how can we expect that new education policy issues will be implemented.

According to the new education policy, the foundational stage starts from the age of three to eight years, where three years of Anganwadi and 2 years of primary school. Most tribal groups live a migratory lifestyle, which includes moving from one place to another in search of a better livelihood. If they keep changing their locations, how will these get admitted to these schools and Anganwadi for education.

The new education policy lays down that there will be greater flexibility in choosing the "individual curricular, but at the same time, all students should learn certain subjects, skills, and capacities to become good, successful, innovative, adaptable and productive human beings. These skills include scientific temper and evidence-based thinking; creativity and innovativeness; a sense of aesthetic and art; oral and written communication; health and nutrition; physical education, fitness, wellness and sports." For these things to be implemented, we need a solid infrastructure, which is extremely difficult to offer to schools situated in locations with little or poor road access and not enough room to house the infrastructure. This makes it very challenging for the government to execute these things additionally, how we will give such an infrastructure to the mobile schools.

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[24] Ministry of Education (1948-49), *The Report of The University Education Commission,* Government of India, New Delhi.

[25] The Right of Children to Free and Compulsory Education Act, 2009, § 29 (f), No. 35 of 2009, Acts of Parliament, 2009 (India).

Another issue is that about inclusive education, the policy also states that Children with Special Needs should get the same opportunities for quality education as any other child. The issue is that children with special needs do not have special schools in those villages to obtain a quality education. They do not take admission to those schools because they will not be able to cope with those students, so they have to sit at home without education. To mitigate this challenge, the government also needs to open such schools in those areas to impart education to such children, or they can dedicate one or two classrooms to the same schools already established in their village.

The new education policy states that teachers should be involved in teaching, not in strenuous administrative tasks. The issue is that due to the shortage of teachers in these areas, teachers have to play different roles in their schools, either as teachers or administrators. To resolve such an issue, the number of teachers should be increased, and a proper administrator should be appointed for those schools that only look after the administrative tasks.

VI. Conclusion

The new education strategy will not disrupt the established order of the educational system. Since the PVTG are primarily migratory and stay in isolated places, it will be challenging to implement the new educational strategy concerning them. To educate the tribal people in general and PVTGs in particular, the government has to take unique and additional steps that are not already being done.

Suggestions have been made concerning implementing the new education policy up to the primary level, such as introducing mobile schools in these areas where these tribal people go from one place to another. Like in Bhubaneswar, the State Government has launched School Sanjog Programme for Class 1 to 5 students.[26] This initiative programme focuses on continued learning among the children PVTGs areas as an alternative to address the disruption in education during the

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[26] *PNS, School-in-van to reach out to 40,000 tribal kids as School Sanjog Prog launched in 1,000 villages, THE PIONEER (Oct. 30, 2021), https://www.dailypioneer.com/2021/state-editions/school-in-van-to-reach-out-to-40-000-tribal-kids-as-school-sanjog-prog-launched-in-1-000-villages.html.*

pandemic. After this is accomplished, mobile schools should also be assigned the task of operating Anganwadi centres. This will serve two purposes: first, it will improve education since there will be more teachers on staff, and second, it will relieve the government of establishing Aganwadi facilities. The government must make a concerted effort to hire an increasing number of instructors who can speak and write in their language. The government should also recruit more teachers in those schools so that teachers are only involved in a teaching role. There should also be schools for children with special needs. The government needs to take measures to prepare the literature in their language, and such efforts should be taken immediately. The infrastructure at these schools is so subpar that it must be improved. Most of these schools are in mountainous regions and have the worst infrastructure.

NOTES AND COMMENTS

Cataclysm within Cataclysm: Do Catastrophic Events Impact Child Trafficking?

Luvleen[1]
Shikhar Bhardwaj[2]

Abstract

India through her Constitution, legislation, and ratifications to the international conventions has always condemned the felony of trafficking. The Immoral Traffic (Prevention) Act was inducted in the year 1956 to protect humans from trafficking. Since then, hundreds of cases have been dealt with under the act, but the act remained silent on the most intensifying and escalating issue, i.e., trafficking during the disastrous events. India has faced striking catastrophes almost every two years and with that, the rise has been comprehended in trafficking. Children being easy targets were majorly trafficked from the battered regions. This raises the question as to whether India has taken preventive and protective measures with respect to the trafficking of children in catastrophic times. The paper is discussed on three planes: (1) Whether there is any law that specifically covers the protection of children from being trafficked during catastrophic events, (2) Whether the catastrophic events affect the number of children being trafficked and the intensity of trafficking during such events, (3) Whether the government has righteously approached the apprehension of trafficking during catastrophes. Last, of all, this paper scrutinizes the rescuing and restorative steps taken by the government as well as other organisations to protect the victims of trafficking. In conclusion, the paper put[3] *forth solutions that need to be implemented and evaluates the 2021 bill on the prevention of trafficking.*

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I. Introduction

Trafficking is one of the gruesome tribulations of society. Trafficking doesn't only exploit the socio-civic rights of a human but also belittles the right to life. What's worse than trafficking is the trafficking of children. It can be understood as removing a child from their protective environment and plundering their vulnerability for purpose of exploitation. Though, the act remains hidden its effects can be perceived through the legal, social, and economic facets.

The onset of sudden disasters has amplified due to climate change which then increases the unexpected loss of land, lives, and any safety nets. The aftermath of any disaster is often displacement without enough financial resources thus allowing traffickers by luring them with job opportunities. Poverty and Feminization of Poverty are the main underlying factors in the trafficking of women and girls for Commercial Sex Exploitation. Poverty is an important factor for pushing people into trafficking as it exacerbates the other vulnerabilities, even if the poverty itself is not a fundamental factor leading to trafficking. Various "Plus" factors become the conjoining force that forces anyone into trafficking which can vary from "natural disasters and civil strife as well as community-family- and individual-level vulnerabilities."[4] Trafficking is common in refugee camps or camp-like settings to provide shelter to displaced persons. These places become a target hub of the traffickers where criminal actors, sometimes, affected families also resort to trafficking to pursue relief from disaster. With climate change, continents and islands are on verge of submerging and facing livelihood risks, which may drive them to outmigration; as research published by International Organization for Migration (IOM) after Cyclone Aila in Bangladesh proved that victims of such disasters are vulnerable to trafficking.

When cyclone Aila struck the Sundarbans delta, it left labourers and daily wage workers impoverished. This led the families to send off their children as domestic

[4] SOCIAL AWARENESS INSTITUTION, RESEARCH STUDY ON TRAFFICKING IN WOMEN AND GIRL CHILDREN FOR COMMERCIAL SEXUAL EXPLOITATION: AN INTER STATE EXPLORATIVE STUDY IN JHARKHAND, ODISHA AND WEST BENGAL (2016).

help in the Northern region. An interview was conducted by The New Indian Express of the village council, who explained the situation of child trafficking after cyclones as,

"Mostly girls are being trafficked in the name of giving jobs of domestic help exposing them to physical and psychological torture."

Another study claimed that an already trafficking-struck region of the Philippines saw an escalation in the rates of trafficking after Typhoon Haiyan in 2013.[5] During the Gorkha earthquake in 2015, Nepal was considered a hotspot for trafficking. Often, the children separated from their families were considered missing and orphans which makes them more vulnerable to trafficking. In other cases, when families couldn't support their children, they put them up for illegal adoption. As any kind of adoption is under the state's authority, illegal adoption can be understood as adoption without the state's authorized intervention. After an interview with parents who sent their wards after the 2015 earthquake in Nepal for a better life didn't hear from them again. They were made to believe that their children are being taken to a monastery in India where they will be educated.

"We had to lie to police so that my son could leave the village with the Lamas," said a parent of one of the children. "We are happy because the Lamas had promised to educate my son and send him home after three years."[6]

The Constitution of India has emanated the authority through Fundamental rights under Article 23 to curb trafficking. This article talks about the prohibition of trafficking in human beings and has distinctively covered the felony of forced labour and beggar. Article 24 prohibits the employment of children as labours which if read in continuance to Article 23 provides a stronger base for the prevention of child trafficking as children are often trafficked for labour. Any such violation of these articles is liable to move to the Court under Article 32 or 226 of the Constitution as well as the specific statutes enacted by the legislature.

The Immoral Traffic (Prevention) Act was legislated to invoke the obligations provided under the Articles mentioned above. It was enacted in 1956 to prevent

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[5] *Id.*

[6] *Why child trafficking spikes after natural disasters – and what we can do about it,* THE CONVERSATION, (last visited August 28, 2021), https://theconversation.com/why-child-trafficking-spikes-after-natural-disasters-and-what-we-can-do-about-it-53464

and penalise the offence of trafficking. The Act has penalised the activities including keeping a brothel or a premise put to use as a brothel.[7] This Act has also policed and penalised the various activities which are part and parcel of trafficking such as living on the earnings of prostitution;[8] procuring, inducing or taking another person for prostitution;[9] detaining another person on a premise where prostitution is being carried on;[10] seducing or soliciting for prostitution,[11] and seducing a person in the custody.[12] The Act has also empowered the judicial magistrate to take cognizance and shut down the brothel as well as to evict the offenders from any such premise which is being used as a brothel.[13]

Trafficking has also been criminalized under the Indian Penal Code (IPC), 1860. Section 370 and 370 A of the IPC was introduced by the Criminal Amendment Act, 2013. Section 370 defines as well as elucidates all the acts that constitute the offence of trafficking and prescribes a detailed punishment. The propensity of punishment differs with the age and number of victims. Trafficking of more than one person and minor has been penalised with rigorous imprisonment of a minimum of 10 years. Furthermore, Section 370A prohibits the sexual exploitation of a trafficked person including minors. In addition to the abovementioned provisions, the other provisions of IPC have also penalised the acts including trafficking of human beings for habitual dealing in slaves,[14] or procurement of minors to indulge them in employment, prostitution, or any other illicit acts.[15]

Trafficking has been a pandemic for which countries have put continuous efforts to regulate if not curb and yet, even the developed countries with the advanced economy are struggling with it. United Nations and other organizations like International Labour Organization, Amnesty International, and Human Rights

[7] Immoral Traffic (Prevention) Act, 1956, § 4.
[8] Immoral Traffic (Prevention) Act, 1956, § 4.
[9] Immoral Traffic (Prevention) Act, 1956, § 5.
[10] Immoral Traffic (Prevention) Act, 1956, § 6.
[11] Immoral Traffic (Prevention) Act, 1956, § 8.
[12] Immoral Traffic (Prevention) Act, 1956, § 9.
[13] Immoral Traffic (Prevention) Act, 1956, § 18.
[14] Indian Penal Code, 1860, § 371.
[15] Indian Penal Code, 1860, § 372.

Watch have tried to provide a regulatory framework and conducted research studies in various countries to contain the growing trafficking of children.

II. International Background

Various international instruments have been implemented to protect humans from trafficking which include the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children [hereinafter referred to as Palermo Protocol I] supplementing the United Nations Convention against Transnational Organized Crime (2000), and other accompanying conventions such as ILO Forced Labour Convention (Convention No. 29 of 1930), the ILO Abolition of Forced Labour Convention (Convention No. 105 of 1957), The Slavery Convention (1926), The UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), and The International Covenant on Civil and Political Rights (ICCPR) which directly and incidentally prevents the practices related to slavery and human trafficking.[16]

Palermo Protocol I defines '*trafficking*' as

"the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".

The protocol continues to state,

"the recruitment, transportation, transfer, harbouring or ***receipt of a child*** *for the purpose of exploitation shall be considered trafficking in person".* Here, the age of the child must be under 18 years.[17]

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[16] UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, INTERNATIONAL INSTRUMENTS CONCERNING TRAFFICKING IN PERSONS (2014). https://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/IntInstrumentsconcerningTraffickingpersons_Aug2014.pdf .

[17] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, November 15, 2000. https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx

Palermo Protocol I came as a supplement to the United Nations Convention against Transnational Organized Crime addressing the lack of an international instrument to curtail trafficking in women and children. This protocol not only suggests the State take action against trafficking but also manoeuvres the restitution of the victims. While concerning the protection of children from trafficking, the Convention on the Rights of the Child (hereinafter as CRC), 1989, the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography, 2000, and the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, 1993 are the specific international instruments that deals with the issue.

CRC obligates the state under Articles 33 and 35 to prevent the trafficking of children.[18] India obligated herself to protect children from trafficking for any purpose and ratified this convention on December 11, 1992.

India took the following steps after the ratification of CRC to curb the issue of trafficking in children.

1. The Department of Women and Child Development formulated a National Plan of Action to combat trafficking and commercial sexual exploitation of women and children in 1998. The fundamental objective was to prevent and rehabilitate women and children who have been victims of commercial sexual exploitation return back into society. This action plan was the first-ever National Policy initiated by the Government of India to combat trafficking.
2. CHILDLINE India Foundation got registered on January 10, 2000. It has been coordinating and managing the CHILDLINE Service-24x7 toll-free emergency helpline which is an outreach service for children who are in need of care and protection. CHILDLINE team approaches the children in need of care and protection as soon as they receive any information and endeavour to provide long-term rehabilitation to the children.
3. Juvenile Justice (Care and Protection of Children) Act, 2000 was also enacted which was later got amended in 2015 to comply with the standards set out in the United Nations Convention on Rights of the Child. Section 2 (d) (vii) of the Act defines a “child in need of care and protection” as a child

[18] Convention on the Rights of the Child, November 20, 1989. https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

who has been found to be vulnerable and has a high chance to be inducted into trafficking or drug base.[19]

4. Swadhar scheme was also launched by the Government of India in December 2001 to rehabilitate and reintegrate the rescued trafficked girls. It has also extended its protection to the girls who ran away from brothels or other such places as well as to the victims of sexual crimes who were renounced by their families as beneficiaries. Under this scheme, the trafficked victims are provided with immediate shelter, food, clothing, and other essential needs. In addition to this, the scheme also offers to rehabilitate them socially and economically through counselling, clinical, legal, and other support to the beneficiary in need.
5. South Asian Association of Regional Cooperation (SAARC) introduced the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution which has been signed by India on January 5, 2002, in furtherance of her objective of combating trafficking. The Convention encapsulated that trafficking in women and children for purpose of prostitution is violative of their human rights and antagonistic to their dignity and honour. It also called upon the states to criminalise the act of trafficking in any form in their penal laws.
6. On February 9, 2004, the Government of India adopted National Charter for Children, 2003 to ensure that no child is deprived of food, shelter, and other needs. Another fundamental approach of this charter was to ensure that every child has the right to protection against trafficking. The Charter obligated the State to enact measures and create an environment where no child is used for the purpose of trafficking and other illicit activities. Under this Charter, the State has also been obligated to ensure the speedy cognizance to reduce the number of girl victims and prompt help to girl children and ensure their right to protection from participating in prostitution.[20]
7. The Commission for Protection of Child Rights Act (CPCRA), 2005 was legislated which laid down the foundation of the National Commission for Protection of Child in March 2007. The basic agenda of the commission was

[19] Juvenile Justice (Care and Protection of Children) Act, 2000, § 2 (d) (vii).

[20] MINISTRY OF HUMAN RESOURCE DEVELOPMENT, NATIONAL CHARTER FOR CHILDREN, 2003 (2004). http://14.139.60.153/bitstream/123456789/362/1/Act-national_charter%20for%20children%202003.pdf

to ensure that child rights are being implemented in the country. The act obligated the Commission to examine the factors that impact the rights of trafficked children.

8. The Department of Women and Child Development was converted into the Ministry which goes by the name Ministry of Women and Child Development on January 30, 2006. With this shift, the Ministry undertook several initiatives and projects to fulfil the agenda of combating trafficking in the country. It has also been collaborating with the United Nations Office on Drugs and Crime, Regional Office for South Asia on human trafficking.
9. The Ministry of Home Affairs established the Anti-trafficking nodal cell in 2006 which acts as a primary point for communicating directives to states and union territories for effective enforcement of laws on the prevention of human trafficking. The cell has been conversing and cooperating with nations worldwide to tackle the issue of trafficking.

Various other initiatives were also taken by the government of India to address child trafficking in general and during catastrophic events. The same has been discussed in part 4 of the paper. This part also critically analyses the Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021.

The issue of child trafficking becomes more prevalent during the disastrous events. Crimes are often piqued during catastrophic events making trafficking the most committed felony. Any natural disaster whether floods or earthquakes and pandemics or epidemics raises the risk of persons being trafficked. The economic deprivation of the families makes the children, especially minor girls, prey for trafficking.

III. Issue of Trafficking during Catastrophic Events in India

India being prone to natural calamities has seen various floods and landslides almost every year. In the absence of empirical studies on this topic, anecdotal evidence from various newspapers and articles has been collected from 2013 to 2021.

If it isn’t bad to survive the tragedy, the worse lies ahead for women and children. India’s most irreconcilable natural disaster was flooding in Uttarakhand in 2013. More than thousands of people were affected. People in the worst-hit districts lost everything from their life savings to their family members. Women and children

were prey to being trafficked as brides and sex workers.[21] In the course report of the Training Programme on "Gender and Disaster Management" conducted by the National Institute of Disaster Management under the Ministry of Home Affairs, the disaster-struck areas were assessed on gender-related grounds. It has been reasserted that any disaster has a direct influence on gender. The report claims that during the 2014 floods in Jammu and Kashmir, women and girls felt that their Right to Privacy is being jeopardized. They have also felt threatened due to military bases and camps and with the reportage of gender violence in two villages of Jammu and Kashmir, the risks of human trafficking were also apprehended.[22]

Women and children are at higher risk of being sold for slavery in hotels, restaurants, and even brothels. The 2016 floods in India's eastern region risked more than 200,000 being trafficked.[23] During the 2017 floods in Assam, the then DIG (CID) and the nodal officer of the Anti-Human Trafficking Cell, Assam reaffirmed the sad reality of the vulnerability of women and children to trafficking during such events. As per an editorial, two girls were saved from being trafficked during these 2017 floods. Furthermore, the police arrested three men who befriended these girls and lured them to accompany them to New Delhi where they will get married. It was presumed that around 6 lakh children got affected by the floods.[24]

During the 2019 floods in Assam, the issue of trafficking got worsened. According to a news article published on July 18, 2019, the Assam police rescued around 19 girls that were being trafficked to Gujarat in the disguise of work at a

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[21] *Women, children at risk of trafficking after Uttarakhand floods,* REUTERS, (last visited Aug. 28, 2021), https://www.reuters.com/article/uttarakhand-floods-women-children-traffi-idINDEE96402V20130705

[22] *Id*.

[23] *India's deadly floods raise risk of women, children being sold into slavery,* REUTERS, (last visited Aug. 28, 2021), https://www.reuters.com/article/india-floods-trafficking-idINKCN1111VT

[24] *Assam's flood victims turn easy targets for trafficker*, THE TIMES OF INDIA, (last visited Aug. 29, 2021), https://timesofindia.indiatimes.com/city/guwahati/assams-flood-victims-turn-easy-targets-fortraffickers/ articleshow/ 59840120.cms.

salary of Rs. 8000. Out of those 19 girls, ten were minor.[25] Most of the girls that were rescued belonged to poor families and from flood-prone areas.

Another such example is the cyclone Amphan in West Bengal, India. In the year 2020, when India was badly stricken by COVID-19, the cyclone Amphan worsened the crime rate ratio. The areas where the cyclone battered were also the hotspots of trafficking which obligated the West Bengal Commission for Protection of Child Rights (WBCPCR) to dedicate a special desk and helpline.[26]

The COVID-19 pandemic has blurred the differences between global health crisis, economic inequalities, and crime rates. On September 9, 2020, 14 children were recovered from the old Delhi Railway Police station and 10 people were arrested involved in their intrastate trafficking.[27] Traffickers have exploited this global crisis for their benefit. According to Bachpan Bachao Andolan, 9000 children suspected of being trafficked were rescued across India between April 2020 and July 2021.[28]

The police play an important role in controlling the growing issue of trafficking. Yet, there are various ethnographic research where police have been encouraging such acts like in this case,

"… sitting inside her brothel room, Priya (name changed), a migrant cis female adult sex worker, said that "[…] Police is the culprit here". She shared an incident of the previous day that two policemen were harassing a customer and then the customer gave 1000 Indian Rupees to these Policemen. The police then allowed

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[25] *Assam floods turn colleges into makeshift 'jail', trafficking activities see spurt as state battles fever, diarrhoea amid deluge,* FIRSTPOST, https://www.firstpost.com/india/assam-floods-turn-colleges-into-makeshift-jail-trafficking-activities-see-spurt-as-state-battles-fever-diarrhoea-amid-deluge-7013051.html (last visited Aug. 29, 2021).

[26] *Lockdown, Amphan render girls vulnerable in West Bengal*, THE HINDU, (last visited Aug. 29, 2021), https://www.thehindu.com/news/national/other-states/lockdown-amphan-render-girls-vulnerable-inbengal/article 32233610.ece.

[27] *Delhi: Railway Police arrests 10 involved in child trafficking racket, 14 minors rescued*, INDIA TODAY, (last visited Aug. 29, 2021), https://www.indiatoday.in/crime/story/delhi-railway-police-arrests-10-involved-child-trafficking-racket-14-minors-rescued-1720259-2020-09-09.

[28] *Over 9k trafficked kids rescued by law enforcement agencies and BBA since beginning of Covid: KSCF*, OUTLOOK, (last visited Aug. 31, 2021), https://www.outlookindia.com/newsscroll/over-9k-trafficked-kids-rescued-by-law-enforcement-agencies-and-bba-since-beginning-of-covid-kscf/2120822.

these customers to enter the brothel. She said the Police is a party in the business in that red light area. She also shared that usually work should be up to midnight or 1:00 am. But since the Police take rounds till midnight, there are very few customers who come before that midnight, due to the fear of harassment from the Police. Priya said that here the system is reversed as the market opens after 12 once the police gather their money and leave the place."[29]

In such instances, it becomes really difficult for any victim to seek help from law enforcement agencies. Another important agency that looks out for trafficking prevention is the Anti-Human Trafficking Units. These are integrated task forces comprising experts from the Police, Women and Child Welfare, and other pertinent departments of the State. These coherent units work in coordination with various stakeholders to prevent and combat human trafficking by confronting all the criminal aspects of human trafficking. The units also ensure that special emphasis is made out on the offence of human trafficking.

These special units carry out the rescue operations upon receiving information about activities related to trafficking from police, NGOs, civil societies, or any other credible source. These units work at the elemental level where they collect the crucial information which is required to preserve the sanctity of law and rescue the children from being trafficked.

The central government is also taking initiatives to help the AHTUs. The Ministry of Home Affairs (hereinafter referred to as MHA) released around Rs. 25.16 crores between the financial year 2010-11 and 2019-20 as a pecuniary aid to the state governments for setting up AHTUs in fifty per cent of police districts, i.e., in 332 Districts of the country. In 2020, the MHA released an amount of Rs. 100 crores under 'Nirbhaya Fund' to aid the states and union territories for improving and re-enforcing the existing AHTUs as well as setting up new such units in different districts.[30]

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[29] *Human Trafficking in India: How the Colonial Legacy of the Anti-Human Trafficking Regime Undermines Migrant and Worker Agency*, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, (last visited August 29, 2021), https://blogs.lse.ac.uk/humanrights/2021/02/11/human-trafficking-in-india-how-the-colonial-legacy-of-the-anti-human-trafficking-regime-undermines-migrant-and-worker-agency/.

[30] MINISTRY OF HOME AFFAIRS, INSTITUTIONAL MECHANISM FOR PREVENTING AND COUNTERING HUMAN TRAFFICKING AT STATE LEVEL (Dec. 1, 2020).

However, a national study was conducted on AHTUs in India (2010-19) which was carried out by Sanjog, a technical research organization, and Tafteesh, a coalition of lawyers and activists. It was found that only fifty-one per cent of AHTUs were notified with all powers and resources whereas only twenty-seven per cent of AHTUs were functioning during the study.[31]

IV. Rescuing the Victims

The MHA on 12th August 2013 issued a Standard Operating Procedure (hereinafter referred to as SOP) to handle the trafficking of children and prescribed a set of measures that ought to be followed while rescuing the trafficked child.[32] It has also specified the actions to be taken against the traffickers. The SOP recognized that trafficked children are vulnerable and in need of special care and protection including rehabilitative needs.

As per the SOP, the rescued child should be immediately sent to Child Welfare Committee. They should be given proper counselling by a social worker. It must be ensured that there is no kind of communication between the victim and the perpetrator. During the investigation, the prima facie objective should be repatriation and looking for the safety of the child. The police personnel are empowered to opt for any precaution and necessary act to fulfil the same. It is advised that victims must be provided with proper medical aid as soon as they are rescued. It is a mandate to have the victim's consent before any such medical examination. The Child Welfare Committees are obligated to secure the well-being of the children in their districts.

Before repatriating the child, an inquiry ought to be conducted to verify the home address and related information under the Juvenile Justice Act. The police are advised to take necessary action to obtain any relevant information from the

[31] *Anti-human-trafficking units in India exist only on paper,* THE NEW INDIAN EXPRESS, (last visited Aug. 29, 2021), https://www.newindianexpress.com/cities/delhi/2020/sep/01/225-anti-human-trafficking-units-in-india-exist-only-on-paper-2190943.html.

[32] MINISTRY OF HOME AFFAIRS, STANDARD OPERATING PROCEDURE TO HANDLE TRAFFICKING OF CHILDREN FOR CHILD LABOUR- MEASURES TO BE TAKEN FOR RESCUE OF TRAFFICKED CHILD LABOURERS' AND ACTION AGAINST THE TRAFFICKERS/EMPLOYERS (Aug. 12, 2013).

victim about the trafficker or anything related to the offence. Such information is required to be uploaded to the trafficking database maintained by the state/district.

The statement of the victim is to be recorded in accordance with Section 164 of the Code of Criminal Procedure, 1973. Additionally, a proper investigation must be inducted against the traffickers. AHTUs are also empowered to take any action required to investigate the offence of trafficking. Furthermore, the government has launched different schemes to help the victims. One such scheme is 'Ujjawala.' It is a comprehensive scheme formulated by the Ministry of Women and Child Development for the prevention of trafficking as well as rescue, rehabilitation, and reintegration of victims of trafficking for commercial sexual exploitation. This scheme aims to provide aid to women and children who are vulnerable to trafficking or have been victims of trafficking for commercial sexual exploitation. The scheme has two-fold objectives: firstly, prevention of trafficking through social mobilization and involvement of local communities, spreading awareness among the public through different events such as webinars, seminars, and other outreach activities. Secondly, the scheme focuses on rescue as well as rehabilitation of victims of trafficking. The rescued victims are placed in safe custody and are provided with other necessary amenities such as food, shelter, clothing, medical treatment, and vocational training.

The organizations that want to collaborate as an implementing agency under the scheme have to meet certain conditions to become eligible for the same including experience of the organization in the field of trafficking; registration under the law; providing basic facilities to assist the victims of trafficking; other facilities to comfort the victim.

This scheme has been categorized into five components, namely: prevention, rescue, rehabilitation, reintegration, and repatriation. The first three components have been explained above. Reintegration includes setting up of halfway home (home within the community) where victims get comfortable to integrate, stay, or work from that place. Albeit, according to the NALSA report submitted in the Prajwala case,[33] these homes have either been not set up or lack the proper facilities required for the rehabilitation of the victim. Further, every victim

[33] Report of National Legal Services Authority, Prajwala v. Union of India & Ors. W.P.(C) No. 56/2004, http://uphome.gov.in/writereaddata/Portal/Images/NALSA-report.PDF.

requires tailored support according to the circumstances they have been through but there is no professional help available for them.

Moreover, under its reintegration component, the scheme also bears the expense incurred in travelling the victim from the destination place to their hometown. But the aim of reintegration is not limited to reuniting the victims with their families. The goal is to reintegrate the victim into society. It requires in-depth policies which are framed by professionals to cater for the needs of all the victims. The ITPA was silent about the specific schemes for the formal education or vocational training of the victims. Although, The Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021 under sec.6(3) has mentioned specialised services and technical assistance which should be extended to the victims but doesn't deal with them in detail giving immense jurisdiction to the State Anti-Human Trafficking Committee.[34]

The last component of the scheme, i.e., repatriation deals with cross-border trafficking. This scheme also covers the expense incurred in sending back the cross-border victim to their nation. Ironically, the victims have been prosecuted for violating the visa norms.[35] Albeit, in the 2021 bill, this issue has been dealt with under chapter VI- Repatriation and Reintegration of Victims. Under sec. 21(4),[36] the foreign nationals are ought to be provided legal aid and assistance, legal representation as well as any other support for their repatriation. Further, this sub-section doesn't limit itself to the repatriation of foreign nationals from India but also provides for the steps to be taken to facilitate the return of the Indian national who's present in a foreign country illegally or has been accused of any offence in the foreign country. This bill opens the door for all the victims of cross-border trafficking who couldn't return to India due to a lack of support. Furthermore, the timeframe has been provided in this chapter which is quintessential to scrutinise the actions of the National Investigation Agency towards the furtherance of this bill.

V. Compensating the Victims

The offence of trafficking being a serious attack on privacy and integrity of the body leaves a heavy toll on both minds as well as the body of the victim.

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[34] The Trafficking In Persons (Prevention, Care And Rehabilitation) Bill, 2021, § 6(3).
[35] *Supra note 30 at 7.*
[36] The Trafficking In Persons (Prevention, Care And Rehabilitation) Bill, 2021, § 21(4).

Therefore, it becomes quintessential that all the victims are rehabilitated according to their specific needs. Various countries offer compensation to the victims of trafficking which serves as a helping hand in the rehabilitation of the victim. Though pecuniary compensation may not remove all the traumatic events that the victim has gone through, it could help them make it through their medical assistance or psychological recovery as required by the victim to reintegrate into society. Without any compensatory help, it can be easily anticipated that the pre-existing vulnerabilities that led the children to become victims of trafficking will exacerbate. Thus, the compensation prevents the already victimized children from being the victim of trafficking again.

Article 25 (2) of the United Nations Convention Against Transnational Organized Crime provides a legal base for the compensatory rights of the victims of trafficking. The provision requires that the States who are party to the convention should establish a procedure to render compensation to the victims. Also, Article 6 (6) of the Palermo Protocol I put an obligation upon the state party to the protocol that there should be a provision ensuring the right of the trafficked victim to claim compensation in the municipal legal system. There are different ways in which victims can be compensated. In India, victims of trafficking are compensated under the Central Victim Compensation Fund Scheme of the MHA as the ITPA is silent on compensation of victims. Under this scheme, a trafficked victim has entitled to a minimum amount of Rs. 1 lakh as compensation for the purpose of rehabilitation.[37] However, in fact, as few as one per cent of the trafficked victims have received compensation between 2011-2019. According to National Crime Records Bureau data, there were around 38,503 trafficked victims between 2011 and 2019, out of which only 107 applied for compensation from the concerned authorities.[38] Surprisingly, a survey conducted by the collaboration of lawyers with anti-trafficking NGO, Sanjog revealed that only seventy-seven victims received compensation between 2011 and 2019.[39] Additionally, most states have their victim compensation scheme which ranges from Rs. 1 lakh to Rs. 10 lakhs. During the catastrophic events including the Covid-19 pandemic,

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[37] MINISTRY OF HOME AFFAIRS, CENTRAL VICTIM COMPENSATION FUND SCHEME (CVCF) GUIDELINES (Jul.13, 2016).

[38] *India had 38,503 victims of trafficking in 2011-19. Only 77 have got compensation*, THE PRINT, (last visited August 29, 2021), https://theprint.in/india/india-had-38503-victims-of-trafficking-in-2011-19-only-77-have-got-compensation/365761/

[39] *Ibid*.

thousands of trafficked survivors are left out of the safety net and become more economically vulnerable.

VI. Conclusion

The numbers of child trafficking cases are very difficult to enumerate as there has been no proper data that provide cases according to the age of the trafficked victims. Secondly, there is no legal provision under penal statutes that penalize the offence of child trafficking during catastrophes. A case of trafficking may get registered under more than one legal provision in the IPC and other special laws (the same case may get registered under Sections 370/370A, 366 A, 372, 373 of IPC and the ITPA), thereby making it difficult to enumerate the exact number of cases of trafficking in women and children. The Stanford University Report for the Asia Foundation has shown that the nature of trafficking differs among the different states of India.[40] States like Odisha which are more disaster-prone are on the verge of high trafficking rates and West Bengal being contiguous to other countries like Bhutan, Nepal and Bangladesh serves as a hub for international and interstate trafficking. To prevent the trafficking of children, it would be beneficial to have a body that works within the state and looks into the peculiar circumstances of the case. Such concern has been dealt with under the Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021. Under this bill, the government will be obligated to establish a State Anti–Human Trafficking Committee, especially for the emergence, rescue, protection, medical care, psychological assistance, recovery, relief, rehabilitation, repatriation, and reintegration of victims.[41] The District Anti-Human Trafficking Committees shall also be constituted. Such committees are provided with the responsibility of rehabilitation as they are asked to 'submit an individual care plan for every victim and his dependent.' The bill under section 15 also obligates the executive to inspect 'all protection homes and rehabilitation homes or any other homes or centres or facilities set up or identified under this Act for housing victims' whereas no such provision has been provided under the current legislation. In chapter III of the bill, the District Legal Services Authority should provide some interim relief to the victim whereas, in the current statute, there is no such

[40] SADIKA HAMEED ET AL., CURRENT EFFORTS, AND INTERVENTION OPPORTUNITIES FOR THE ASIA FOUNDATION. REP. STANFORD UNIVERSITY'S FORD DORSEY PROGRAM IN INTERNATIONAL POLICY STUDIES.

[41] The Trafficking In Persons (Prevention, Care And Rehabilitation) Bill, 2021, § 6.

provision. Furthermore, the bill discusses the trafficking of victims affected by a natural calamity or disaster which was ignored in the current statute. Conclusively, the issue of trafficking especially during catastrophic times requires political support to not only implement the legislation but also to act on repatriation of the victim of international trafficking as well as to provide adequate compensation to the victims. The ratification of this bill is the need of the hour as it covers the lacunas of the ITPA.

NOTES AND COMMENTS

Protection of Women from Domestic Violence: Legal Challenges and Issues

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"It is not the bruises on the body that hurt. It is the wounds of the heart and the scars on the mind."- Aisha Mirza

Abstract

Domestic Violence against the women is an age-old reality which is being inflicted upon women irrespective of age, caste and religion. Domestic violence can take the form of physical, sexual, emotional or psychological abuse by an intimate partner or former partner. Many women till date faces intimate partner violence behind the closed doors in our Indian society. Domestic Violence is a universal issue and it is a direct violation of women's basic human rights. The feminist movement have played a major role in demands for legislative actions, changes in laws and criminal procedures and the sensitization of police and judiciary for the protection of women from domestic violence. Existence of domestic violence is morally unjustifiable and has a far deeper impact than the immediate harm caused on women. India implemented its first law i.e., The Protection of Women from Domestic Violence, 2005 to curb domestic violence.

Keywords: Domestic Violence, Types of Abuse, Victim, Aggrieved Person, Respondent, Provision.

I. Introduction

The main objective of the Protection of Women from Domestic Violence Act, 2005 is to safeguard the wife or female live-in partner from abuse by her husband,

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male live-in partner, or members of his family. Domestic violence, as defined by the law, includes actual or threatened abuse of any kind, including verbal, emotional, financial, sexual and physical. This description would also include harassing a woman or her family members by making illegitimate dowry demands. Regardless of their age, religion, caste, or class, it greatly impacts women.

The Indian Penal Code's Section 498-A, which prohibits "husband or relative of husband of a woman subjecting her to cruelty,"[3] allowed the victim to seek redress in court before the Act was enacted.[4] However, this provision only applied to a specific set of crimes that specifically dealt with cruelty.

The Act was enacted for a number of reasons, including the fact that, despite Section 498-A of the I.P.C. which deals with cruelty to women, there is no civil law that covers domestic violence in its entirety. In light of the aforementioned circumstances, a law was recommended to be passed bearing in mind the rights given by Articles 14, 15, 21 of the Indian Constitution in order to protect women from being victims of domestic violence.[5]

The Act's primary objective is to provide several remedies to a woman who is or has been in a relationship with the abuser. The Legislature included sub-section (2) of Section 28, to allow the Court to establish its own procedure for handling an application under Section 12 of the Act because many of the reliefs envisioned by the Act are of a civil nature and can typically only be guaranteed by a Civil Court.[6]

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[3] Indian Kanoon (last visited on October 8, 2022), https://indiankanoon.org/doc/538436/.
[4] The Protection of Women from Domestic Violence Act, 2005,
[5] SUSHIL DWIVEDI & VIKAS DWIVEDI, COMMENTARY ON THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT,2005 (Dwivedi & Company, Allahabad, Edn, 2020)
[6] *Ibid.*

II. Main Features of the Protection of Women from Domestic Violence Act, 2005

In order to safeguard women from domestic violence, the Indian Parliament passed the Protection of Women from Domestic Violence Act, 2005.[7] The following are the Act's primary characteristics:[8]

1. Whether or not she is his legal wife, a woman who is a man's sexual partner is considered a "aggrieved person" for the purposes of Section 2(a), which has an equally inclusive definition. The Act also applies to any woman living in the home who is related to the respondent in any way, including the daughter, mother, sister, child (male or female), widowed family, and any woman who is a mother.
2. The respondent under Section 2(q) given in the Act means any "adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act."[9]
3. The aggrieved party is not required to report a domestic violence act or acts and anyone can act on behalf of the victim, including neighbours, social workers, family members and others.[10]
4. Many women become silent sufferers due to their dread of being ejected from the house. By virtue of this new Act, the Court may now order that she not only continue to live there but also be given a portion of it for her own use,

[7] The Indian Government and Ministry of Women and Child Development implemented it on October, 2006.

[8] The Protection of Women from Domestic Violence Act, 2005, (last visited on October 9, 2022), https://www.legalserviceindia.com/articles/dv_era.htm.

[9] The Protection of Women from Domestic Violence Act, 2005 (last visited on Oct. 9, 2022), https://www.indiacode.nic.in/bitstream/123456789/15436/1/protection_of_women_from_domestic_violence_act%2C_2005.pdf.

[10] Section 4(1) of the Protection of Women from Domestic Violence Act, 2005 (last visited on Oct. 9, 2022), https://www.indiacode.nic.in/bitstream/123456789/15436/1/protection_of_women_from_domestic_violence_act%2C_2005.pdf.

even if she has no legal right to the property or any interest in it under Section 4(17).

5. In accordance with Section 18, the Magistrate may order the respondent to stop interfering with the woman's possessions, committing acts of violence against the aggrieved person, or entering the victim's home, workplace, or school if the victim is a child. The Magistrate may also order the respondent to stop any acts of violence against the victim that are likely to occur in the future.

6. The respondent may also be prohibited from contacting the aggrieved person in any way, including verbally, in writing, electronically, or by telephone.

7. The Act enables the Magistrate to order financial assistance and recurring maintenance payments under Section 20. The aggrieved person and any of their children may also suffer losses and expenses as a result of domestic violence, and the respondent may also be required to pay for lost wages, medical costs, property losses, or damage to property.

8. For harms like mental anguish and emotional distress brought on by acts of domestic abuse, the Magistrate may compel the respondent to pay compensation and damages under Section 22.

9. A violation of a protection order or an interim protection order carries a punishment of up to one year in prison and or a fine of up to Rs.20,000. Additionally, the offence is regarded as cognizable and non-bailable.

10. Even further, Section 32(2) states that the court may determine that the accused has committed an offence based only on the testimony of the party who was wronged.

11. The Act also guarantees prompt justice because the court must begin proceedings and hold the initial hearing no later than three days after the complaint is submitted.

12. It outlines how the State is to fund Protection Officers and the entire apparatus for putting the Act into effect.

13. If the Magistrate deems it essential, the Act also permits the assistance of welfare professionals.

14. The punishment for failing to carry out the responsibilities of the Protection Officer as described in Section 33 of the Act are also laid out in the Act.

III. Types of Domestic Violence

Intimate Partner violence can occur in many different forms. Some of the different types of domestic violence are discussed below:

A. Physical Abuse

Physical abuse is slightly easier to recognize because it is one of the first forms of violence people think when they hear the words domestic violence. It involves the use of force against the victim, causing injury (punching, kicking, slapping, pushing, spitting or throwing objects at or near partner, abuse those results in lacerations, broken bones, internal injuries or miscarriage etc.). Physical abuse occurs when behaviours are deliberate to render the victim powerless and gain control in the relationship.[11]

B. Sexual Abuse

Any sexual activity that is coerced or attempted to be coerced without the victim's agreement, such as intimate partner rape, acquaintance rape, forced sex after physical violence, attacks on the victim's privates, coerced prostitution, fondling sodomy, and extramarital sex. Additionally, it entails making an effort to discredit the victim's sexuality by using negative sexual language, criticising the victim's desire and performance during sexual acts, and making untrue sex allegations.[12]

C. Emotional Abuse

All abusive relationships involve some level of emotional abuse, which is caused by constant insults, humiliations or criticism. Unless the abuse is continuous and so severe that the relationship may be described as highly and immensely coercive, emotional abuse often isn't adequate to launch a domestic violence lawsuit. Constant criticism, name-calling, acting superior, threatening behaviour, isolating oneself from family and friends, excessive jealousy, accusing one of having extramarital affairs, etc are all examples of this type of abuse.[13]

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[11] Types of Domestic Violence, (last visited Oct. 10, 2022), https://www.doorwaysva.org/our-work/education-advocay/the-facts-about-domestic-violence/types-of-domestic-violence/ .

[12] What is abuse? 5 forms of domestic violence, (last visited Oct. 10, 2022), https://woodbridgedvrt.org/five-forms-of-domestic-violence/

[13]last visited Oct. 10, 2022, Forms of Abuse, available at https://nnedv.org/content/forms-of-abuse/.

D. Psychological Abuse

Psychological abuse actually happens when one partner, through a series of actions or words deteriorates other's sense of mental wellbeing and health. It involves regular and deliberate use of a range of words and involves non-physical actions which are used with the purpose of creating fear, such as driving dangerously, possessing weapons, creating angry looks, destroying property or valued possessions, hurting or killing pets in front of family members, making threats regarding custody of any children, saying that the police and the courts will not help, support or believe the victim and threatening to 'out' the person.[14]

E. Economic Abuse

When the victim's money and other financial resources are completely under the abuser's control, this is known as economic abuse. This may appear in the form of limiting or denying the victim access to funds. Some examples of financial abuse are: having all bank accounts in the abuser's name, controlling how, when, and where money is spent, assigning an allowance, denying a partner the right to work outside the home or make any financial contribution to the family, controlling all or most of the finances, misusing a partner's name for financial reasons, forcing partner to sign documents against their will, such as taxes, immigration papers or other important documents.[15]

IV. Legal Issues in Domestic Violence Act, 2005

The Domestic Violence Act, 2005 has not been implemented properly although it guarantees justice to women who suffers from domestic violence. Many women in rural areas are still not aware of their legal rights and the provisions relating to the Act.[16]

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[14] Types of abuse in domestic and family violence, (last visited on Oct. 10, 2022), https://www.facs.nsw.gov.au/domestic-violence/about/types-of-abuse-in-dv.

[15] The Protection of Women from Domestic Violence Act, 2005 (last visited on October 9, 2022), https://www.legalserviceindia.com/articles/dv_era.htm.

[16] Laws relating to domestic violence in India: Legal issues and challenges (last visited on 11 October, 2022), https://www.legalbites.in/laws-relating-domestic-violence-india-legal-issues-challenges/.

The Act was considered to be a novel solution but there are many instances where the States are failing to implement it properly as many victims have to wait for months before their needs are addressed.[17]

Some dishonest women have utilised the Act inappropriately against defenceless men, resulting in blatant injustice in the eyes of the law. In this Act, man has no rights and only women may submit complaints against men.[18]

There are mainly two legal approaches for women who had suffered domestic violence. The one is filing for divorce in Family Court, and the other is filing an application to the Magistrate according to the provisions of Domestic Violence which might go through Criminal Legal System. The legal proceeding sometimes become more complex because of the dual system. The social impression of each approach sometimes create stress on the victims.[19]

False complaints may be filed by a woman due to certain grudge or revenge where a guilt-free man is left with no remedy. The clause in Section 32(2) of the Domestic Violence Act of 2005 states that no supporting evidence is required to establish an offence has been committed because the court finds the victim's (a woman) testimony to be always true.[20]

It has also been observed that though the Act provides for State legal aid, the quality of services in such cases is really poor. The State has passed on all the responsibility to the service provider, where they have to provide medical aid to abused women, arrange for short stay homes and arrange for compensation. It becomes a burden on these providers who do not have the wherewithal.[21]

Anyone who has cause to believe that domestic abuse has taken place or is being committed may report an act of domestic violence, under Section 4(1) of the Act.

[17] Strong Laws, Weak Implementation: Dissection of Protection of Women (last visited on 11 0ctober, 2022), https://aif.org/strong-laws-weak-implentation-dissection-of-protection-of-women-against-domestic-violence-act-2005/.

[18] *Supra note* 14.

[19] Critical eye analysis of domestic violence act, 2005 (protection of women against domestic violence act) (last visited on 11 October, 2022), https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=1840628.

[20] *Supra note* 14.

[21] *Supra note* 17.

This means that the victim of the alleged act of domestic violence is not required to report the incident, and anyone can file a complaint on the woman's behalf without providing any real proof or evidence, this situation is blatantly unfair.[22]

V. Legal Challenges in Domestic Violence Act, 2005

There are also positive aspects relating to Domestic Violence Act, 2005 in India, despite the limitations of the laws given in the Act. The domestic abuse laws have increased awareness among women and society, and the victim is no longer required to remain in the abusive environment. A collection of some leading judgements related to Domestic Violence Cases are given below:

Vandhana v. T. Srikanth (2007)

In this case, the Court held that since the rival contention revolve around the provisions of the recently enacted Domestic Violence Act, 2005, it is necessary to examine the historical background of the said Act, the objects and reasons for the said enactment and the provisions contained therein.[23] Article 16 of the said Convention,[24] which deals with measures to eliminate discrimination against women in matters relating marriage and family read as follows:[25]

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into a marriage

(b) The same right freely to choose spouse and to enter into marriage only with their free and full consent

(c) The same rights and responsibilities during marriage and at its dissolution; (d) The same rights and responsibilities as parents, irrespective of their marital

[22] *Supra note* 14.
[23] The Act enacted with a view to implement the General Recommendation of The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)
[24] *Id.*
[25] JITENDER KR. DHINGRA, DIGEST ON PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE, 210 (L.R.C. Publications, New Delhi, 3rd edn, 2019).

status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choosing a family name.

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

The domestic violence legislation acknowledges a woman's legal entitlement to live in a joint family. After getting a court order, a woman who has been expelled from her shared home may be allowed to return. A woman in this circumstance must prove two things in order to exercise her entitlement to the protection of "shared household": (a) that her relationship with the opposing party is one of "domestic relationship," and (b) that the residence for which she is attempting to exercise the right is a "shared household"[26] in order to enforce her legal rights.[27]

[26] According to Section 2(s) of DV Act 2005, a "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.

[27] Law on Domestic Violence [Protection of Women from Domestic Violence Act, 2005] (last visited on 10 Oct. 2022), https://www.scconline.com/blog/post/2020/07/27/law-on-domestic-violence-protection-of-women-from-domestic-violence-act-2005/.

Sandhya Wankhede v. Manoj Bhimrao Wankhede, (2011)

Following nearly a year of living with Respondents 1, 2, and 3, the Appellant's marriage started to have issues. She reported her spouse to the police for assaulting her under Section 498-A of the IPC. The First-Class Judicial Magistrate approved an additional application the appellant filed against each respondent ordering Respondent 1 to pay support on a monthly basis. Additionally, the Court prohibited all respondents from evicting the appellant from her matrimonial home.[28]

However, in Sessions Court, the appeal of the appellant was dismissed based on the finding that "females" are not considered "respondents." Similar to the lower court, the high court mandated that the appellant leave the marital residence home.[29]

This case has been considered and finally decided by the Hon'ble Apex Court wherein it is categorically answered by the Court as under:

"Having carefully considered the submissions made on behalf of the respective parties, we are unable to sustain the decisions, both of the learned Sessions Judge as also the High Court, in relation to the interpretation of the expression "respondent" in Section 2(q) of the Domestic Violence Act, 2005."

According to the court's ruling in this case, while it is true that the word "female" is not used in the proviso to Section 2(q) as well, if the Legislature had wanted to exclude women from the scope of the complaint that an aggrieved wife could file, women would have been mentioned specifically in the proviso rather than the statement that a complaint could also be filed against a relative of the husband or the male partner. The term "relative" has not been given a restrictive definition, nor has it been used in the Domestic Violence Act of 2005 to limit it to male

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[28] DV Act S.2(q)- Case Law- Females can be respondents in, (last visited on 11 Oct. 2022), https://www.lawyersclubindia.com/judiciary/dv-act-s-2-q-case-law-females-can-be-respondents-in-dv-complaints-sandhya-wankhede-vs-manoj-bhimrao-wankhede-and-others-2011-3-scc-650-4216.asp.

[29] *Ibid*.

perpetrators alone. Therefore, complaints may also be directed towards the adult male's female relatives in addition to the adult male.[30]

Ishpal Singh Kahai v. Ramanjeet Kahai (2011)

In this decision, the court reaffirmed that the goal of the Domestic Violence Act was to provide legislative protection to victims of domestic violence who lacked property rights. Its goals are to safeguard the wife from abuse and prevent violent crimes from happening again.[31]

V.D. Bhanot v. Savita Bhanot (2012)

The High Court and the Apex Court both argued in this case that even if a woman had previously shared a household but was not doing so at the time the Act took effect, she would still be entitled to protection under the provisions of the Act.[32]

Indra Sarma V. VKV Sarma (2013)

The Supreme Court's decision in this case is significant in determining the Act which applies to live-in relationships also. Some guidelines are laid for testing under what circumstances, a live-in relationship will fall within the expression "relationship in the nature of marriage" under section 2(f) of the Act.[33]

1) Duration of period of relationship

Section 2(f) of the DV Act has used the expression "at any point of time", which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.

2) Shared household

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[30] Sou. Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade & Ors. (Last visited on 11 Oct. 2022), https://indiankanoon.org/doc/134989405/.

[31] Law on Domestic Violence [Protection of Women from Domestic Violence Act, 2005] (last visited on 11 Oct. 2022), https://www.scconline.com/blog/post/2020/07/27/law-on-domestic-violence-protection-of-women-from-domestic-violence-act-2005/.

[32] VD Bhanot v. Savita Bhanot: Woman Can Seek Relief under Pwd Act Regardless. (last visited on 11 Oct. 2022), https://www.lawyersclubindia.com/judiciary/dv-landmark-judgement-6-v-d-bhanot-vs-savita-bhanot-woman-can-seek-relief-under-pwd-act-regardless-of-whether-she-lived-independently-or-was-subjected-to-domestic-violence-prior-to-the-enactment-of-theact-5830.asp.

[33] JITENDER KR. DHINGRA, DIGEST ON PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE, 243 (L.R.C. Publications, New Delhi, 3rd edn, 2019).

The expression has been defined under Section 2(s) of the DV Act, 2005.

3) Coordination of financial and resource arrangements

To maintain a long-term relationship, supporting each other financially or any of them, sharing bank accounts, buying real estate in joint names or in the name of the woman, making long-term business investments, and holding shares in separate and joint names may all be deciding factors.

4) Domestic Arrangements

Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or upkeeping the house, etc. is an indication of a relationship in the nature of marriage.

5) Sexual Relationship

A sexual relationship described as being "marriage-like" is one that involves more than just sexual gratification; it also involves emotional intimacy and the goal of having children in order to provide companionship, support, and other benefits such as material affection and care.

6) Children

Having children is a strong indication of a relationship in the nature of marriage. Sharing the responsibility for bringing up and supporting them is also a strong indication.

7) Public Socialising

It is in the nature of marriage to maintain the relationship when one person holds out to the public and the other by acting like they are husband and wife and associating with friends, family, and others as though they are.

8) Goals and intentions of the parties

The character of marriage is essentially determined by the couples' shared expectations of what their relationship will be, what it will entail, and what their respective duties and obligations will be.

This case is significant because it created a precedent for such an exception and urges lawmakers to take protective measures for women like Indra Sarma, whose contributions to a shared home are frequently disregarded.[34]

Hiral Harsora v. Kusum Harsora (2016)

In a recent landmark verdict, the judgement given by the Hon'ble Supreme Court in this case was that it set aside the impugned judgement given by The Bombay High Court and the declaration was made that the words "adult male" given in the definition of "Respondent" in the Section 2(q) of the Act shall be struck down and would be deleted from henceforth. The Ratio behind the same was that the words were in violation of Article 14 of "The Constitution of India." It was also made clear that the Section 2(q) shall not be rendered invalid, and only the said words i.e., "Adult male" are being struck down, the rest of the sub section remains as it is and is valid.[35]

Lalita Toppo v. the State of Jharkhand (2018)

In this instance, the Appellant and the Respondent, with whom she shared a child, were living together. The Appellant went to the Gumla Family Court after the Couple got separated to ask for support from her partner. Her compensation of Rs. 2000 per month and Rs. 1000 for her child was approved by the Family Court. The Family Court's decision was determined to be wrong by the High Court, which then decided in favour of the Partner when the Appellant filed an appeal. The Appellant subsequently went to the Supreme Court, where a three-judge bench consisting of Justices K.M. Joseph, U.U. Lalit, and then CJI Ranjan Gogoi issued the ruling.[36]

The Court determined that the victim in this case, an estranged wife or live-in partner, would be entitled to more remedy under the terms of the DV Act, 2005 than what is provided for in Section 125 of the Code of Criminal Procedure, 1973,

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[34] Indra Sarma v. V.K.V. Sarma: Case Facts, Issues, Judgement & Analysis https://www.simplekanoon.com/family-law/indra-sarma-vs-v-k-v-sarma-1512/ (last visited on 10 Oct. 2022)

[35] Hiralal P. Harsora & Ors. v. Kusum Narottamdas Harsora & Ors., (last visited on 11 Oct. 2022), https://blog.ipleaders.in/hiralal-p-harasora-ors-v-kusum-narottamdas-harsora-ors/?amp=1

[36] Top 10 domestic violence cases (last visited on 11 Oct. 2022), https://blog.ipleaders.in/top-10-domestic-violence-cases/?amp=1.

specifically, to a shared household as well.[37] The Domestic Violence Act's provisions, according to the Court, include economic abuse as a form of domestic violence.

However, it has been noted that the primary obstacle to domestic violence laws is that in recent years, there have been numerous instances of women abusing the provisions made for their benefit to bring false charges against their husband and in-laws. This Section is being abused more frequently, and the educated women who commit these crimes are aware that they are both cognizable and non-bailable. For instance, the Court ruled unequivocally in the case of **Savitri Devi v. Ramesh Chandra & Ors (2003)**, that the laws had been abused and exploited to the point where they were undermining marriage itself and had shown to be detrimental to the society as a whole. The Court held that in order to stop these types of situations from happening, politicians and the relevant authorities needed to reassess the situation and applicable laws.[38]

VI. Conclusion

John Stuart Mill, in 1869 in his thesis on the Subjection of Women, while questioning women's subordinate status within marriage, argued that man as a master not only wants a woman's labor but also her sentiments, and he conspires to exploit in order to accomplish this desire for a submissive docile slave over whom he could have an absolute control. Mill rejected the 'cult of domesticity' and wrote that marriage is a form of slavery that confers power to men and not "only to good men or decently respectable men, but to all men, including the most brutal and most criminal" are benefitted by it.[39]

The Act no doubt has played a major role in our Indian Society, where women could actually fight for their rights. Domestic Violence is a crime which not only affects the victim alone but also her children and has wider implications on society. It damages a Person's physical, mental and social well-being and sometimes requires assistance to come out of the plight. But on the other hand, many women have misused this Act against innocent men. As a result, it would

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[37] Lalita Toppo v. The State of Jharkhand on 30 Oct. 2018 (last visited on 11 Oct. 2022), https://indiankanoon.org/doc/63547.

[38] *Supra note* 14.

[39] SHALU NIGAM, WOMEN AND DOMESTIC VIOLENCE LAW IN INDIA: A QUEST FOR JUSTICE, 211 (Taylor & Francis, London and New York, First South Asia Edition, 2020).

be extremely helpful if the Act could elaborate on its definitions and prohibitions, as well as expand its scope to include men who are victims of domestic violence. Domestic violence is still a significant problem in our culture, and for a variety of reasons, many occurrences continue to go undetected.

BOOK REVIEW

Democrats and Dissenters (2017) by Ramachandra Guha, Penguin Random House, India, pp 345

Upholding democracy, in its truest sense, is challenging, especially in a third-world country like India, which is a land of differences and disparity. Since independence, the leaders have tried to maintain plurality within India's political structure. The efforts have in recent years been eroded to make way for a country that is governed by religious chauvinists. The collection of sixteen essays in Guha's book is an exploration of democracy in the current socio-political scenario of the country. The book is divided into two parts - Part 1, titled "Politics and Society", traces the path of the decline of the Indian National Congress, freedom of expression, and the scope of conserving plurality within the democratic structure of the country. The essays are highly anecdotal about his experiences gathered in different parts of India and the neighboring South Asian states. Part 2 of the book - " Ideologies and Intellectuals", takes a more reflective and critical turn, where he criticizes and compares intellectuals like - Eric Hobsbawm, André Béteille, and Amartya Sen.

Democrats and Dissenters starts with Guha's disappointment with the current state of the Congress party in India. Why should one expect more from Congress than any other political party in India? His frustration stems from the party's historical significance in the freedom struggle of India, the leaders whose visions sustained a democratic structure in post-independent India's chaotic diversity. Guha writes -

This was the party that led the movement for freedom, the party that united India and brought people of different religions and languages into a single political project. Its finest leaders were not confined by national boundaries, they had a universalist vision. And they were men and women of high personal integrity.[1]

He takes the then-Congress Party's vision and achievements to a global stage and compares them to that of Britain's Liberal Party, Germany's Social Democratic

[1] Guha, Ramachandra, *Democrats and Dissenters,* Penguin Random House, 2016, Haryana, pp. 3-4.

Party, and the Democratic Party in the United States. Guha highly focuses on the role of Gandhi in the Indian National Congress's endeavors towards building the party as a more inclusive organization and breaking the much-criticized language hierarchy by operating in vernaculars. The party formed provincial committees that operated in regional languages such as - Marathi, Telugu, Tamil, Kannada, Oriya, and so on. It is he who brought the national independence movement to the grassroots level, his dress and lifestyle gave an impetus to his efforts. Even though Gandhi's role in the Indian freedom movement is undeniable, his ideologies regarding issues of women and the Dalits remain questionable, which Guha ignores in his essays. While mentioning the many forgotten leaders of the Congress party, Guha especially mentions Kumaraswamy Kamaraj. A party that has been driven by the very ideology of Rabindranath Tagore - the spirit of the west, and nation of the west, the former being the promotion of freedom, equality, and scientific advancement by the West, and the latter is the West's role as an oppressor, saw a massive decline in upholding its lineage. Guha alludes to Indira Gandhi's role in this decline when she was elected as the Prime Minister. He throws light on Indira Gandhi's choice of the cadre of advisors belonging predominantly to the community of Kashmiri Pandits, which can no way be overlooked as an unintentional coincidence. Under her, the Congress was once again divided into two factions, and the faction led by her was acknowledged as the real Congress party. However, with the declaration of Emergency of 1975, Indira Gandhi's actions those were gradually leading to the demolition of the democratic structure within the Congress, and subsequently, the state reached its peak. With Indira Gandhi's ascend to the throne, and Rajiv Gandhi, Sonia Gandhi, and (now) Rahul Gandhi, the party has become a family organization and shifted from a decentralized to a centralized power set-up. The first essay "The Long Life and Lingering Death of the Indian National Congress" extensively focuses on the decline of leadership over the years, one of the reasons being the omission of other leaders apart from the ones belonging to the Nehru family. The political party is still highly dependent on the Nehru-Gandhis. Ramchandra Guha unapologetically and, needless to mention, justly attacks the leadership qualities of Rahul Gandhi.

"We live in a deeply divided and intensely politicised society. It is hard, if not impossible, for writers to escape into an imaginary world of their own. They... find themselves compelled to engage in political and social debates. But? they

must never ally themselves with a political party, still less a particular politician. I am also uncomfortable with rendering history or politics or public affairs a zero-sum game, whereby one is mandated to choose one party on a particular dispute. In a contest of greater and lesser evils, there is no need to take sides"[2]

Guha analyses the eight threats to freedom of speech in India, and one of them is the inclination or identification of artists or writers to a single political party, or even in some cases a politician. During the reign of every political party, writers or artists have been banned, hence, giving a huge blow to the freedom of expression. The other threats mentioned by him are -

- Retention of archaic colonial laws
- The partial judiciary which harasses, and therefore, curtails the freedom of artists and writers
- The rise of identity politics
- The role of the police force in harassing artists, writers, comedians, or anyone criticizing the existing government
- “Pusillaminity” and “mendacity” of the politicians[3]
- Dependency of media on government expression
- Dependency of media on commercial advertisements

The essays are neatly interlinked with one another bound by the thread of democracy. In one of the essays Guha delves into the famous debate on democracy between Nehru and Jayprakash Narayan. The debate is a mention worthy phenomenon in the history of Indian political discourse, as well as in this academic piece discussing Guha’s book bears the same reasons. The debate is not a mere rebuttal between two political leaders with different views, but a passionate, well-read, and well-understood dialogue on democracy. Such dialogues, absent from today’s politics, are politically productive. The two different interpretations and concerns about democracy remain relevant even in

[2] Guha, Ramachandra, *Democrats and Dissenters,* Penguin Random House, 2016, Haryana, pp 260-61.

[3] The two adjectives have been used by Guha in his essay while discussing the role of politicians in the threat to freedom of expression

the contemporary political scenario. "… such debates do not take place any more, at least not among full-time politicians. No politician now alive can think or write or speak in an original or even interesting fashion about the direction Indian society and politics is or should be taking. The discussion of what Narayan, in his letter to Nehru, had called 'dispassionate political principles' has now been left to the scholars.'[4] he writes.

Guha's chapter on Adivasis is a brilliant insight into the social, economic, and political negligence faced by the tribal groups in India. They still remain the "unacknowledged victims of seven decades of democratic development", as Guha puts it. He draws a comparison between the tribal communities and the Dalits in the domain of politics, where tribals do not get any representation in the decision-making process, securing their position in the lowest strata of society. Dalits, and religious minority groups, Muslims, have had some representation, if not fair, in the administrative system. These communities are muted and exploited incessantly without any intervention. Where lies their democratic privilege then? His exposition of the condition of the Adivasis makes us question the success of India's democracy, and how the system lacks inclusivity. The unacknowledged position also comes from distorted or no representation of these communities in mainstream media. They continue to remain the "other", the subaltern in this hierarchy. In his personal anecdote, Guha refers to China's minority community and his exploration of Tulon (communal buildings in the village) as an "element of subaltern counter-narrative".

In the second part of the book, Guha criticizes Amartya Sen in *The Argumentative Indian* for anachronistically seeing secularism and pluralist tolerance in India's ancient history and characters such as Ashoka and Akbar in one of the book's noteworthy essays. He warns of the hazards of such a historicist appeal, which might wind up supporting claims by the Hindu Right to 'traditions' that are not always progressive. Guha would much rather root his desire for secular tolerance in India's Constitution and the nationalist movement's prominent personalities such as Gandhi, Nehru, and Azad. Critics are of the opinion that "He could well have included Sen's combative yet unsatisfactory response, which came a year later if only to share a great exchange in which Guha clearly comes out on top.

[4] Guha, Ramachandra, *Democrats and Dissenters,* Penguin Random House, 2016, Haryana.

Someday, one hopes, he expands on his differences with Sen, much as the latter did with Rawls, in his book, 'The Idea of Justice.'"[5]

There are two complementary arguments put forth by Guha which can be read in reference to his criticism of Amartya Sen. According to Guha, Dharma Kumar's research established that contrary to popular belief the position of the Mughals were not as celebratory as they were believed to be, taxing their subjects far more harshly than the British ever did. His view on Andre Beteille begins with an intriguing parallel to Amartya Sen. But Guha's position on André Beteille has been criticized and contested. Sankaran Krishna, while exploring his essay on André Beteille, writes, " Guha's not even raising the question of how Beteille's location within a Brahmin household might have skewed his ethnographic findings about Thanjavur village society is striking. It is reminiscent of the sort of myopia displayed by M.N. Srinivas (another of Guha's heroes), who begrudgingly acknowledged that his own status as a Brahmin might have influenced his understanding of caste society in southern India or his view on reservations or his much-vaunted theory of Sanskritisation only when the British anthropologist Edmund Leach called him out on it. As always, caste privilege is rarely acknowledged or explicitly spoken of: it constitutes the invisible normal of our middle-class habitus."

Guha's concluding chapter mourns the lack of a conservative intellectual heritage in contemporary India, blaming it mostly on the right wing's lack of intellectual prowess. His contempt for Hindu fundamentalism and their scholarly incapacity has been mentioned in the previous essays as well, on multiple occassions.

At a time when democracy in our country has become like "two wolves and a sheep voting on what to have for dinner"[6], Guha's book helps answer a number of unanswered questions. Guha's fluid, unadorned, and reflective writing style makes the book intellectually affordable to the mass. It serves as a brilliant

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[5] "A wistful look at India's intellectuals", The Hindu Business Line, 12 Aug 2023, https://www.thehindubusinessline.com/opinion/books/a-wistful-look-at-indias-intellectuals/article9285749.ece
This is cited from a review written by Uday Balakrishnan of Ramachandra Guha's book *Democrats and Dissenters.*

[6] Bovard, James. *Lost Rights: The destruction of American Liberty*

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expository of the democratic structure of India, what should have been, and how can the situation be improved. He studies the Indian democracy placing it in the wider and global sphere, drawing comparisons with its neighboring South Asian nations.

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DEPARTMENT OF LAW, UNIVERSITY OF NORTH BENGAL

The Department of Law is prominently situated on National Highway 31 between Bagdogra and Siliguri in the District of Darjeeling, West Bengal. The distance from Bagdogra is six kilometers and from Siliguri is seven kilometers. The Department has its own campus in the south Block of the North Bengal University. The sprawling campus of the University enjoys the pristine beauty of the eastern Himalayas and is the intellectual hub of North Bengal. Siliguri is an important sub-division of the district and commercial capital of North Bengal. Located at the foot hills of eastern Himalayas, Siliguri is the gate way to North eastern India and land locked countries like Bhutan and Nepal. It shares a huge and porous international border with Bangladesh, Nepal and Bhutan. It is well connected with all metropolis and major cities by air and rail.

The Department of Law was formerly known as the University College of Law and was established as such in the year 1974. It was upgraded as the Department of Law in the year 2000. Presently the Department offers a B.A. LL.B. [Honours] 5 year integrated course, LL.M. course and Ph.D. The intake at the LL.B. level is eighty, and the LL.M. course which was started in 1993 has twenty five seats. The criteria of admission both at LL.B. and LL.M. is on merit. The Department has a rich Ph.D. programme. It was started in 1999 and since then more than 24 Ph.D. degrees have been awarded. Presently there are about twenty five scholars engaged in doctoral research under various faculty members under the UGC Regulation, 2009. The Department attracts scholars and students from all over India and especially from Sikkim, Assam, Tripura, Arunachal Pradesh, Uttar Pradesh and Orissa. It also attracts students from Bhutan, Nepal and Bangladesh. The self financing P.G. Diploma course on Environment has presently been discontinued.

The Department was jointly selected by the British Council, Delhi, University of Warwick, U.K., and the National Law School of India University to carry out the 'Human Rights Outreach Project'. It was also a partner institution with CEERA, National Law School of India University for carrying out environment education for forest personnel, Tea Garden personnel and judicial officers.

The Department has published number of books as well as Booklets in Human Rights, Environment Legislations in Bengali and Nepali. It has a Legal Aid Clinic in collaboration with the State Legal Services Authorities. It runs a very successful NSS programme.

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