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Foreword

Law as a discipline of study has arrived and is subject of choice for last 10 years. Students have been seen preferring 5 years LL.B. second only to Medical education and I have met two students who did not join Medical College and decided to shift to law. The third generation reforms in legal education mostly introduced through National Law Schools are available to only few thousand students per year. Saving of one year through 5 years LL.B. course is available to very few but is at high cost. Saving a year allows the student to earn early by one year and if the value of that year is seen in sixtieth year of life then it is exorbitant amount.

This University has made it possible of tremendous savings through both the courses of 5 years B.A. LL.B. and LL.M. one year established by this University through an Institute. We had the zeal that a people's version of National Law Universities could be contributed at 1/3rd cost of NLUs. We have to know how and convinced the Government to contribute resources which they provide for higher education. The result is here before you to benefit from the facilities. In our introductory year with 35 students we are coming out with this journal done amateur way. We would do it in appropriate way soon.

Economic Laws Ignored Even in History by all

Our seniors and predecessors in law academics and in Bar Council or even judiciary failed to introduce economic laws for study. Even taxation which was prevalent as land revenue or income and gift tax was not brought to notice of students, teachers and society. So many economic laws got introduced as part of Defence of India Act during World War II, like Essential Commodities, import – export, capital issues, foreign exchange have not been sought to be told to the students who are teachers or judges now. Companies' law, Intellectual Property Law, the then trademarks and patents laws were not informed to polity. Planning Commission by whatever name called has been non statutory body under all the governments. The ushering of minimum wages and industrial disputes law before capital formation for the country remained counterproductive. This institute would like to work on above and on Cyber laws, GST law, women laws, PC-PNDT law, animal, climate change and environment laws. The Essential Commodities Act, Rent Control Act and so many land laws need attention.

Additionally, majority of law teachers are still engaged in primitive discourse. Law students talk only general knowledge of law without ability to interpret and apply law. Few know the much required interpretation techniques; even fewer appreciate precision or ways to control misinterpretation. The words used

by legislatures or distinguishing tests for drawing lines between permissible and non-permissible actions are not highlighted, as if it is not the job of the teacher or a judge in judiciary.

Legal Fraternity had not adopted a Social Goal

All the three pillars of legal system: teaching, advocates, judges taken together are not displaying any priority item as an agenda of legal fraternity as a whole. Anything doable or achievable on their part for the society is sorely missing. Legal fraternity has not worked on corruption nor displayed any thinking or contribution to sustainable development.

Law is an instrument which enables regulation of human conduct everywhere. The legal academics can hardly have a role in checking judicial delays and the Bar Associations appear so powerful or the system has become so entrenched, that the reforms in legislation could not deliver results. I wrote elsewhere that the judiciary can lose its relevance if political process starts blaming for judicial delays.

Law can be used to inculcate behavior, create artificial structures. Still our fraternity has not adopted any goal to deliver to population or the nation. Educating sons about the safety of daughters and women could be an area. The publications on social media has to be respected as it is not only a freedom but is greatest equalizer, the times have ever seen. To suggest, why can't the legal fraternity adopt *women safety as a deliverable by all law schools, all advocates and all judges.*

Judiciary had done it in context of implementation of section 498A, efforts are on but a similar zeal is not visible.

Need of a Course on Applied Rule of Law

It would not be to the liking of many, if we take note of the achievements of lawyers or judiciary in neighbouring countries, it is apparent that they have delivered likable things to their people. We need mercenaries for Rule of Law and they cannot come from other disciplines of study, except law. Thus, it is the job of the legal academics or the Bar Council of India regulating law schools in discharge of the responsibility of standards, but treating it as a power. This small mention should be sufficient to discerning.

The course curriculum clearly lacks thrust on rule of law. One is dismayed that law teachers are not respected and this reflects more so in their being paid inappropriately. If the legal academics are made to fight the battle of employment, remuneration or survival, they cannot become mercenaries for rule

of law, or for sustainable development. Law profession has to be remunerative and capable to deliver to population without delay. If the noble medical profession could become so costly, then the plight of law profession cannot be different. There is a serious question why in disciplinary proceedings against advocates, the judges and academics are not involved. No advocate, howsoever senior he may be, does not write an adverse but professional comment on a judgment is an unanswered question

Convergence of Laws

A by-product of legal globalization is convergence of national laws. Students have to be told Indian laws in a manner that within a 15 days crash course they should be able to understand any legal system of the world. Our law students should be able to advise foreign clients for Indian courts and should be able to advice and work for Indian firms when they need legal assistance abroad. It is for us to ponder over whether any of our law schools are near to achieving that aim and when law firms are able to do it, we are satisfied after complying with the BCI prescribed courses.

Aim of the 2018 Conference was to bring home this discussion to the participants and to set a high benchmark for the new MSB Global Law Institute we are establishing at Bharatpur. Teachers and students should know how the domestic laws compare with the laws of other countries and how they fare with international norms on that law.

Does India or Indian population get reciprocity in legal framework of other countries? Is Indian law keeping pace in dynamism with laws in other developing or comparable societies? Are we able to represent in disputes before international forum (s)? We have to train our own for these coveted functions. Law has to be adaptable to the changing needs of the society. Our laws should have close convergence with the laws of particular subject in international legal scenario.

Ongoing Compliances/Monitoring

India as a national polity or society has failed to monitor compliance of all laws which is truer of all economic and financial laws. Scams are rampant. Accountability in relation to public finance is quite low. The systems put in place at inception are left with the possibility of manipulation for the ruling elite – for possibility of crony capitalism or selective distribution of largesse.

Indian polity and administrative set up mostly have learnt to keep the door completely shut or wide open, and have consistently failed to regulate the society to the advantage of the society. Governance lacks the equipment, will

and honest/dedicated human resource to do ongoing monitoring and oversee compliance.

All audit reports or annual reports laid before legislatures or Parliament are not read over or commented upon.

It is duty of all stakeholders in the university or as a Professor that each one should do one's bit, and say so or admit if one remains dissatisfied with the outcome. Kindly do not hesitate to point out deficiencies albeit politely and carefully of the colleagues. If you don't, you are conspiring to stall the growth of your institution and, as a result, of the whole society and nation.

In a democracy the competitors or population or other persons are the eyes and ears of the Government or administration and they must act as watchdogs for the rule of law and for compliance of obligations imposed by law.

How we can Contribute

National Law Schools and other advanced Law schools should contribute to transference of legal knowledge to society. Law teachers, advocates and law students are not applying the 'clinically parroted' legal knowledge in their conduct or to situational realities. Mostly, they do not analyze impact of law teaching at all. An illustration is – wrong portrayal of law in movies, TV serials or any mass media must be prohibited and should be punishable (not talking of legal arguments in profession).

Self-discipline bodies like the Press Council, the MCI, BCI, Teachers Council, Advertising Standards Council et al, all, are unable to discipline themselves. To cite an illustration – the knowledge and education of Pc-PNDT Act is entrusted to doctors; but instead of ensuring adherence and compliance to the law, the organizing doctors talk and preach of 'social plight', as if their leaders do not accept the provisions of law.

I submit 'veiled questioning of law is a serious threat to Rule of Law, be it done by anyone. In comparison, all those who openly disagree with a law do a great service to society and nation.'

Prof Ashwani Kr Bansal
Vice Chancellor/Director

Speech of Prof. Ashwani Kr Bansal*

Firstly, I welcome all the participants to this International Bird Sanctuary city Bharatpur giving it a prominent place on the historical Golden triangle of Delhi-Agra-Jaipur. Then on behalf of all of you, I extend my heartiest welcome to the celebrities on the dais. All of us are a part of this conference and we will start our deliberations soon. There is a substantial presence of Delhi University, IP University Delhi, Jamia Milia Islamia University Delhi, Lucknow University, NLU Lucknow & Jodhpur and University of Rajasthan and Alwar.

Secondly, we note the presence of celebrities High Court Judge and Additional Solicitor General and two Vice Chancellors who adorn the stage, kindly look to future celebrities sitting in front of us. We don't know how many chief executive officers, how many High Court Judges, how many Professors and Vice Chancellors are sitting in front of us. I invite you and request to join me in cheering for our participants.

About the Conference

The title of the Conference says 'contemporary issues' and if I connect it to the headlines of today, it says impeachment of the CJI--we the legal fraternity should not remain silent and support the judiciary and call upon all the Supreme court judges to act together and the knowledge brought to people in January 2018 should come handy in resolving the crisis. Ipso facto it becomes part of the topic today. Legal profession produces realist persons, the legal process takes us to reality, whether the dominant activity is in hands of academics, lawyers and/or judges. All of us have to uphold realism.

I have to acknowledge that our city is not working in English only therefore I believe that some of the message should go in our national language, comprehensible to the audience. The message stated in Hindi and that in English is now written in English.

We are holding this conference to announce the opening of a 5 years' integrated law course of B.A. LL.B. and B.B.A. LL.B. at this Government University and to celebrate the one year LL.M. which we have opened in August 2017--the first batch of LL.M. shall write their examinations in May end of 2018! We will make

* Professor Ashwani Kumar Bansal, Vice-Chancellor, MS Brij University, Bharatpur, Rajasthan. Address in the Inaugural Session of the Two-day National Conference on Legal Education and Contemporary Issues: International Convergence of Laws held during April 21--22, 2018.

admissions to LL.B. 5 years in June if we are able to make all preparations. It was heartening that we did open B.A. LL.B. in July 2018. This is indeed a proud moment for us and the north east area of Rajasthan.

Ours is truly a Global Law Institute

We have an enviable Advisory Council drawn from four National Law Schools in 2018 and Delhi University and now we have five Vice Chancellors from NLUs and the Deans of all Delhi Universities' and that of Rajasthan University Jaipur. We seek to build bridges with all the National Law Universities and with Universities in Delhi to have students training or internship, Jamia University, IP University and Rajasthan University Jaipur which are represented here.

I am happy to inform that during the year 2017-18 about 20 persons from cities of Jaipur, Delhi and even Bihar came to study our LL.M. course at Bharatpur. Another 35 persons from outside of Bharatpur District have joined the Ph.D. programme of our University. This brings prosperity to the city. The sum total of the growth of each student, teacher or officer represents growth of the area, society and the University. I request co-operation from all for the new upcoming university. We assure you we would take on all established Universities and in each year we shall deliver the growth of two years.

Higher education can be viewed as industry and it is our contribution to and is equal to development. If we train one more student at Bharatpur who would go otherwise to another place the city saves about 2 lakhs of rupees as minimum. I make an appeal to the district administration, faculties of different disciplines, advocates, industry and trade leaders to assist and help your own University to grow and make a mark not only in Rajasthan and India but elsewhere in the world.

Our idea of the University at Bharatpur is of one goal to uplift city of Bharatpur in diverse spheres so that it may become a hub of higher education. We desire to unleash a wholesome life in higher education, entertainment, wealth creation, conversion to the culture of doing and not idling, and women safety. I trust that we would achieve this in the remaining time of two years. In our first aim to be eligible for section 12B under UGC or RUSA, We have opened other courses which equip women much more. We have prioritized women development and desire to upgrade the conventional courses so as to enable knowledge to set up domestic industries.

We adopted women development and opened 2 courses predominantly for women. I insist that the Drawing and Painting course when coupled with Computer Graphics and designs enables careers in applied art and designing. Home Science equipped with introductory fashion design and interior decoration would contribute to possibility of domestic industries. We are working to open Master of Science course in 3 departments. When we open M.Sc. in Operational Research, we will be the first in State of Rajasthan. We are looking to open M.Sc. Maths and Computer Science, all these are advanced courses.

Road Map and Vision to Future

I appeal to High Net worth Individuals (HNIs) of Bharatpur and Dholpur to work with us and grow so that we build a hub of higher education, business and contribute to hub of medical facilities with Medical College opened, the city is ripe for the same. The health expenditure of local population of Bharatpur to Jaipur has to stop, if we have to develop this city. Bharatpur is geographically efficient town for inviting medical tourism. When I make such statements I am not obliging anyone. I am not trying to be a public leader—I am doing my job of developing the area or building an urge for development and to be doers. It is the knowledge and education which will incentivize investors to supply the medical services in the market and make money with Medical College providing critical infrastructure and a diagnostic Centre the best quality teachers and equipment can be brought to Bharatpur. The entertainment for youth must be available in the city to stop their flight to Jaipur.

Our prime objective is that the population of Bharatpur must get higher education of Jaipur, Jodhpur or Udaipur here at the doorstep. I hear the trend of the city is such that so many brilliant people have left the city, if we don't grow the facilities for which we have the potential we would fail our duty. We must do it. It is also our duty that the students and College administration of colleges should know University culture. They have to learn to abide by rules.

The security shall have to be provided by the state, the taxes will be paid. The District administration and Police force has to ingratiate appropriate norms and tolerance. I assure Bharatpur that increasingly you would find this can become an international destination of students in the same way as it is natural international destination of birds. The way Keola Dev is catered the university needs same attention from government.

I would wish my successors to compete with Jodhpur NLU in 10 years' time, if we reach in top 20 or even 30 in 5 years, we would have made it. But people should be ready to receive teachers from outside. We have to create facilities for teachers to stay here. We would like to send my BALLB students to 2-3 NLUs or other universities, which may increase later. This reciprocation is easy as we would invite them here in December–January, the season of the Bird Sanctuary, the destination rendezvous with international academics. We wish and would be happy to employ a nationally representative faculty in the courses we have opened. As you would read other speakers you would find everyone endorsed the teaching of law have to be in English. I have been trying to speak in Hindi, when I don't know correct Hindi or fluent Hindi. But the experts and the Hon'ble Judge preferred to give message of English for your development

Contemporary Issues in Law

About contemporary issues in Law-I have been writing some such things, which I believe we have circulated amongst participants—something like legislation for political parties, where I have concluded that there is not much need of electoral

reforms whereas there is a need of reforming the political parties' bylaw. Political party is an organisation which is floated to capture and perpetuate and to return to power. It is a business or profession as well. Law reform for political parties shall happen only when rulers would decide or the elitist bureaucracy shall create the circumstances. One paper on Economic Administration tells that the country failed in disciplining. Law profession in all 3 spheres ignored economic regulation. If one may see the UN has one organ as Economic and Social Council. I had audacity to write that Lok Sabha must have special sessions as Economic Council with a different Chairman or Economic Speaker, if we cannot have third house of Parliament.

Another writing that is being circulated amongst you is about the de tente between Supreme Court and Parliament. Mostly the conflict between Supreme Court and Parliament or Legislature/ Governments comes in exercise of powers, for resolving which the doctrine of Basic Structure was pressed in service in the year 1973. Thus there was no basic structure till 1973. In a paper I have submitted there are some permanent features of constitution as there was no agreement on 4 items in Constituent Assembly. Rashtra Bhasha, Reservations, Article 370, Uniform Civil Code and one on Privy Purses which has been resolved.

What the Basic Structure of the Constitution is now has literature of 50,000 pages. While sending this to Press it can be said that one constitutional amendment could be passed in 55 hours displays a different ball game on which velocity India can proceed. On 21st April and earlier in 2015, I had submitted that the de tent between Judiciary and Government/Parliament can resolve the issues, otherwise the basic structures for millions of poor people, the poverty-stricken have-nots-- the basic structure of Constitution is only Roti, Kapda and Makan (bread, clothing and shelter) and not the fight over judicial review. The contest between Judiciary and Parliament is always in the name of sections of people of India. How much trouble the universities, how much trouble the youth of the country faces in this difficulty is inevitable, collateral and appears necessary.

I have written a paper in which I said that our judiciary in the context of IPR laws decided in favour of MNCs with foreign bias; we did not protect our markets the way House of Lords protected or USA refused to give free hand to MNS to exploit in certain situations of parallel goods. All these papers shall now be put on our Universities website. The purpose is not to rebel against any dispensation, but yes I have chosen to be a plain speaker, if it may produce some good to society. I have served my innings, it is now extra work which keeps us fit and fine. So we are thankful.

Though friends tell me that by writing such plain truths you invite the anger of the ruling classes--yes one has to pay for it! I submit 'Knowledge and transparency'¹ is

¹ I had occasion to learn the Multinational Corporations in early life of 23-24 years. The whole world had decried the killing of Mr Allende the elected communist President of Chile in 1973 where in the role of a MNC was under question. For about 15 years the activities and strategies
contd...

the answer to any difficult situation. Whatever happened in the Judiciary in January 2018—knowledge of the people would be the answer. The difficulties which have been exposed by the 4 senior most judges of Judiciary—the Supreme Court has to become a part of common knowledge and only then the solutions can be found. All of us should have faith in the competing contest of top shots. Judicial Appointments Commission if it happens or not, the public knowledge about Uncle judges is no harm. You learn so many things at breakfast table from your parents that education cannot be written off.

This kind of knowledge, this kind of reality has to be transmitted to the newer generations, the people who are sitting in front of us and I am constrained to say that higher education including legal education—in fact is facing the difficulty of wasteful education!

We can apply Basic Structure of constitution or John Kenneth Galbraith's technostucture doctrine to anything: for the university, it is growth, development and higher education and building knowledge; A person concerned with the University would normally be 6-8 times well trained or equipped than the ordinary city dwellers i.e. population mix in the vicinity. Basic Structure of Constitution similarly answers the vocabulary of aspiring leaders mostly delivering same with leeway of more than 5-6% in priorities, but sometimes priorities can differ substantially.

Higher Education-Without Knowledge

It is increasingly accepted that in the sector the distribution of degrees is happening and the only power—the youth power in which India was having abundance— that is being disorganized, in the sense that education is being imparted albeit without knowledge. I am afraid the present generation is only 'Google intelligent', or storing photo-stated materials or on every occasion consulting the Internet. All this displays a lack of thought process or ability to process information with own intelligence. Independent creative thinking is being stifled by excessive use of Artificial Intelligence. Education providers are relying heavily on such methods and the result is reservoir of brain is empty.

How to continue to build knowledge is a serious challenge. In Rajasthan or Bharatpur, or Hindi hinterland, this rebel against learning English language is going to be counterproductive. Our mother tongue or language of basic learning is mostly Hindi and is not English. I still desire to impress upon the students if they think they need progress, development or growth, then they or we must learn English, if we can enhance our value and/or knowledge in English, then let us do it. The way we learn science or maths we should learn English. Nobody can steal

of MNCs were under surveillance and exposed on official sponsorship of UN. That literature and knowledge of developing countries ensured disciplining of MNCs to a great extent throughout the world. Exposing the malpractices of ruling elite or powerful happen at a cost and the one who pays that cost brings benefit to population should be accepted.

or harm our mother tongue. You can't defeat your own progress by rebel against English, thereby you harm yourself.

We feel happy and elated that the law which is a career option falling among first two-three avocations; we have been able to usher it at Bharatpur and that too along the lines of the National Law Schools of Bangalore, Jodhpur and Delhi. I can assure the cooperation of best of National Law Schools for our Law Institute as all of the Vice Chancellors are friendly colleagues. It is for our faculties and students to work towards gaining acceptance and building bridges with Bangalore and Jodhpur NLUs, to which we have added Lucknow and Jabalpur NLUs. We will be able to send our deserving students to these institutions to learn or benefit from them. Legal Education is a priori for ushering rule of law for eradicating corruption for ensuring delivery of benefits to poor or deprived. I am not dwelling upon further in this matter.

Call to be Doers

An adage disliked in universities is an eye opener for educational institutions and teachers alike. 'One who can, he does it; one who cannot he teaches and researches!' I believe many would start working and writing because to a large percentage would not accept "cannot" or incapacity. I think it had impressed me to work better. Take it from me all the persons on dais have been doers. In each organization both the categories co-exist.

About 15 teachers and students who have come to conference from Delhi University had been doers. They are referred as my friends or followers, but real analysis is they have been helping us, they were working there and when called upon to do here, they happily obliged. We record our gratitude to all on the dais and to all as I said in beginning that many CEOs, judges and Deans and VCs are sitting in front of us, the proviso is that they have to be doers. Let us be doers, and not gossipers or discussants!

Kindly enjoy gourmet deliberations and gourmet food.

[Post Script by Chief Editor: The Conference on Convergence of Laws has been enviable and unparalleled, making it daunting and formidable for us to repeat the same in future. More than 150 faculties flowed in and coagulated at Bharatpur and enjoyed the treat of listening to eminent academics and humble hospitality. The University chose the best venue at Bharatpur near the International Bird Sanctuary.

The initiation by the undersigned and culmination by Justice Veerendr Singh Siradhana, Judge, High Court of Rajasthan; Prof. Poonam Saxena, V.C. National Law University, Jodhpur; Shri R.D. Rastogi, Additional Solicitor General of India (Rajasthan); Prof. M.P. Singh, an international legendary name in legal education; Prof. D.N. Jauhar, ex Vice Chancellor, Agra, wherein to the best advantage of University all promised continued co-operation to MSB Global Law Institute; all displayed their commitment to develop legal education, to create a legal temper in the society and contribute to the cherished object of achieving economic development by mobilizing legal fraternity.]

Speech* of Justice Veerendr Singh Siradhana**

Respected Ashwani Bansal ji, Vice Chancellor of the University, former and present Vice Chancellors of University's, other dignitaries on the Dias, present professors, when I received a call from Mr. Rastogi and reference made to Prof. Bansal, I immediately said yes, because coming to Bharatpur is just like a feeling of coming home.

When I was hearing my predecessor speakers, and when I was informed about this conference on Globalization and Convergence of International Laws, the first thing which struck to my mind is unless we stick at the core area, unless we address the core issues, our future - our progress cannot turn into reality, Education is the fundamental core issue. And education means quality education; we are so divergent about superficial issues nowadays that we forget and we totally ignore the core areas and core issues. We as citizen of this nation, we can ask anybody who talks about region, religion, caste, community that is none of their business; our business must be quality education, clean drinking water, clean air.

Do you realize that the richest person of this country can't afford clean air and clean water, yes because he is gifted with wealth he may turn into a polluted air into a clean air, a polluted water in pure water, but as such if he walks out into nature-- into a garden, he too can't afford clean air, clean water--that is where we stand and this is the core issue, we should realize.

I was reading an article somewhere, a year back. Now when we talk of globalization we are very much attracted towards the foreign concepts--no doubt the boundaries are erasing. Today we are a global citizen, and why we realize it today, I am reminded of APJ Abdul Kalam's observation. With regard to constitution of national education policy, a committee was constituted, and he said rightly so, that our education system wants and needs a total fundamental systematic and structural change, the type of education we have been receiving and we have been imparting to the generations to come, is the education of the times when in Europe it was industrialization and what they wanted was a clerical cadre of persons to serve the needs to the industries. Today when we are talking,

* Edited to ensure unbroken narrative.

** Justice Veerendr Singh Siradhana, Judge, High Court of Rajasthan (Jaipur Bench).

we talk of science, engineering; today when we talk of medical science, everybody is so interested and that becomes the core area.

No doubt they are important, but then there are other core areas which are also important, even your cooking is as good as and as important as is your plumbing or carpentry. The educationist forces of this country are not finding jobs, when they are not finding jobs, they get frustrated, would you realize that a youth of this country is committing suicide in every hour--every hour a youth of this country is committing suicide only for a simple reason he could not get an admission in the desired course in the desired college. Why these core areas are not the subject matter of our discussion, concern, and an effort how to meet out these challenges, these are the core areas these are the core issues, which needs to be addressed nowadays.

As to the global convergence of laws I am reminded there is a Tamil poet, who said 3000 years ago, "*yaadmurey yavaramkillem*". *Yaadmurey* means I am a world citizen, *yavaramkillem* means all the dwellers all the persons on the world are my relatives my friends--this is 3000 years ago by Kanian, a poet of Tamil, now we still don't realize these concepts are not something which are coming from the western, these concepts are our concepts, provided we learn them, provided we strive a step, how to develop these areas, would you realize that young people who are participating in this conference 82 percent are in possession of a smart phone 4G and out of this 4G, if you read the report, 42 per cent goes to be used in the entertainment section. We have given the technology but we have not taught them how utilize this technology. Very old saying, very fundamental saying, since I used to learn from my elders at home not in Institutions. Fire is such a beautiful thing, you can cook your food but you can set your house ablaze too, so these are the ethics. Why don't we make our digital learning relevant?

As we have started, as presently our government has started *Swachch Bharat*--why can't we start a digital learning platform, there are so many lessons available on YouTube, digitally we can run the classes and learn the art, our children can learn the best education. The thing is what is required is pre and primary education--these areas are core areas, which are most ignored. The teachers somehow became the teachers and what they are producing now is half baked biscuits. The children of this country--they are neither educated nor uneducated--that is what sort of output we are getting.

So this international convergence of laws, if you want to really make a mark in these areas, what you have to address is the core quality education. I would expect from Mr. Bansal that whenever he is designing and approving these courses these courses must find place and they must be equivalent and good as the International standards. It would surprise you that in USA the total budget that is allocated for the education of a child per year is 76-75 dollars this is the amount USA is investing and allocating for a child's education. Can we imagine in this country,

are we then worthy in thinking of becoming *Vishwa Gurus*, I mean it's a thing we need to consider and we need to introspect ourselves--the lecturers, the persons who are entrusted towards their duties and authority to improve the education system. The entire problem in this country is the core area of education, once you get educated, you get conscious about your health, once you are conscious about your health you will be conscious what you want to be governed by, you should not think about who governs us, you should think how we are governed because we are governing ourselves.

The type of constitution we have adopted we are very touchy about our sacred animals; we are very touchy about our past, our queens/kings. I don't know why past was very glorious--we can be very proud of it but the future will be very very bleak, if we are not going to handle our present in a manner befitting to see and meet the challenges which are looking aghast into our eyes. We see the international borders, where we are. 70 years is not a small time lap, where we were and what we have achieved, I don't say that we have not achieved, we have achieved a lot, but then this is not justified in 70 years, two generations--at least 2 generations have passed.

If the foundation is weak, we can't raise a strong building, so pre and primary education is the fundamental core foundation which requires to be addressed. Higher education of course, no less, but then, if the child is informed in the pre and primary, it would be easy to accept whatever comes, whatever challenge comes.

We should be very proud of some of our individuals who have done well, marvelled in their areas, like Sunder Pichai, in Google, so many, but, do we realize that these are the personalities who did not do well here in our country. They acquired knowledge, they studied abroad and therefore they began therefore they are acquiring the positions where they are-- so those are the areas, it not to be just happy because they happen to be of Indian Origin, may be good, may comfort us. But then, do we provide the same infrastructure, the same atmosphere to our children, I think no. I am not trying to be critique but I am on self introspection and desire the decision makers if they keep in mind while implementing, it would give me solace and would be their contribution to society.

Another thing which tempted me to attend this seminar at the outset when I had the opportunity was to meet with the young minds, the participants in this conference, you should make a determination that when you have come here for two days you are participating in this seminar you just don't go empty hand, empty hand I mean, you take something, you go enriched you go as a informed individual. Learning is a continuous process and in my opinion a person may be of 20 years if he has declined to learn, if he has no zeal to learn, he is worst then a person of 80 years; and if an individual of 80 years is still zealous to learn being a

continuous process, I consider him as young as a 20 years youth. That is the concept of thinking I would wish you to follow.

Wherever I was, we discussed. My friend Mr. Rastogi on the dais would testify whenever we came across some problem when I was practicing, we discussed very freely, be it in service matters, be it from the criminal side, corporate side laws, whatever laws--we never hesitated in asking our problems to our seniors. Please do not hesitate and ask questions, ask questions to your elders, ask questions to your public representatives, don't accept anything as said. Be ready to apply scientific approach, even if you analyse our religious concepts they are based on fundamental science. Those fundamental science concepts are being adopted internationally and we don't know where *we* are.

Another article very recently published referring to a research conducted by some scientist of some western area, he said this diabetes, your deposit in arteries and autism in children is a cause of milk, the milk you use. He has written a book "Devil in the Milk", I think some of you must have come across. The devil in the milk means, the milk you have been using in the name of white revolution. We have switched choices, but now in 2007, after a research of a decade, the thing that has been proved is that Indian indigenous cows and buffalos-- their milk is a A2 milk which is good for your health, it would not cause diabetes, this cross breeds milks cow's milk which is known as A1 milk is a devil which cause diabetes type 1, it causes deposits in the arteries and in children it causes autism. So much so that a commonly known indigenous breed of Gujarat that has been developed by Brazil--do you know what is the lactation of this cow? It is 62 litres per day. None of the cross breeds is yielding so much per day. But you see they are researching; they are enjoying the fruits while we are just following everybody without going into the logics.

Logics remind me what kind of a logics our youth has now acquired. I was referring to the 82 per cent youth who are now in possession of 4G mobile phones. If you ask them where their state and district, its only 42%, 58% can't do it. This was a sampling survey which was carried out and a study published in The Times of India, with 28,323 students. This is the type of education which we have received, these are the types of youths we have produced, now if you put them to higher education what kind of individuals are we going to get, these are the things which we have to point out today, those are the things which require an address today.

Another study is reflected in one of the international organizations known as Programme for International Students Assessment (PISA). This is an international organization and an NGO which conducts a survey and assesses the students of the entire globe of age about 15 to 16 years out of survey of 74 nations. This country, my country, our country finds its place at Serial No. 73. These are the things, now when we talk about daily, if you start giving just opening setting up

of universities, colleges, of no quality education, then this is where we are today these are the international standards.

Now, think of these convergence laws, in this scenario where we are going where we are leading to, I know these signs are not very encouraging but then we can't close our eyes to these hard facts. We might have lived but our young generations, they are the one who have to face these challenges, as the boundaries erase as globalization increases, we would be pushed somewhere we can't imagine. It's not only the USA I talked of, because some may say that USA is a very advanced country, their economy is very solid, they can afford, we can't afford. Take the example of Zimbabwe, not very good economically or backward country, but there also the type of education system which they have adopted is on the basis of how to strengthen, how to allow a person achieve things.

There are so many advocates from this district who often appear in my court, the type of preparation they have, I don't say, you see language is not a problem, but then, in reality, you hate English. English speaking are enjoying it and will continue to enjoy for the simple reason that your all legislations are in English. You will find their translation in Hindi but then how many of us would understand that Hindi. We should be proud of our mother tongue, no doubt, but then we should not berate and abandon the language which is now an international language.

We talk of globalization, now we talk of convergence of international laws, if we stick to our only language Hindi, what will happen, are we going to justify, can we ask our student, no you don't bother about English, you continue with Hindi. These are the areas these are the hard practical realities of lives, one should realize them, one should address them, *I would ask and I would emphasis the institutions, the students, the departments to maximize your conversation in English.* Whenever you want to converse in Hindi, do so, no problem but then you should be equally good with this language as well. *Your entire judgements, your all thesis, your all papers of Mr. Bansal are in English.*

So these are my experiences so far, if my one presence today can ignite some of the youths to do and proceed, into this direction, I would think my presence had been successful here. You have invited me, the grace the honour your have given, thanks a lot, thank you very much.

[The speech was complimented as spoken from heart and from a person concerned for the wellbeing of Bharatpur.]

Speech of Professor M.P. Singh*

First and Foremost I congratulate Prof Ashwani Bansal the VC for the fact that within a short time of around one year, he has changed the character of the university from an affiliating university and has made it a teaching university. This is really a great achievement and therefore he is entitled and deserves to be congratulated by all of us and I was told he started that in 4 months. Now Prof. Bansal is seeking to open 5 yrs integrated LLB and am confident he will achieve or deliver that also.

The main issue today is of the legal education which would be given by this university to begin with. That actually has been a great issue for discussion. From time to time we have tried to make legal education as good as possible from point of view of working in government but also for life as well as in international affairs. There is actually a law that concerns every aspect of our life, within family, our relationship with neighbours or every transaction we enter, hire a rickshaw or buy food or travel, the law regulates and for that reason legal education is important for all people.

Unfortunately, legal education could not acquire important place in our society for number of reasons. One reason was that in Britain itself, from where we acquired the present system of legal education was given priority in the bars and the people without even having any university degree could actually become barristers and they could practice in courts. Depending on their practice in the courts as barristers they could become senior counsels and acquire great importance as well as could become law lords. The same process evolved in India though it was not formally adopted here. The fact is that the universities did not give that prominence to legal education which should have been given. They left the legal education to colleges instead of making it department of university. The few universities which in made the legal education part of the university, they gave it a step motherly treatment. It was thought that it has unnecessarily been added to the university. I am confident Ashwani being a law wizard would be able to fill the gaps, if he comes across a few.

Few universities had made some exception to this and they actually gave good legal education. One of them was Lucknow University and a bit later the Delhi University. The reason perhaps for Delhi University could be, that it started with

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a lawyer Shri Hari Singh Gaur and thereafter it got patronage of Sir Maurice Gwyer who was the Chief Justice of India. A number of teachers of DU had been the Vice Chancellors of various universities just as Prof. Ashwani Bansal is here of this University.

Even the present Vice Chancellor of Delhi University is a law person. I am glad that selection which had not taken place for 10 years at Delhi University have now selected 126 faculties in one go in Jan 2018. The above, Punjab and BHU are only exceptions that have given special importance to legal education. As a result of that around 6 to 7 judges of Supreme Court are at the moment from Delhi University. Most of them were either students of Prof. Bansal or my own students. We are proud that our own students produce such good quality of lawyers which are now decorating Supreme Court and implement our laws in a professional manner.

We found that perhaps 5 years legal education would be a better education in some way¹. But doubts have also been raised separately. This legal education has not been adopted by the state or the central govt. and has been created by an institution which primarily is in the private domain. It is Private in the sense that the students have to pay hefty fee for going to these so called National Law Universities and as a result of that the common man has been deprived of the opportunity of learning law.² For example I can say about myself, if I had to pay that much fee as is now paid for getting admission in National Law Universities, perhaps I would have never done law, that would have been the impossible. At that time when I studied law, legal education was supported like any other education by the state and as a result of that we could easily have the legal education irrespective of our financial condition.

Now this is the issue which has to be considered by this country that as a matter of policy whether we should have made legal education a private affair or we should have shun it and do not allow it as business rather than being education. This is an important issue and opinions may differ. I may not go into deep into it but the fact remains that some of these traits in the society we have adopted from the rich countries, which are based on what is called as the capitalist economy and not the liberal economy. Countries which have liberal economy even now they provide education free for all up to any level. In Europe for example one can study from beginning until Ph.D. or any higher degree at the expense of the state. Everybody should have equal right to have the same kind of education without paying anything.

¹ In any case it saves one year of students.

² Here I am told Prof Bansal insists that he intends to make a people's version of National Law Schools by charging 1/3rd of fee, thus it is not free, but can be afforded by Middle class or by anyone who gives importance to education.

This country however has changed the situation and has adopted the example of US particularly where the education is primarily the best education is private education which is not very good example but it is said by the state that private people are enthusiastic about providing good education and therefore let them have say in education matter. We have yet to establish this fact that private education is better education as compared to state education. I think that no or as far as I know no private universities have established a mark over and above the state universities like IIT which the state has been supporting. There is no guarantee that the private education would be better education. I hope so far as Bharatpur University is concerned it will care for it that it should not be purely available for those who can pay for it. But it should also be available to any one who is interested and who is competent enough to be admitted in the university on the basis of his competence. It is in this regard that I was surprised that recently this Kasturi Nandan Committee has collected information from the law teachers as to what kind of legal education? What kind of recommendation to legal education must be made to the commission? By and large our recommendation has been two kind of education: legal education which is education which is for general purpose and legal professional purpose. I am yet to find out any of this kind of classification is made so far as legal education is concerned. In modern times legal education we may say even from the earlier times also but certainly so far as modern times are concerned legal education is relevant in all aspects of politics and policies of country.

Therefore, we need lawyers who are competent to advice government on every issue --national as well as international. And for that purpose so far as legal education is concerned, it should be having the foremost priority in the educational system of the country and this is the practice followed in western world. That in spite of the fact that Americans might be having private education and better education in private education the fact remains their education does not make a difference between what is for law courts and what is for the general consumption of society and as a matter of fact you will find that most of the legal advisers of the president of USA are lawyers. The reason is that they are not deciding cases there they are not arguing case there but they are actually making national policy for the country

So lawyers are also needed for the purpose of whether there is globalised process or any other process and therefore this country most seriously think on what kind of legal education has to provide to best amongst us not on the basis of those who can pay more but on the basis of who can learn it better and who can make better utilization of education. These are some of the issues which actually have to be taken into account when we are designing our legal education. Unfortunately, universities have not given that much of importance to legal education as given to other disciplines of education. In other words the other branches of education

for some or other reasons the legal education in our country has not made that much of impact as it should have made. Legal education actually should have acquired its place of prestige and that could be acquired when the university's performance matches not only with national matters but also with what is happening internationally.

Our law performers i.e. law students are capable of suggesting what kinds educational sources and political policies are relevant for the purpose of progress nationally and internationally. This is really a big task but this is also fact that the countries who are doing better and those who are laying down international policies for the world are those nations which actually provide good legal education. I hope this university while settling legal curriculum and education will take care of these points.

Thank You.

Speech of Shri R.D. Rastogi*

I have been given fifteen minutes which is a short time for a lawyer as they take fifteen years to build a case. When I was invited I came to know that a legal luminary Prof. Bansal is the VC of Brij University and when I talked to him, it was not merely a pleasure but an honour conferred upon me. Although I had known about him as a legal luminary from DU but it was my first opportunity to hear his voice on phone. Though I was at Jodhpur yesterday due to my professional commitments as I am in charge of Rajasthan state, I had made up my mind to come here so I returned to Jaipur yesterday night as it was a direction not a request from my Gurus and I am a disciple, how can I ignore their direction and here I am. Moreover I also have some personal relations in Bharatpur. This was another factor in bringing me here.

First I would like to raise language issue. The issue is being debated. We are from north India. When I go to south then people even though they know Hindi, ask me to speak in English. Of course I am not criticizing English, it is a good language and I can think, speak and write in English, no problem, but I would like to say that as far as language issue is concerned there is no relation between language and knowledge. Knowledge is not dependent upon language. I have chosen to speak in English today only to make a point otherwise people would say that even though he is an ASG still he doesn't know English, but I have to say that I derive a sense of pride when I speak in Hindi.

This I am saying in presence of Justice Veerendr, who is an expert in English language. He knows that I argue equally well in both English as well as Hindi. Hindi is my own language and my client doesn't know English. He is oblivious to how well I am arguing or presenting my points. I am not here to impress anybody else. I have to get justice for my client and I cannot inspire confidence in him till the time he cannot comprehend what his lawyer is arguing before the judge.

I was debater during my college days in Agra University so language is not a matter of controversy. Language is that-what is understood. I would like to quote an example here, my great grandfather Late Radha Kishan Rastogi was a well-known legal luminary in the state of Rajasthan and had thrice been advocate general. He used to argue cases in Hindi. I asked him, "why do you argue in

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Hindi” to which he replied that, “I argue neither in Hindi nor in English. I choose and use the language that the judge understands. ”See his vision. I am not commenting much on that issue but this is relevant to Bharatpur. I originally belong to Dhaulpur. Bharatpur is my mother district. There are so many people here who know so much, we are just learners. They fear the barrier of communicating in English. This should not be there. This will take some time.

Knowing English is not a bad thing. Even I did not know English earlier as I did my schooling from Dhaulpur. First Sainik school then *paathshaalas*. But when I determined to learn it, I did it.

I would like to say this to my young colleagues here that don't make language an issue. It is not a barrier to learning or expression of opinions. Irrespective of the language you use, if your point clicks you will be heard.

I applaud the Rajasthan State Government for their excellent initiative in opening a university at Bharatpur and we are fortunate to have such a worthy VC to helm it. I believe that under his supervision this university will rise to great heights. VC sir you said that you are going to be here for the next 1.5- 2 years. I think you are mistaken and no will let a talented person like you leave Bharatpur and I have faith that you will continuously keep working for the upliftment of this university.

Now coming to legal education. You have already started LL.M and are planning to start LL.B five years course. We are lucky that Prof. Poonam Saxena is sharing the dais with us here today. I am glad that my sources have informed me that we have started state reservations in NLU Jodhpur. This was lacking earlier and I had been trying for State reservations here on the lines of state reservations in NLU Bhopal and Raipur. I have come to know, subject to correction that now we have got reservation. I can now heave a sigh of relief.

Holding conferences is very important. It is important for exchange of ideas, especially in legal field. If I say that I know everything then I am befooling myself. Let me quote another example here. Once I asked my grandfather the Late Radha Kishan Rastogi that how long will you continue to practice law, you are already 75 years old to which he replied that he will continue till he doesn't become perfect. There is no perfection.

Now as ASG I get so many cases on a wide range of issues. My horizon has broadened. Money laundering, ED etc. All these were not known to me earlier. All of my juniors are from NLU's. I seek their help in research and updation. I don't hesitate in learning from them. This is the spirit that I have. Even Hon'ble judges many times say that we don't know this point clearly so shed some light on it. Even they don't have any inhibitions. Its an ocean and no one can claim to know everything. Learning law is a continuous and unending process.

The topic of this conference-Legal Education. Why the need for convergence? This is an eternal debate. Before the advent of globalization in ancient India there were several invasions, then came trade and commerce, then education. Recently I had an opportunity to visit Nalanda and I saw the room where Hiuen Tsang stayed. He was also here for exchange of ideas. Then come political set ups and diplomacy.

We are a global village. Although we are physically present in India, technology has made it possible for us to do businesses and transactions virtually in any part of the world. This is globalization and there is divergence in so many laws. There should be harmony between all international laws. Of course it is a debate but convergence is to bring all the laws together.

I have seen the program schedule of all the technical sessions and I am very happy that such a conference is being organized at Bharatpur. I have a personal connection with this place. I am indebted to Prof. Bansal and other faculty members for developing this city.

Speech of Professor Poonam Saxena*

I would like to add something to what my predecessors have said. One of the things that we have all noticed is that legal profession has become a very coveted option now. At the time when we did law, there were three kinds of people who did law

1. Who came from a family of lawyers and judges - for them it was a preferred option.
2. Those who were genuinely interested in law but had no legal background
3. Students who were not able to get into any other course, so law was the option always available to them and they did law.

Eventually what they made of their profession is a different story. What has happened in the last 15-20 years, the recent past to engineering and MBA is now happening to the legal profession. So we have state universities offering law courses, central universities offering law courses, lots and lots of private universities and sometimes what we call two room universities offering legal education. But what has changed it all- the change had come right from the time people had started taking legal education seriously. People were getting good placements, they were finding good opportunities in every sphere-whether it was litigation, bar and bench or civil services etc. So when legal education got the respect it deserved long back, people started opting for legal education also. Now we have children of two doctors opting not for medicine but for law, children of two engineers not going for engineering but for law school and that is a very positive sign.

I would like to compliment Prof. Ashwani Bansal for starting five years law course at Bharatpur University, for giving opportunity to natives and other people from nearby areas a chance to go for this kind of a coveted option.

Second point I would like to make is regarding the importance of English language for legal profession. If you are a good lawyer or if you are a good teacher, the first thing that is expected from you is to be update on legal knowledge. So if there is a latest judgment of Supreme Court that has been delivered yesterday, you are expected to be able to discuss it today and not wait for its translation to reach you. So whenever there is an important judgment or point, you are expected to discuss it with your colleagues and students so that you can always be updated.

* Professor Poonam Saxena, Vice Chancellor, National Law University, Jodhpur

There can never be a kind of stagnation. What was law ten years ago may not be a law today. What was a particular judgment may be overruled anytime. So you have to continuously update yourself and one of the means of updating is definitely knowing the language in which the updation comes. Whenever we talk about Hindi being our National language, there is a sense of pride in it absolutely. But, those who really want to have legal education in Hindi language - my advice to them is - do it and do it sincerely. There is a dearth of literature in the local language, so you do it in Hindi and come up with good literature in Hindi so that others can also be benefitted from you; otherwise there is no harm in learning another language just like you learn another subject.

The third point I would like to make is that while we are into imparting legal education, we must take note of the fact that there are teachers required to impart legal education and what are we doing as an institution to prepare good teachers? We have prepared good lawyers, we have prepared good judges but we have hardly produced good teachers. A good teacher is essential for imparting quality legal education and a student learns a lot from a good teacher,

So, I again compliment Prof. Ashwani Bansal for starting LL.M. course and hope that he will pursue it very sincerely and see to it that one particular aspect of legal education that we have been ignoring till now is to prepare quality teachers is also taken care of.

Thank you very much.

[Organiser Prof Ashwani Bansal acknowledges the contribution of and effort of Justice Siradhana, Rastogiji and Poonam ji who travelled so long while she was taken ill but not only to keep the promise but also to cater to her commitment to spread of legal education. I would also put on record the allegiance and commitment shown by faculties at Delhi University, they saw to it that the first batch of LL.M. passes out successfully and some of them are coming to share the joy of their students receiving the degrees as also Gold Medals.]

Essay on Contemporary Concerns in International Convergence of Laws

*Prof. Amar Pal Singh**

Introduction

When we talk about international convergence of laws, three frames of laws come into mind immediately. The first frame is that of Public International law, which derives its material from a variety of sources, but principally from compacts arrived at amongst sovereign nations, which is typically talked about in International Law as "*pactasunderservanda*". Apart from this Article 38 of the Charter of International Court of Justice talks about a certain hierarchy according to which the rules of Public International Law gets operationalized. The second frame of International law that, one can talk about is that of Trade Law, the dynamic of which evolves depending on a variety of factors including the balance of power and several geopolitical factors that affect the international scenario at a given point of time.

The third frame of laws where convergence becomes relevant is principally the domain of what we in India call the domain of personal laws, like, marriage, divorce, succession and adoption etc. This is what is known as the domain of Private International Law or more popularly called 'Conflict of Laws'. During recent two decades or so there has been a general trend in international arena towards the unification of these laws, so as to avoid conflicts in day to day management of increasing immigration and transfer of populations across countries and continents. There are obvious pressures in the International negotiations and even otherwise at domestic fronts as well, as a result of which the political system is put under pressure to change this or that law.

Centralized Political Orders and their Underlying Themes

In Afro-Asian systems in general and India in particular who have seen the days of colonial order and who have inherited the legal system of the colonizing power, have evolved a tradition of a highly centralized political order wherein the legal rules and reports of case law are taken as the universe; where law is treated as distinct, unified and internally coherent and where it is believed that law owes its existence to the state

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system, politically superior sovereign, continues to rule the roost. The understanding is that sovereign power the ultimate legal authority in a political system can legislate on any matter and can exercise control over any behaviour. Underlying this view is the assumption that social processes are susceptible to conscious human control and the instrument by means of which this control is to be achieved is law. The law in the broad sense of the whole legal system with its institutions, rules, procedures, remedies, is society's attempt through state to control human behaviour and prevent anarchy, violence, oppression, and injustice by providing and enforcing orderly, rational, fair and workable alternative to the indiscriminate use of force by individuals or groups in advancing or protecting their interests and resolving their controversies. This logic puts legal institutions and the state at the core of all social discipline. An active Hobbesian war of every man against every man turning life into solitary, brutish, nasty and short, is hinted at darkly as the violent alternative. This legal formalism, that apparently has not been able to accommodate the indigenous and traditional ways of legal orderings, has created the contradictions that most Asian systems seem to reel under. Also known as legal instrumentalism, inherited from western colonial masters, believes that the sovereign power, the ultimate, legal authority in a polity can legislate on any matter and can exercise control over any behaviour within the state.

Indeed in a highly centralised political system, with advanced technology and communication apparatus, it is taken for granted that legal innovation can affect social change. Roscoe Pound perceived the law as a tool for social engineering. Underlying this view is the assumption that social processes are susceptible to conscious human control and the instrument by means of which this control is to be achieved is law. In such a formulation, the law is a short term measure for a very complex aggregation of principles, norms ideas, rules, practices and agencies of legislation, administration, adjudication and enforcement, backed by political power and legitimacy. The complex law thus condensed into one term is abstracted from the social context in which it exists and is spoken of as if it were an entity capable of controlling that context. Pospisil remarks that "the law of western society traditionally is analysed as an autonomous logically consistent legal system in which various rules are derived from more abstract norms." These norms are arranged in a sort of pyramid derived from a basic norm or sovereign will such an analysis presents a legal system as a logically consistent whole, devoid of internal contradictions whose individual norms gain validity from their logical relationship to the more abstract legal principles implied ultimately in the sovereign's will and in a basic norm.

Pluralist Legal Order: The Traditional Wisdom

The legal systems of most Afro-Asian Systems, including India, have, however, been characterized by a very decentralized type of governance which is

technically known as a Pluralist Legal Order. Pluralist Legal Order or legal pluralism is a situation where two or more legal systems co-exist in the same social field, interacting, inter-penetrating, mixed or overlapping and sometimes even superimposed upon one another. As such legal pluralism is constituted by an intersection of different legal orders working simultaneously in a given social order. Asian systems in general and Indian system in particular present a unique civilizational pattern of legal pluralism within its traditional ways of legal ordering, which is complex, but is capable of accommodating diverse normative systems and is flexible enough to accommodate emerging realities. The multicultural setting of Indian civilization presents a unique model of legal plurality capable of accommodating diverse normative orderings. And what is so special about this legal pluralism in Indian system is that while in the western context the plurality of normative orders has been presented to be marginal or even pathological at one time, in India the diversity of normative ordering has always been openly embraced and plurality celebrated.

The idea of 'Legal Pluralism', sees no reason why the law should be associated with a state system or be considered as co-terminus to it. Ordinary experience indicates that law and legal institutions with their whole panoply of courts and law enforcement agencies can only affect a degree of intentional control of society, greater at some time less at others. That limited degree of control and predictability is daily inflated in the folk models of lawyers and politicians all over the world. The social reality is a peculiar mix with rules and other actions that is choice making, discretionary, manipulative, sometimes inconsistent sometimes conflictual. Much legislation today either does not achieve what it purports or sets out to do or when it does achieve specified goals, it also spins of many side effects that were not anticipated. Conventional failures or unexpected side effects tend to attribute particular instances to inadequate information or bad judgment or political deception. That is as it may be in particular cases. But it is possible that there are also deeper causes of transformation that operate pervasively even under the best conditions of information, expertise and relative political honesty.

That legal pluralism stems from sociological pluralism goes almost without saying and no society for that purpose is completely homogenous. Even segmentary societies in a sense are divided. J. Griffith hits the nail on the head by saying that individual social fields are not uniformly governed by a single system of law. Several kinds of laws are normally found to be in operation. Legal pluralism as such consists of the multiplicity of forms of law present within any social field. It might appear rather curious as to how under these conditions are unitary legal myth took root in societies, with most divisions. Norbert Rouland believes that precisely because the state needs to extend its influence over deeply heterogeneous societies, the state needs to deny the existence of these divisions and perpetuate the myth of unity. This is an imperative which does not exist to

the same extent in traditional societies, which are also plural and where political authority is less differentiated than in modern societies and has less sweeping political ambitions. Sally Falk Moore, talks about the semi-autonomous social field instead of subgroups. A semi-autonomous social field is defined and its limits identified not by its type of organization but a character of a processual type, residing in the fact that it gives birth to norms and by constraints or incentives ensures their application. Space within which a certain number of corporate groups are in relation one to another constitutes a semi-autonomous social field. A large number of fields of this type may be connected one to another in such a way that they form complex chains, in the same way as the network of social relations which link individual, may be compared to chains which have no ends. The interdependent connection of a large number of semi-autonomous social fields constitutes one of the fundamental characteristics of complex societies.

Indian system typically a pluralist paradigm, has inherited a common law system from its erstwhile rulers, which works as a gloss over the local ways of legal ordering. India a veritable microcosm of the world has always been a queer mixture of various faiths, religions, a place where the cultures of the world meet, constituting an environment of composite culture. It was for this reason that Pandit Jawaharlal Nehru called India the "the museum of world religions". Indeed, the very paradigmatic setting of India has been pluralist all along. Even today the land mass called India, spread over 3.28 million square km of area inhabited by a billion and quarter plus population, with every imaginable kind of a weather pattern from minus 40 degree Celsius in greater Himalayan region to 50 degree Celsius temperature in the deserts of Rajasthan and temperate weather of coastal regions, 20 official languages written in 16 different scripts, around 2000 dialects, 16 well demarcated agro-climatic zones and almost all religions of the world well and adequately represented, presents a mind-boggling variety and plurality. And all this has a bearing on India's liberal, secular, republican, politico-legal system. Within this variety, the legal ordering of the Hindu social setting itself presents a veritable mixture of faiths, beliefs, customs and traditions.

According to Shri Aurobindo, "Indian Culture, did not deface nor impoverish the richness of the grand game of human life, it never depressed or mutilated the activities of our nature. On the contrary, subject to the certain principle of harmony and government, it allowed them their full often their extreme value. The man was allowed to fathom on his way all experiences to give to his character and action a large rein and heroic proportions to fill in life opulently with colour and beauty and enjoyment." Indeed Indian spirit revealed in variety and plurality.

The Onset of British Colonial Order

However, with the onset of British colonial order, the face of Indian Pluralist order got distorted and the flexibility, diversity and pluralism that has always been the

hallmark of India's legal ordering started getting dried up. The British conquest with legal and judicial reforms accompanying it for the purpose of securing a better administration of justice so as to enable the colonial masters to collect more and more revenue from the already parched lands of Indian peasantry brought the concept of legalism in its tag. In 1772 when Warren Hastings laid the foundation for civil courts of Diwani in Bengal and Bihar and Orissa, it appeared to be a rather inoffensive move. However, for the Indian legal system particularly for the Hindu legal ordering, it introduced a paradigm shift in as much as the concept of authority came to be substituted by the concept of legality in the longer run. The "floating text" of law now came to be mortified in the rule of "stare decisis". Now the judgment was to be delivered by an English judge, though following the opinion of a Pandit, in default of detailed knowledge of his own, this judgment was to become the source of law for future cases. Whilst in the classical system the judgment had no other object or effect but to put an end to a dispute brought before the judge, the judgment in the classical Hindu system left the authority of the law intact always available thereafter for new interpretations, but now the English judge was called upon to define law and fix interpretations once for all.

The judgment which in the classical system was basically one of the ways in which the law could be understood, now in the hands of an English judge became a sole and valid expression of law. "The commentaries and digests which were nothing more than diverse forms and interpretations of the perceptual or scriptural law came to be referred as the records of customary law and once the judicial interpretation was put on it in the form of a gloss, the art of commentaries and digests started being dried up, for now the law was to be found in the rule of stare decisis and the perceptual law or scriptural law, the authority so far, ceased to exert any influence on this new legal rule. This way the reform intended to ameliorate the judicial administration ended in subverting the traditional pluralism. This way the new English judge who was intended to be the interpreter of scriptural laws turned out to be the creator of laws for future generations. Thus the dynamic plurality of flexible diversities turned into sterile legality, thwarted and suppressed the fecundity of an open-ended system capable of accommodating every conceivable faith or belief system.

Indian Independence: A New beginning

Around the mid -20th century, when India finally threw out the shackles of thralldom of centuries, the challenges facing the country were enormous. For a legal professional, it was a maze of imponderables, a mix of customary law, case law, and some assorted enactments. The social system was equally confused, beset with intractable social evils like caste system, unsociability, discrimination against women, child marriages and dowry system etc. The partition of the

country and a senseless violence in its wake had left deep scars on the social psyche and deep suspicions amongst the people banking on divisions were so evident. Thus the challenges for those who were at the helm of affairs were enormous.

Modern law, which has come to be recognized as a technical instrument of rational governance, freed from its traditional roots in culture and communal values and moral contents was the option. It served a modern urge to remake the world grounded in the discovery of that world's contingent and changeable character. This law appeared morally and intellectually autonomous both in the sense of its distinctiveness as a governmental tool and its superiority over and independence from other competing normative systems. It also seemed comprehensive as it could be used to cover all contingencies and provide man-made solutions to all problems of order; unified and systematic as a body of doctrines linked by its formal rational qualities; a structure of human reason, subduing chaos and contingency and principled as a consistent expression of essential conditions of human life.

But this does not mean that the new system ordained under the newly drafted Constitution wrote off the plurality of India's classical ordering. The flexibility and plurality of India's classical legal ordering which despite the onslaughts of every kind from foreign conquest to imposition of new legal ordering, continue to retain the elements of primordial flexibility and interestingly Indian Constitution has kept that space, rather have created new spaces in variety of new and emerging areas of socio-political life of the community called India the complexity and variety of which continues to be mindboggling for scholars of India's socio-economic and politico-legal system. While it may not be possible to exhaustively detail a variety of provisions of Indian Constitution, a few reflections would certainly help in appreciating the efforts of founding fathers of Indian Constitution to preserve the plurality of India's socio-legal and politico-economic ordering. The founding fathers of India's new destiny went on framing a constitution, which was to be the embodiment of all that is rational and modern. Justice, liberty, equality were given the pride of place as the basic organizing principles of the new constitution, caste system and untouchability which were considered the main stumbling blocks in the achievement of social solidarity were now intended to be done away with. Preamble of the Constitution provided the blueprint of the ideals, "We the People of India, having solemnly resolved to constitute India into a sovereign, socialist, secular, democratic, republic and to provide to all justice, social, economic and political, equality of status and opportunity, liberty of thought, expression, faith, belief and worship... Enact and give to ourselves this Constitution." Article 14 of the constitution, guaranteed equality, "The state shall not deny to any person, the equality before the law, or equal protection of laws within the territories of India. This article provides two

different types of rights, first, equality before law irrespective of ones caste, creed, race, religion, sex, place of birth etc and second equal protection of laws, meaning thereby that if there are inequalities existing in the socio-legal system, the law, shall take care of them and shall try to change circumstances by way of protective discrimination in such a way that everybody is treated equally and has the guarantee of a right to equality of respect and concern in the design of political institutions.

Abolition of untouchability, freedom of speech and expression, freedom of peaceable assembly, of forming associations and moving throughout the territories of India of settling down in any part of the country, practicing any profession or to carry on any occupation trade of business, freedom of right to life and liberty, a right against exploitation, of freedom of conscience, to freely profess, practice and propagate religion of once choice, to establish and administer institutions of religious and charitable purposes, protection of interests of minorities which included the right of minorities to establish and administer educational institutions and last but not the least the right to constitutional remedies were some of the major highlights of rights secured to Indian citizens and thus embodying everything that was representative of modern ideologies.

A very interesting element of these rights is that some of the provision that we find in part-III of Indian Constitution, are representative of what is popularly known in Human Rights Law as the third generation of human rights, i.e. the rights that one gets by virtue of being member of a group or denomination, thus rights under article 26, 29 and 30 of Indian Constitution are the rights that distinctly are intended to preserve, protect and promote the plurality of India's rich tapestry of socio-political and politico-legal life. Article 372 of Indian Constitution provided that all laws at the time of coming into force this constitution would continue to be there until altered or modified and article 13 of Indian Constitution defined law to include customs and traditions. And the interpretation of these provisions in the case of *Narsu Appa Mali vs the State of Bombay*, the constitutional courts tried to preserve the pluralist traditions of Indian system even at the cost of some Orthodox practices. Interestingly enough though this decision was not much quoted or discussed in formal legal institutions, this opinion continued to be the code of conduct for constitutional courts in India so as to keep lot of customs and traditions in variety of personal laws of Indian citizens as being out of the reach of fundamental rights and thus preserving the plurality of the new legal order even if some in-occurs provisions continued to remain valid in the post-independence phase.

Tribal Systems: Nurturing the Pluralism

An interesting device that Indian Constitution used was the inclusion of V and VI Schedules which provided for alternate or special governance mechanisms for certain 'scheduled areas' in the mainland and certain 'tribal areas' in north-eastern

India. Normative legislative-executive and judicial authority for States and Union Territories in India are provided for in Parts 11-12 and Chapter 5 of Part 6 respectively. The Fifth Schedule applies to an overwhelming majority of India's tribes in nine States, while the Sixth Schedule covers areas that are settled in the north-eastern States bordering China and Myanmar. The basic thrust of the Fifth and Sixth Schedule of the constitution is the protection of cultural distinctiveness of Tribal. It also provides protection to the tribals on account of their economic disadvantages so that they could maintain their tribal identity without any coercion or exploitation. The interests of Schedule Tribes outside the Northeast are protected by Fifth Schedule. The fifth schedule designates "Schedule areas" in large parts of India in which the interests of the "Scheduled Tribes" are to be protected. This was a very unique attempt to protect and promote plurality and diversity of India's distinctive legal ordering. 73rd and 74th Constitutional Amendment which has found its way into the Constitution after nearly four decades of Indian Constitution, has opened new ways of experimentation in local ways of governance and thus preserving a very diverse and plural democratic system of India.

Obviously, the examples of India's plural character that Indian Constitution seeks to protect, preserve and promote are not adequate, to say the least. However, one thing that can safely be concluded is that Indian democratic experiment with its diverse and a complex set of demographic structures, has been a unique experiment and with all its limitations can show the way for a conflict-ridden world in resolving its dilemmas. Asian systems in particular which partake a lot of similarities can always look for an inspiring example from India's democratic experiment. The question that stares at our face after this analysis of India's plural character of its socio-legal and politico-economic system is as to what implications it would have for the legal studies and analysis of Afro-Asian systems. The following few conclusions that I seek to articulate out of the above analysis should guide us in the academic endeavours that might identify some common characters, common to Afro Asian systems and guide us to find new ways of looking and analyzing legal realities of the day to day world.

Concluding Observations

The pluralist tradition of India's classical legal ordering has been a complex body of legal learning, linked indirectly and unevenly to governmental practices and to self-regulating activities of villages, guilds, castes and other groupings. "Hindu legal learning contemplated broad delegation of regulatory functions to these groups." In modern times there appears to be an increasing faith in the instrumentality of law for effecting desired changes in the socio-political sphere. The pathology of the social sphere is being sought to be addressed and remedied by the instrumentality of a legal mechanism.

A better understanding and appreciation of the patterns of traditional socio-legal set up would move the focus away from the ideology of legal centralism, suggesting attention to other forms of ordering and their interaction with state law. It might highlight the competing, contesting and sometimes contradictory orders outside state law and their mutually constitutive relations to state law. Most of the Afro-Asian systems, including India have that kind of a paradigm and pluralist approaches of legal learning can make us understand the underlying realities of these Systems enabling a realization of our own plural traditions, better recognition of these traditions and incorporating the same in our own emerging ways of governance models. This kind of an understanding can lead us to understand and appreciate emerging legal realities of melting pot international scene, accommodating the emerging diversities and pluralities in better ways and paving the way for a long-lasting peaceful and prosperous world order.

The Muddled Notions on Wrongful Death and Abortion— a Conceptual Analysis

*Dr. Sunanda Bharti**

Introduction

As soon as one hears the expression abortion, medical termination of pregnancy and miscarriage, there arise confusion in the mind as to their differences and similarities. The same uncertainty strikes in case of wrongful death and abortion. In addition to explaining the difference between the above two concepts, the paper brings out the dichotomy between concept that life begins at conception (and that personhood should be granted to the foetus immediately upon conception) on one hand and giving right and personality only after birth or with condition of live birth on the other.

Ever since the Madison County probate judge Frank Barger, allegedly 'recognised' the legal rights of an aborted foetus¹, the debate around legal personality of unborn has re-captured the attention of the world, including India. There are three plus two issues to this problem as discussed below:

- 1) issues of bodily autonomy and integrity of the woman
- 2) difference between wrongful death 'WD' (a tort) and abortion² (criminal, if illegal)
- 3) the jurisprudence involving wrongful death (WD) claims
- 4) the overrated case of *Roe versus Wade*
- 5) the obvious issue of whether foetus/unborn is a legal person.

The case of *Roe versus Wade* and the issue of 'foetus/unborn is a legal person' have not evoked interest leading to a jurisprudential vacuum and intellectual non-application. The legal fraternity is not paying the deserved attention to the *Alabama case*. I believe it is misunderstood by many. Firstly the last two issues and then Madison County. Authors stand shall be reflected in each part.

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¹ <https://www.al.com/news/2019/03/madison-coprobate-judge-lets-man-be-representative-for-aborted-fetus.html> (accessed on April 23, 2019).

² The distinction between illegal and legal abortion not debated.

I. Legal Personality of Foetus/Unborn

The concept of legal personality has been puzzling and uncertain since inception. The Harvard Law Review in 2001 gave this diagnosis concluding that 'the law of the persons is fraught with deep ambiguity and significant tension; that the definitional problem of the person was likely to become more acute with 'technological and economic progress; and further that the subject was so 'grossly under-theorised that it merited more attention.³ Legal personality for human beings begins at birth and extinguishes at death, with the consequence that pre-birth and post-death situations do not result in legal persons.⁴ The intellectual lethargy has been responsible for not addressing grey areas around this general rule.

On one end of the spectrum (of this general rule) is the foetus⁵, the unborn which is denied personality as such but anomalously granted the same, on the condition of live birth, in cases of transfer of property or creation of trust in the name of the unborn.⁶ For instance, in India, Section 20 of the Hindu Succession Act, 1956 recognises the rights of a child in the womb by providing that it retains the right to inherit the property of the intestate as if it was alive (already born) at the time of death of the intestate. Sections 13 and 20 of the Transfer of Property Act 1882 deal with situations in which on a transfer of property, an interest therein is created for the benefit of a person, not in existence. As per Section 20, where on a transfer of property an interest therein is created for an unborn person, he acquires on his birth, a vested interest.

Debate Surrounding Personhood of Unborn

An unborn is generally not taken to be a legal person. This denial is due to jurisprudential ambiguity because pro-personality persons did not assert and left it as a jurisprudential controversy which would not be there if the law could permit conferral of personality. The moral notions could easily credit the unborn

³ 'What we talk about when we talk about Persons: The Language of a Legal Fiction' (April 2001) 114(6) (notes) Harvard Law Review 1746, 1768.

⁴ Salmond said, 'so far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties. Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, and an idol.' Sir John William Salmond, Patrick John Fitzgerald, *Salmond on Jurisprudence* (Sweet & Maxwell 1966) 299.

⁵ For a detailed elaboration on the legal status of the foetus see J Seymour, *Childbirth and the Law* (Oxford: Oxford University Press, 2000).

⁶ See, Transfer of Property Act 1882, s 13 that provides for the transfer of property for benefit of an unborn person. Typically, the parties to a transfer of property must be living persons (including juristic persons), but Section 13 is an exception to the general rule of transfer providing a way through which property can be transferred to a child in the mother's womb.

with personality without any doubt, but the legal scenario could not be unambiguous.

Over the years, the law has taken cues from both the moral and medical paradigms but has managed to fashion its own unique conception of the legal meaning of personhood for the unborn.

The foetus has a potential claim to personhood but is a subject of controversy because of the age old legal tradition of considering 'birth' as the criterion of possessing legal capacities. Demand for legal protection to the child in the womb is vociferous. The inception of personhood for the foetus is not the only point of debate. The debate strengthens and becomes contentious when the pregnant woman's (PWs) right to control her body--a part of her rights as a person is asserted.

Contingency of Birth

Indian, English and American laws have recognised the right of an unborn to inherit property, but its accrual is made contingent on live birth. If the foetus does not take its place amongst the living, the limited personality attributed to it disappears *ab initio*. In short, if the child perishes in the womb, the inheritance will revert to someone else.

One of the most famous (read popularised) right of the foetus involves the right not to be wrongfully injured before birth, which has been recognised in tort law of India, UK and the USA. In the present legal situation, if the child is born alive, it is permitted to maintain an action for the consequences of pre-natal injury, and if he dies of such injuries after birth--an action will lie for his wrongful death. It is submitted that the law of pre-natal torts, is full of anomalies for the foetus. They may be categorised as—

- A. A situation where the unborn are injured *en ventre sa mere* (while in the mother's womb), is born nonetheless, and then brings a suit for his injuries through a guardian. Presently the UK and every jurisdiction in the US allow recovery on these facts.
- B. A situation where the child is born, but subsequently dies from the effects of the pre-natal injury. *This is the classic WD situation.*
- C. A situation where the child is stillborn as a result of defendant's tortuous act, that is, the death occurs before birth. It is this third scenario that poses problems, although now many jurisdictions allow recovery.

Based on technological advances, it is submitted that the Born Alive Rule (BA Rule) must be brought to an end and full scale rights be enacted for unborn from conception. The 'rights of the unborn' cannot be projected as 'rights' if they are to be ultimately conditioned on birth.

This is because the unborn does not have any power to sue until after birth. Presently, since there is no technological handicap cause of action should be allowed to be accrued in the foetus, whenever an injury is caused to it. This gels well with the basic tenet of Tort law on the cause of action which states that only the aggrieved has the *locus standi* to initiate/maintain a suit against the tortfeasor.

There is nothing sacrosanct about the Born Alive Rule and calls upon the civil society to advocate and accept change of understanding, in line with the argument of Carl Wellman "[T]here is no logical or legal impossibility in abandoning the rule." The law could if legislatures or courts so choose to confer unconditional rights upon the unborn child... To be sure, this would require giving the foetus the legal power to institute legal proceedings before birth. Similarly, the law could enable parents or other guardians to take legal action in the name of the unborn child.⁷

Courts must Break the Shackles

Apart from the fear that the legal system might not be able to cope with the consequences of disturbing an age old tradition, the reasons why the courts have refused to recognise any right of the foetus while *in utero* are –

- (1) that it would enable the parent or some other guardian to take legal action before the child is born and even when it perishes before birth. Any such suit would require an unequivocal evidentiary proof that the act of the defendant was the proximate cause of the injury to the foetus; and
- (2) it would also require an assessment, by the court, of damages that are commensurate with the injury suffered by the foetus.

In earlier times when technology provided limited support, both these matters became manageable only after childbirth. The present medical technology enables one to determine almost with precision, the time of the injury, the reason behind the same and also the possibility of correction through *in utero* therapy or surgery.⁸ It is submitted that it is no longer impossible to compensate the foetus while *in utero* and the principles should be accepted, how so many riders might be necessary, can be acceptable. There is no ground to refuse recognition of personality to foetus.

Facilitation of Pregnant Woman v. Unborn

The second reason why foetus has not been accorded with personhood is that the aspect of the duty of care may give rise to wrongful life claims against the host Pregnant Woman, which is viewed as a serious moral and legal conflict.

⁷ Carl Wellman, 'The Concept of Foetal Rights' (Jan 2002) 21(1) Law and Philosophy 67-68.

⁸ The latter may be helpful in determining damages.

Its time that foetal rights be given significant and real meaning and the Pregnant Woman should owe a duty of care to her unborn child. If a Pregnant Woman ingests toxic substances such as heroin other narcotics (as an example), it should be viewed as a violation of the foetal right to a wholesome life and a breach of duty on her part. It is high time that the decision makers and courts should recognise, and overwhelmingly so, the tort of maternal malpractice, analogous to the existing tort of medical malpractice, irrespective of difficulties in implementation.

For instance, if in a given case, despite the due care being displayed by the attending doctor in transmitting the necessary warnings, the PW makes a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born, that conscious choice should be taken as sufficient to exonerate the doctor and inculcate the PW for the WL of the child so born. It is the PW (both parents in case of a joint decision to retain the pregnancy) who is responsible for the pain, suffering and misery wrought upon the child; hence it is only logical for the law to inculcate her/them for the tortuous act. Such imposition of liabilities is not an easy task in governance nor in jurisprudence and its conflict with *laissez faire may boomerang*.

II. The Legendary Case of Roe

In the American case of *Roe v. Wade*⁹ on foetal personhood one Jane Roe, unmarried and pregnant, wanted an abortion. Because her life was not threatened by continuing pregnancy, she could not get an abortion legally in her home state of Texas. Moreover, she could not afford to travel to another jurisdiction for a legal abortion.¹⁰ She, therefore, sued on behalf of herself and all

⁹ 410 US 113 (1973).

¹⁰ Till this point, the case was similar to the one that arose recently in December 2012 in Ireland when an Indian woman was refused abortion allegedly because of Catholic sentiments. Insofar as the law goes, at independence from the UK in 1922, the Offences against the Person Act 1861 remained in force in Ireland, maintaining all abortions to be illegal and subject to punishment. In 1983 the Constitution of Ireland was amended to add that the unborn had an explicit right to life from the time of conception.

In 1992, a controversy arose whether the denial of abortion in Ireland should be absolute and whether abortion should not be made available if the PW goes suicidal in an attempt to terminate a rape-induced pregnancy. The case which became famous as *Attorney General v. X* [(1992) 1 IR 1], paved a way for abortion being constitutionally available in the Republic of Ireland where a woman's life, as distinct from her health, was at risk from the continued pregnancy.

However, ever since, no legislation was introduced to give doctors a legal certainty as to when an abortion could be carried out. In the background of these facts, Savita Halappanavar, a PW of Indian origin, suffering from a miscarriage at 17 weeks gestation sought an abortion. The hospital told her that though the foetus was not viable, they could

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similarly situated women contending that she had a constitutionally guaranteed right of privacy that included the right to terminate her pregnancy. In defence of its statutes, Texas contended that it could protect foetal life constitutionally from the time of conception and that Roe, therefore, had no right to an abortion. In a decision that should be decried a three-judge district court panel held that the Texas criminal abortion statutes were void.

The Problem with Roe: In *Roe v. Wade*, the Supreme Court of the US denied any personality to the foetus stating that if the foetus was designated as a person with a corresponding right to life, abortion would necessarily be first-degree murder and illegal. Paradoxically, the Court also found that the state had a legitimate interest in protecting the 'potential' life of the unborn and that this interest grew as the woman approached full term. ***Then the notion of 'viability' was introduced which was to complicate things in the years to come.*** Briefly put, viability marks that stage of foetal gestation whereupon the unborn acquires the capacity to live independently (sometimes with artificial medical support) outside the mother's womb. The court decided that once the 'compelling' point of viability was reached, the state's interest in protecting potential life could even override the woman's right of bodily integrity.

All this depicts a morally burdened jury which was compelled to accept limited personality in favour of the unborn after it had reached viability, for, after all, a third trimester foetus is extremely similar to a newborn in terms of its physical attributes. The author insists and maintains that it is not possible that the foetus is a nonperson at the beginning of its time in the womb and 'person' post-viability.

The author further submits that no miraculous change is brought about by viability so as to compel the state to offer it protection and make the PW lose her right of bodily integrity. The American Supreme Court's decision in *Roe* did not resolve the issue because it did not completely decide the status of the foetus.

The author further submits that states interest in potential human life should be extant throughout pregnancy. Potential life is no less potential in the first weeks of pregnancy than it is at viability or afterwards.

Coming back to *Roe*, it is needless to mention that the decision outraged those who supported the concept that life begins at conception and who felt that personhood should be granted to the foetus immediately upon conception. The

not perform an abortion under Irish Law as the foetus's heart was still beating. The legislative vacuum and consequential delay took the woman's life.

Fortunately, one development that later took place in the matter was that Irish government was compelled to introduce the 'Protection of Life during Pregnancy Bill 2013 which was signed into law on 30th July 2013 by Michael D. Higgins, the President of Ireland.

decision was equally offensive to those who argued in favour of the woman's rights over her body. Hence, by giving to the world a twisted verdict that foetus was not a person, but a 'potential life' in which the state developed a legitimate interest once viability was reached, the Court, in *Roe v. Wade* succumbed to moral sentiments and set a precedent that remains a pitfall for advocates of foetal personality even today.¹¹

The only point perhaps that the case did manage to resolve is that unborn was not recognised in the law as 'person' in the whole sense but just because foetuses were not 'persons in the whole sense' did not mean that their existence could be ended through abortion. In *Roe*, the US Supreme Court needed to come to a decision as to when the state could intervene in the PW's decision to abort in order to protect the foetus. The Court chose viability and since then, viability has come to be recognised as a critical stage in gestation.¹²

Before Roe versus Wade; and why Roe is Overrated

Bodily Integrity, Freedom of Sex and Right to Abort

It is necessary to emphasise that *Roe* was more a case concerning abortion rights, than personhood for the unborn. And it was definitely not a case involving wrongful death (WD). Infact, cases prior to *Roe* were indicative of a healthier debate focusing on personhood. In 1973 however, the debate got monopolised around abortion.

It is notable that cases concerning the status of the foetus from the late 1800s to the 1960s did not concern abortion. Instead, they dealt with rich and relevant issues, such as third party injury and wrongful death of the foetus, medical malpractice suits where the foetus was injured or died, the PW's negligence, and the right to claim monetary benefits as a dependent. These early cases initiated discussions of legal foetal personhood.

Since we are on the impact of *Roe*, it must be mentioned that though traditionally Common Law has been parsimonious in awarding rights to the unborn, there *were* courts which were radical enough to grudgingly or wholeheartedly bestow

¹¹ In the 1989 case of *Webster v. Reproductive Health Services* (492 US 490), marking a significant change from *Roe v. Wade*, the Court found that (i) a compelling state interest began at conception rather than viability; (ii) that a pre-viable foetus was also a potential human life, no less than a viable foetus. The author maintains that though the case was different from *Roe*, it did not explicitly grant foetal personhood. In what can be appreciated as a play of words, *Webster* maintained that the foetus, at all stages of development, was a 'potential human life' and not a person. Nonetheless, it was a step ahead of *Roe*.

¹² See generally Jed Rubenfeld, 'On the Legal Status of the Proposition that 'Life Begins at Conception'' (1991) 43 *Stanford Law Review* 607.

such awards as early as the year 1933.¹³ In the 1940s, cases concerning foetal personhood like the 1946 case of *Bonbrest v. Kotz*¹⁴ recognised foetal personality for pre-natal injuries. By 1949, the American case of *Verkennes v. Corniea*¹⁵ tried to create a further dent by being recognised as a wrongful death case, despite the foetus being stillborn. Prior to this, in cases of injury to the foetus, the courts allowed compensation only when the child was subsequently born alive. Most wrongful death laws also required a 'person' who had died upon being born alive in the first place.¹⁶ The status of the foetus in this respect was amusing—because it was yet to be born, it could not die!

As for the cases falling under Criminal Law, the thumb rule was that punishment for pre-natal injuries resulting in the death of the unborn was possible if the injuries were inflicted post-viability (initially quickening) and there was live birth.

Twin Test is Retrograde

After *Roe*, however, the courts doggedly started insisting on viability *plus* born alive as the *necessary and indispensable* equation for recognising any pre-natal compensable injury or WD claim. The criterion of 'viability' which essentially was invented as a benchmark for allowing or disallowing abortion by the US-SC in *Roe*, bled into other foetal issues. Here lies the reason for blaming *Roe*. For instance, in 1976, in *The People v. Smith*¹⁷, the California Court of Appeals denied a wrongful death charge because the foetus was only thirteen weeks of gestation.¹⁸ The Court of Appeal held that a non-viable foetus under 24 weeks did not qualify for a murder charge even though the California legislature had amended the criminal statutes in the 1970s after *Keeler v. Superior Court of Amador County*¹⁹, to include foetuses.

There was no logical need to club 'viability' with wrongful death claims, but it was done nonetheless. **The Court in *Roe* might not have meant to treat abortion and WD/injury cases in the same vein, but the later judgements somehow clubbed the two categories.** One can only imagine the force of the

¹³ See, *Montreal Tramways v. Leville* [1933] 4 DLR 337 (Can Sup Ct).

¹⁴ 65 F Supp 138 (1946).

¹⁵ 229 Minn 365, 38 NW 2d 838 (1949).

¹⁶ That is, death was to be necessarily preceded by live birth. Stillborn foetus' were not of any legal consequence, even for WD statutes.

¹⁷ 59 Cal App 3d 751.

¹⁸ In this brutal case of spousal abuse, the husband said that he did not want the foetus to live and then kicked his pregnant wife in the stomach and back while repeating 'bleed, baby, bleed'.

¹⁹ *Keeler v. Superior Court* 2 Cal 3d 619.

precedent set by *Roe* citing which, the court found that until the capacity for independent life was attained, there was only a *potential* human life.²⁰

Roe focused on viable fetuses and post birth period; being born alive being a mandatory requirement for claiming rights. This historical reliance on birth and viability, as the point at which legal protection vested in the developing human, has perhaps been the greatest hindrance in the foetus acquiring no personhood till date.

Pre-Viability Unprotected Status of the Unborn

The general global lethargy of courts being evasive in decisions and the legislature being slow in coming up with a law governing foetal abuse and crimes (without the limitations of viability or live birth) has led to a complete isolation of the foetus *in utero*—it is left in a vacuum in which it exists as something undefined—waiting to be viable or to be ultimately born when it will, miraculously, become something, if it is fortunate enough to reach these stages.

Unborn *in-utero* entities are thus in a uniquely unprotected position. While most other living beings, from rabid animals to serial murderers, traitors are protected from unreasonable or arbitrary death; because unborn children do not have lives recognizable in a court of law, they are not granted protection till they achieve a certain developmental stage.

III. Rise of Wrongful Death (WD) Cases

The era of denial of liability for any pre-natal injury was, in a way, less of a burden on intellectual, legal and judicial intelligentsia because there was no need to distinguish between cases where pre-natal injury resulted in death of the foetus from the cases where it simply caused an injury to it—*remedy was denied to both uniformly*.

Survived Foetuses versus Dead—Rational behind Denial of Relief for WD: In case of foetuses injured pre-natally who survived birth, denying relief comprised the hardship of requiring the newborn to go through life, as it was so aptly put, bearing the seal of another's fault.²¹ There was no such moral complication in a wrongful death situation.²² Moreover, the infant was not a 'breadwinner' which made it all the more easy for the courts to deny relief.

²⁰ See, 59 Cal App 3d 757.

²¹ See, *Montreal Tramways v. Leveille* [1933] 4 DLR 337, 344.

²² 'The policy considerations which call for a right of action when a child survives do not necessarily apply in the absence of survivorship': *West v. McCoy* 233 SC 369, 375 (1958) (emphasis added).

Reasons for Finally Allowing Cause of Action in WD cases: According to Robertson,

[O]nce the courts recognised the foetus as a living entity with a separate biological existence, it was clearly tempting to carry the proposition to its logical extreme-to endow this living being with all the attributes of personhood and to extend to it all the legal protections that attach to that concept. Thus, when the death of that separate biological existence occurred through the wrongful act of another, logic dictated that such a wrong required a remedy.²³

In addition to this, the following reasons may be culled out for the evident shift in stance by courts:

- (1) It was considered as incongruous to allow a cause of action to a live infant for pre-natal injuries but to deny it to one whose injury was so severe that it died from it. The requirement of live birth was also removed from WD claims because it indirectly permitted the tortfeasor to inflict the greatest injury to avoid liability.²⁴
- (2) Wrongful death is mostly governed by statutes and is punitive in nature, and it was felt that there was just as much reason to punish a wrongdoer where the unborn infant died before birth as where it survived to live birth.
- (3) Not to allow recovery, it was felt, would amount to permitting a wrong for which there was no remedy.
- (4) Since the foetus was recognised as a life separate from its mother, it was felt that certain elements of damage could only be compensated in an action by the unborn.²⁵

²³ Horace B Robertson Jr, 'Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Pre-natal Injuries, Preconception Injuries and Wrongful Life' (Jan 1979) 1978(6) Duke Law Journal 1427.

²⁴ As stated by the Supreme Court of Wisconsin: 'Denying a right of action for negligence [sic] acts which produce a stillbirth leads to some very incongruous results. For example, a doctor or a midwife whose negligent acts in delivering a baby produced the baby's death would be legally immune from a lawsuit. However, if they badly injured the child they would be exposed to liability. Such a legal rule would produce the absurd result that an unborn child who was badly injured by the tortious acts of another, but who was born alive, could recover while an unborn, who was more severely injured and died as the result of the tortious acts of another, could recover nothing': *Kwaterski v. State Farm Mutual Automobile Insurance Co* 34 Wis 2d 14, 20, 148 NW 2d 107, 110 (1967).

²⁵ In WD cases, on several occasions, there arose a question whether the mother had suffered a personal injury on account of the death of the foetus. And in order to avoid liability, it was argued that since the mother was distinct from the foetus, she was not capable of claiming compensation for any personal injury-as none happened. The author maintains that convenience of law played a role in denying rightful compensation, meaning that when it

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With the recognition of liability, however, live birth resurfaced as an incident of utmost importance for WD cases. In many jurisdictions till date, a prenatal injury that results in stillbirth is not considered as a case fit for WD claim.²⁶

At this juncture, it would be interesting to emphasize again the following instances that present a Wrongful Death claim:

1. The situation, where the unborn are injured *en ventre sa mere*, is born-remains alive and then brings suit for his injuries through a guardian. Presently the UK and every jurisdiction in the US allow recovery on these facts.²⁷
2. A situation where the child is born but subsequently dies from the effects of the pre-natal injury. This is the classic WD situation.
3. A situation where the child is stillborn as a result of defendant's tortuous act, that is, the death occurs before birth. This third situation is that non-classic, atypical WD scenario that posed problems, although many jurisdictions allowed recovery.²⁸

As would be clear, the Alabama case is not covered by 2 or 3 above. It is a case more akin to the abortion case of *Roe* where the teenage minor mother decided to terminate the unwanted pregnancy.

IV. Difference between the Civil Wrong of WD and Criminal Act of 'Miscarriage'/Abortion

Abortion is a generic expression used in popular parlance in relation to loss of pregnancy in the early stages. The expression chosen by medical sciences is a miscarriage. Often they are used synonymously.

Abortion or miscarriage is very different from WD. The latter is remedial in nature, the purpose of which is to vindicate the life destroyed and also to compensate the survivors for their loss. Procuring or inducing miscarriage unlawfully, is a criminal offence. Contrary to this, a WD is a civil wrong, a Tort. The remedy of a WD claim is available where an unborn child is killed as a result

was demanded on account of foetal death by the mother as a personal injury, the foetus was declared to be a separate entity and when compensation was demanded for pre-natal injuries by the newborn, it was declared to be an inseparable part of the mother!

²⁶ For a successful claim, traditionally speaking, the foetus should take birth and then die later as a result of prenatal injuries.

²⁷ Irrespective of whether the injury occurred before or after viability, so long as the child's condition can be traced to the concerned injury.

²⁸ For instance, the State of Michigan does allow recovery as in the case of *O' Neill v. Morse* stated above.

of another party's negligence, malpractice, unsafe product and so on. WD may occur in two ways: (1) the foetus dies because the mother is killed (this may, in fact, give rise to both a crime and a tort, if the killing of mother is intentional), or (2) the mother survives/is unharmed but the foetus sustains injuries which lead to its death either *in-utero* or post birth.

In these situations, ideally, there arises a distinct claim for the wrongful death of the foetus (which can be maintained by the kith and kin of the deceased foetus who would have benefitted from his life) which is separate from any claim involving injuries to or the death of the mother.²⁹ The courts have avoided any encouragement of these claims primarily because of two reasons: foetus not being a legal person (in jurisdictions such as India); and because there is no way to deal with the flood of cases which would be sure to follow.³⁰

The argument for maintaining WD Action in India

In India, though the Law of Tort is not that strong, there have been cases in the recent past that would come under the head of WD. The substance of all those cases hints that the foetus is regarded as a person in India per the unwritten Law of Torts and can claim compensation as a separate individual if other fundamentals of tort law, for instance, causation, can be established (though it has not been enunciated in so many words). Also, the viability of the foetus seems to be an essential requirement for recovery, if cases are to be taken as indicative of any trend. Viability, barring a few cases, it seems, remains a *sine-qua-non* for both WD and simple pre-natal injury cases.

Need for WD Legislation

There is not only dearth of any wrongful death laws but also an absence of any legislative will to fill the vacuum. It is suggested that India should have a specific 'Unborn Wrongful Death Act' to permit wrongful death claims for the death of an unborn child *at any stage of development or gestation and even for in-utero wrongful deaths*.³¹ This would place India not only at par with the most advanced countries of the world but also introduce a change in one of the basic tenets of Tort law--survival of causes of action post the victim's death. The tortfeasor (wrongdoer) would not be able to escape liability merely because he inflicted injuries so severe that they resulted in the death of his victim *in utero*. It would

²⁹ This scenario has been termed as ideal because it goes in favour of recognising the unborn as a separate legal person.

³⁰ Innumerable pregnancies end in a miscarriage which is indicative of potential tort claims.

³¹ This would effectively do away with viability and also the requirement of live birth for WD claims.

also mark as a watershed development for it would mean acknowledgement of the foetus as a legal person.

While in India, we have had 8-9 cases that may touch upon the issue of WD tangentially; in the USA, we do have a plethora of cases. There is however no uniformity amongst states on the treatment of WD claims. In 1949, Minnesota became the first state to permit a civil cause of action for the death of an unborn child. As of 2013, 40 states recognised such a claim. Of these, 27 states allowed a wrongful death suit only if the child was viable at the time of his or her death while the remaining 13 states allow suits for a pre-viable child. Conversely, 10 states still require a live birth, barring a cause of action for the death of the unborn child, unless the child is born alive and dies thereafter.³²

In the Alabama case 2019, the pregnant teenager sought an abortion and she chose a certain reproductive health centre as a medium to achieve that. The health centre gave her an abortion pill which ended her 6-week pregnancy. There was no third-party injury to the foetus, as traditionally understood in WD cases. This being the story, the father of the unborn foetus suing the women's reproductive health centre and the manufacturer of the pill, on behalf of the unborn alleging WD does not make sense as per available WD jurisprudence. Hence, it has been incorrectly dubbed as a WD case. It is not a tort law matter. Moreover, if Alabama law allows the teenage girl to terminate her pregnancy in the concerned gestational period, then the act is not a crime as well. It is simply a lawful induced abortion of an unwanted foetus.

V. Issues of Bodily Autonomy and Integrity of Woman

Having elaborated upon the foetal status, a related and important aspect that should have been a focus of the Alabama Controversy is that of a pregnant woman (PW)--foetal conflict, especially in the face of abortion being available (either freely or on demand or in a regulated fashion). Historically, a foetus has not been recognised as a legal entity separate from the PW. The laws and judgements, both, have maintained woman's right to health and life as a clear priority outweighing the state's interest in potential life. However, there has been a reversal in a trend whereby the issue of separate personality for the unborn has raised its head. This development has created serious conflicts not only regarding health care decision making, if the needs of the foetus and PW diverge, but also in regard to rights of mother versus the foetus: the foremost being right to life of the foetus in the light of abortions being legal.

³² See 'Unborn Wrongful Death Act Model Legislation & Policy Guide 2012, Americans United for Life <www.aul.org> accessed April 08, 2019.

Co-existence of Abortion and Foetal Rights?

One obvious difficulty that surfaces, if one argues in favour of recognising full legal personality to the unborn, is that since both the mother and the foetus are persons, both have almost the same set of fundamental rights, particularly the right to life. If both have the right to life, where does abortion fit? Pregnancy can be terminated medically only if the requirements of the Medical Termination of Pregnancy Act, 1971 are fulfilled. It is an established fact that India is a pro-life and not a pro-choice country per legal policy, so abortion is not a right, as in the US and the UK.³³

Indian law, however, provides for specific situations where the foetus/pregnancy can be terminated provided certain conditions are met and not as a response to the right of self-determination or right of bodily integrity. One of the reasons behind such severe regulation of abortion in the country is the obsessive *Shastric* slavery of preference for the male child and the consequent malaise of female foeticide or sex-selective abortions performed illegally. It is prudent and wise to continue with such regulation and not slavishly ape the west in terms of abortion rights if India is to fight and tackle the menace.³⁴ If abortion on demand is made available in India, as a right, it would pave a way towards the damaging trend of forcible but completely legal abortions of female foetuses. This is not to state that everything is alright with the present provisions of MTPA, 1971.

Mental/Emotional Detachment of Pregnant Woman from Foetus should merit Abortion: One ground that clearly needs to be added to the ones already mentioned in the MTPA, 1971 under which pregnancy could be medically terminated, should be the extreme detachment of the mother from the unborn with the result that she does not want to carry on with the pregnancy. This of-course is case sensitive and slippery, and hence whether a matter falls within its purview would demand thorough investigation and assessment of crucial facts. The author strongly submits that this activity should be undertaken because the taking of 'life' is involved.

It is appropriate to advocate for foetal rights and personhood from the time of conception on one hand and supporting abortion on the other in such cases

³³ Generally speaking, in the US and the UK, since one has a 'right' to abort, PW can do so, long as her own life is not at risk. In advanced stages of pregnancy, because of increased risk to the host and also because of attainment of viability by the foetus, abortion is not advised by Doctors. Thus regulation comes in only at the later stage and this is how their laws have also developed.

³⁴ It must be added however that once that stage of evolutionary development is reached where female foetuses are not discriminated against, we may have a law as progressive as the USA. (who would decide and how it would happen

because if the mother herself, being the host, is unwilling to carry on with the pregnancy, there is absolutely no reason why the State should thrust it upon her to carry it till full term (unless her own life/health is at stake). It is here that foetal right to life should be treated on a lower footing than the life of the expecting mother. If the child is unwanted, the emotional bond that is expected to exist between the foetus and the woman is absent. If foetus should have a right to life, it must be life with dignity, a meaningful, wholesome life which would not be possible if the mother herself has not been able to form any emotional bonding with the foetus/would-be child. Here it is suggested that all reasonable attempts must be made to provide therapy and consultation to the PW to persuade her to keep the baby.

Abortion, yet Foetal Personhood: Middle Path

Ethicist Rosalind Hursthouse who maintains that biological or psychological milestones are not critical factors in adjudicating the morality of abortion. She writes,

[T]o think of abortion as nothing but the killing of something that does not matter, or as nothing but the exercise of some right or rights one has, or as the incidental means to some desirable state of affairs, is to do something callous and light-minded, the sort of thing that no virtuous and wise person would do. It is to have the wrong attitude not only to foetuses but more generally to human life and death, parenthood and family relationships.³⁵

The author submits that a middle path can be achieved if one does not operate on extremes. Allowing abortion at the drop of a hat, even as a medium of birth control is one extreme; so is a total aversion to abortions.

Mothers Responsibility to Carry the Pregnancy Through

It is conceded that it is the mother who is at the receiving end of most of the pregnancy related stress. But that does not mean that one should abort as a matter of routine and social convenience. Women in India till date do not have full control over their bodies. They are subjected to rape, marital rape, incest, forced to conceive to beget a son and forced to abort to lose the female foetus. In addition to this, widespread illiteracy, ignorance and social taboos prevent them from seeking methods to control procreation. The factors are endless. Hence, in the Indian scenario, it would be unreasonable to place the responsibility of

³⁵ Rosalind Hursthouse, 'Virtue Theory and Abortion' (1991) 20 *Philosophy and Public Affairs* 237-238.

conception only on the PW. It is also because of this that one has to suggest more liberal grounds of abortion, as above (psychological detachment of the PW with the would be child), in addition to the current MTPA, 1971.

About responsibility of a PW towards the foetus, the author submits that the following can be maintained at the most: If a woman makes a conscious and voluntary decision of engaging in an act, the biological consequence of which is pregnancy, she should be deemed to have made a choice and must, therefore, take responsibility for it. If now she demands an abortion, it should not be viewed as her right of 'self determination' or choice; rather it amounts to her ruse to evade responsibility once she has chosen. Despite the myriad legal/ethical tangles that this perspective might generate, the core aspect that needs to be acknowledged-that the woman is responsible for the pregnancy and the life that it creates.

It needs to be mentioned that in rape situations, or minors pregnancy-where the actors involved cannot be expected to appreciate the consequences of the act etc, it cannot be maintained that the PW has assumed any responsibility, and so her right to demand an abortion originates.³⁶ This, of course, should be allowed within the folds of the existing law-the MTPA, 1971.

In countries like the US (and wherever abortion is available on demand), although a PW does not have an obligation to allow a foetus to remain in her body and thus has a right to abort a foetus, the author suggests that once that woman forgoes the option of abortion, she assumes obligations and duties to the foetus that should translate into limiting her freedom and autonomy. Legal scholar John Robertson, who specialises in bioethical issues, argues,

[T]he mother has, if she conceives and chooses not to abort, a legal and moral duty to bring the child into the world as healthy as is reasonably possible. She has a duty to avoid actions or omissions that will damage the foetus and child, just as she has a duty to protect the child's welfare once it is born until she transfers this duty to another. In terms of foetal rights, a foetus has no right to be conceived or, once conceived, to be carried to viability. But once the mother decides not to terminate the pregnancy, the viable foetus acquires rights to have the mother conduct her life in ways that will not injure it.³⁷

³⁶ Or in other words, foetus' claim to live becomes less strong. See generally JJ Thomson, 'A Defense of Abortion' (1971) 1 *Philosophy and Public Affairs* 47.

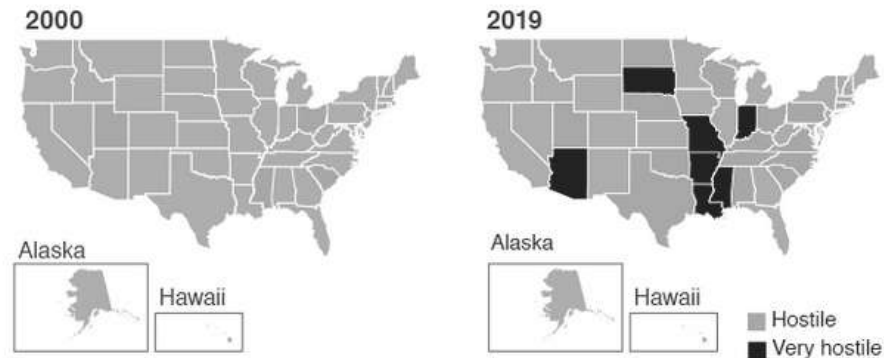
³⁷ John A Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth' (1983) 69(3) *Virginia Law Review* 438.

Conclusion: Explanation of the above stated 5 points was occasioned and necessitated by the *Alabama case*. The author concludes briefly by stating that WD claims and abortion issues are distinct situations involving foetal rights debate. The two should not be confused.

Post Script: Meanwhile, while this write-up was in print, a development ensued in re Alabama which has been briefly included upon the suggestion of the editors. The development makes Alabama the latest US state to pass a Bill in an attempt to completely restrict abortions. The Bill outlaws the procedure in almost all cases, including in cases of rape or incest.³⁸ As a reaction to this, a suit has been filed by the American Civil Liberties Union (ACLU) and Planned Parenthood Federation of America on behalf of Alabama abortion providers that argues that the ban runs directly counter to *Roe v. Wade* and claims that ACLU would make sure that abortion remains legal in all 50 states. It would be relevant to leave the reader with the following statistical image to get an overview of the change in the abortion stance in the USA amongst various states.

*The US States Tightening Laws on Abortions*³⁹

In 2019, 21 states are “hostile” or “very hostile” towards abortion rights



*Alaska and Hawaii not to scale

Source: Guttmacher Institute, as of 15 May 2019

BBC

³⁸ See, <https://www.bbc.com/news/world-us-canada-48275795> (accessed on June 9, 2019).

³⁹ <https://www.bbc.com/news/world-us-canada-48275795> (accessed on June 9, 2019).

Right to Information and Its Role in Contemporary Democracy

*Varun Chhachhar**

Introduction

Right to Information is hope for a democratic framework around the globe. Especially in India, Where the Right to Information Act, 2005 works as a tool for eradicating corruption from society. It is important to understand the development of the right to information law in India because it has given tooth to all whistle-blowers around the country and in fact around the globe. Right to Information is sunshine and a disinfectant for a corruption-ridden society. Hence for better implementation of Right to Information law, the role of the judiciary is commendable and worth appreciation. The author examined the development of the right to information law in India as a constitutional right with special reference to the judiciary.

The Constitution of India speaks in the flame of 'We the people of India'.¹ The two major institutions of governance, namely Parliament and the state legislatures have representatives of the people elected through free and fair elections.² Every adult of more than 18 years of age is entitled to vote,³ and no person is to be ineligible to vote on grounds of religion, race, caste or sex.⁴ These representative bodies, unless earlier dissolved, have a tenure of five years.⁵ If a legislature is dissolved prematurely, fresh elections are held. The legislatures and the governments are supposed to be responsible to the people.

Challenges to Archetypal Democracy

The inability to provide effective governance and semblance of justice to the poor and marginalized has its own consequences. Apart from the suffering that it imposes on the citizens of India, it has also fostered a violent response. From

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¹ The Constitution of India, 1950, Preamble.

² *Id.*, Articles 79, 80, 168, 170.

³ *Id.*, Article 326.

⁴ *Id.*, Article 325.

⁵ *Id.*, Articles 83 and 172.

the late 1960s, there has been a festering armed revolution in parts of India. Originally known as Naxalism, after the Naxalbari village of West Bengal from where it originated, a new and somewhat transformed version of the armed "revolution" is now more popularly known as Maoism. Recently a few years back, the Prime Minister declared Maoism the greatest threat to India's internal security⁶. The popularity of Maoism has ebbed and waned over the years. In the early 1990s, with the opening up of the economy, many believed that corruption and the poor delivery of services could now be tackled through the three pillars of the new economic order: privatization, liberalization, and globalization.

The dismantling of the "license raj"⁷ and the inclusion of the private sector into core economic activities were seen as the way to break the nexus between the corrupt bureaucrat and politician, and deliver essential services and economic growth to the citizens of India. However, nearly twenty years down the line, though the economy has grown, the stock exchange is doing well and India has all but weathered the global economic meltdown, the plight of the poor and the marginalized seems no better. All that seems to have changed is that whereas earlier Maoists were fighting against the mis-governance of the state, they now fight against the usurping of natural resources and land by corporations intent on building factories, mining natural resources, and displacing local populations.

Writer Arundhati Roy suggests that where the violence is often in opposition to the memorandum of understanding (MoU) being signed between governments and profit-seeking corporations, can more appropriately be called "Maoist corridors"⁸. Perhaps an alternative to the armed struggle that started around Naxalbari village of West Bengal in the late 1960s is the RTI movement that started around Devdhangari village, in Rajasthan, in the early 1990s. Reacting to similar types of oppression, corruption, and apathy, a group of local people, led

⁶ PM warns of failure to tackle Maoist 'menace'; Sep 15, 2009; Available on www.livemint.com/2009/09/15114802/PM-warns-of-failure-to-tackle.html, visited the site on 12.09.2012.

⁷ The dismantling of government control and regulation in favour of private enterprise.

⁸ "Ms. Roy also described her recent visit into areas controlled by groups portrayed in the mainstream media as "violent Maoist rebels" that need to be "wiped out." She argued that in exchange for giving such groups the right to vote, democracy "has snatched away from their right to livelihoods, to forest produce and to traditional ways of life."

She pointed out that the states of Chhattisgarh, Jharkhand, Orissa and West Bengal, had signed hundreds of Memoranda of Understanding worth billions of dollars with large trans-national companies and this inevitably led to moving tribal people from their lands. "We refer to such areas, not as the Maoist corridor but the MoU-ist corridor," she quipped." (The Hindu, 3 April 2010, reporting on conversations between Naom Chomsky and Arundhati Roy in New York; posted at <http://beta.thehindu.com/news/national/article387214.ece>.)

by the *Mazdoor Kisan Shakti Sangathan*⁹ (MKSS), decided to demand information. "Armed" with this information, they proposed to confront the government and its functionaries and demand justice.

From these modest beginnings grew the movement for the right to information, a movement that could promise an alternative to the gun. But is the RTI movement really an alternative to the armed struggles that threaten many parts of India? To answer this question, one has to look at the genesis and the outcome of both the armed struggles and the alternate, peaceful, movements in India. One common thread that seems to run through many struggles and movements is that they arise out of a sense of acute frustration among people who feel that their legitimate demands and grievances are being deliberately ignored by the government. On the other hand, movements like the RTI movement try and make the system face up to its own contradictions and try and force the state to respond to the demands of the people.

Right to Information Act, 2005-Genesis

The basic object of the Right to Information Act is to empower the citizens, promote transparency and accountability in the working of the Government contains corruption, and make our democracy work for the people in real sense. It goes without saying that an informed citizen is better equipped to keep necessary vigil on the instruments of governance and make the government more accountable to the governed. The Act is a big step towards making the citizens informed about the activities of the Government.

Salient features of India's RTI Act, 2005

Right to Information Act 2005 empowers every citizen to ask any questions from the Government or seek any information take copies of any government documents, inspect any government documents, inspect any Government works and take samples of materials of any Government work. Any citizen can seek information from any department of the central or state government, from Panchayati Raj institutions, and from any other organization or institution (including NGOs) that is established, constituted, owned, controlled or substantially financed, directly or indirectly, by the state or central government (Section 2(a) & (h)).

In each department, at least one officer has been designated as a Public Information Officer (PIOs). He/ She accepts the request forms and provides the information sought by the people (Section 5(1)). In addition to a Public Information Officer, in each sub-district/divisional level there are Assistant

⁹ Loosely translated, the alliance of the power of farmers and workers.

Public Information Officers (APIOs) who receive requests for information and appeals against decisions of the PIOs, and then send them to the appropriate authorities (Section 5(2)).

A person seeking information should file an application in writing or through electronic means in English or Hindi (or in the official language of the area) along with the application fees with the PIO/APIO (Section 6(1)). Where a request cannot be made in writing, the Public Information Officer is supposed to render all reasonable assistance to the person making the request orally to reduce the same in writing (Section 6(1)). Where the applicant is deaf, blind, or otherwise impaired, the public authority is supposed to provide assistance to enable access to the information, including providing such assistance as may be appropriate for the inspection (Section 7(4)). Besides the applicant's contact details, the applicant is not required to either give any reasons for requesting the information or any other personal details (Section 6(2)).

The Act provides for a reasonable application fee i.e. Rs 10/- as prescribed by the Central Government, whereas in other states the fee amount may vary. The fee will be charged for each application and supply of information. However, no fee is chargeable from persons below the poverty line (Section 7(5)), or if the information is provided after the prescribed period (section 7(6)). A fee will be charged for obtaining a copy of the documents. (The Central Government has prescribed fees of Rs.2/-for each page created and copied. In some states the charges are higher). If the Information is not provided within the stipulated time limit then the information will be provided for free (u/s 7(6)).

Whenever the Public Information Officer feels that the sought information does not pertain to his department then it shall be his responsibility to forward the application to the related/relevant department within 5 days and also inform the applicant about the same. In such an instance, the stipulated time limit for the provision of information would be 35 days (u/s 6(3)). In case PIO does not furnish information within the prescribed period or unreasonably troubles the applicant, then the applicant can file a complaint against him with the Information Commission. Where a Public Information Officer without any reasonable cause, fails to receive an application for information, or malafidely denies a request for information, or knowingly gives incorrect, incomplete or misleading information, or asks for high fees for furnishing the information; the applicant can file a direct complaint to the Central or the State Information Commission.

Decisions supporting RTI Act 2005

The Basel Convention, it cannot be doubted, effectuates the Fundamental Rights guaranteed under Art 21. The right to information and community participation for protection of the environment and human health is also a right which flows

from Article 21. The Apex court has held – "the Government authorities have, thus to motivate the public participation. These well-enshrined principles have been kept in view by us (Court) while examining and determining various aspects and facets of the problems in issue and the permissible remedies".¹⁰

If public access to the personal data containing details like photographs of public servants, personal particulars is requested the balancing exercise, necessarily dependent and evolving on a case by case basis, would take into account of many factors which would require examination having regard to each case¹¹. In a case where the question was whether, an applicant has any right to get information regarding correspondence/notings relating to appointment of Judges objected by P.M.O., the matter was referred to Chief Justice of India for being placed before appropriate bench¹².

A Division Bench of the High Court held that the evaluated answer-books of an examinee writing a public examination conducted by statutory bodies like CBSE or any University or Board of Secondary Education, being a 'document, manuscript record, and opinion' fell within the definition of "information" as defined in section 2(f) of the RTI Act. It held that the provisions of the RTI Act should be interpreted in a manner which would lead towards dissemination of information rather than withholding the same; and in view of the right to information, the examining bodies were bound to provide inspection of evaluated answer books to the examinees. Consequently, it directed CBSE to grant inspection of the answer books to the examinees who sought information.¹³ The High Court, however, rejected the prayer made by the examinees for a re-evaluation of the answer-books, as that was not a relief that was available under the RTI Act. RTI Act only provided a right to access information, but not for any consequential reliefs. The right to information is a cherished right. Information and right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability. The provisions of RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under clause (b) of section 4(1) of the Act which relates to securing transparency and accountability in the working of public authorities and in discouraging corruption. But in regard to other information, (that is information other than those enumerated in section 4(1)(b) and (c) of the Act), equal

¹⁰ *Research Foundation for Science and Technology and Natural Resource Policy v. UOI* JT 2007 (11) SC 49; 2007 (11) SCALE 75.

¹¹ *C.P.I.O., Supreme Court of India v. Subhash Chandra Agarwal* 111 (2009) CLT 481.

¹² *Central Public Information Officer, Supreme Court of India v. Subhash Chandra Aggarwal*, (2011) 1 SCC 496.

¹³ *Aditya Bandopadhyay v. Central Board of Secondary Education & Ors.* W.P. No. 18189 (W) of 2008.

importance and emphasis are given to other public interests (like confidentiality of sensitive information, fidelity and fiduciary relationships, efficient operation of governments, etc.). Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration or to destroy the peace, tranquillity, and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of public authorities prioritizing 'information furnishing', at the cost of their normal and regular duties. In view of the foregoing, the order of the High Court directing the examining bodies to permit examinees to have an inspection of their answer books is affirmed, subject to the clarifications regarding the scope of the RTI Act and the safeguards and conditions subject to which 'information' should be furnished.¹⁴

Loopholes and Flaws in the Act

As much as the Act has empowered the citizen and given them a "weapon" to keep the public officers in check, not everything about it is fool proof. The Act has flaws – some of them in its implementation, and some in its interpretations. One of the latest blows to the Act has come in the form of a Supreme Court Judgment, *Namita Sharma v. Union of India*,¹⁵ in this case, the constitutional validity of provisions dealing with the eligibility criteria for Information Commissioners at both the Central and State level was challenged. The Act provides that members of the State and Central Information Commission should be persons of eminence in public life with wide knowledge and experience in law, science, and technology, social service, management, journalism, mass media or administration and governance. It was the contention of the petitioner that the Information Commission performs duties of judicial and quasi-judicial nature; however, the qualifications prescribed for the same are vague, general and ultra vires the Constitution. The Supreme Court upheld the validity of the

¹⁴ 2011 STPL(Web) 685 SC, *Central Board of Secondary Education v. Aditya Bandopadhyaya*.

¹⁵ *Writ Petition Civil No. 210 of 2012*.

sections but ruled that the Information Commissions are "quasi-judicial authorities" or "tribunals" performing judicial functions and those they will have to work in a bench of two members, one judicial member, and the other a qualified person from a specific field. The judicial members will be appointed in consultation with the Chief Justice of India and Chief Justices of the High Courts of the respective States, as the case may be.

About the consequence of such a move, Shailesh Gandhi, former Central Information Commissioner, opined that "Effectively the disposal of pending cases will drop to about 50 per cent of the current disposals. This will lead to Commissions deciding cases after five years or more in the next few years."¹⁶ At present, a review petition against this judgment has been filed by the Union government and is pending before the Supreme Court. The Government of India's purported intention in 2006 to amend the RTI Act was postponed after public disquiet but has been revived again in 2009 by the DoPT.

Right to Information and File Noting

A file in public office is nobody's private affair. Any such file contains various documents including file noting, which indicate the process and steps involved in making a decision. File Notings are the life of file and source of decisions taken. They are that part of the file on which officer of different ranks writes their comments. File Notings are not individual officers opinion note, but a compilation of different opinions and analysis of all the positions and application of rules to the particular situation so that the final authority – like the Chief Secretary or Chief Minister or a Council of Ministers – takes an appropriate decision, in public interest. File noting, thus offer the reasons for the decision. Less than a year after the RTI Act came into force, there were rumours that the Government of India was intending to amend it, ostensibly to make it "more effective". Sympathisers within the government confirmed that a bill to amend the RTI Act had been approved by the Cabinet and was ready for introduction in Parliament in the coming session. A copy of the draft amendment bill also became available, though legally it would not be publicly accessible until it was presented in Parliament. A perusal of the draft bill revealed that the main thrust of the amendments was to effectively remove "file notings"¹⁷ from under the purview of the RTI Act. The Genesis of this demand of

¹⁶ Available on <http://barandbench.com/brief/2/2788/supreme-court-says-only-judges-to-be-appointed-as-cics-at-both-central-and-state-level-cic-to-see-clarifications-on-judgment-visited> on 10.03.2013.

¹⁷ File notings are the views, recommendations, and decisions recorded by civil servants/ministers in files and include the deliberative process which leads up to the final decision. In the Indian system, this deliberative process is usually recorded on sheets of (usually light green) paper with a margin. These sheets are attached to a file but are distinct

the government lay in the drafting of the RTI Act itself. When people's movements were drafting the RTI Act, they had under the definition of information specifically added: "including file notings". However, as it turned out, even without this phrase the definition of information in the act was wide and generic enough to unambiguously include file notings. As soon as the RTI Act became operative, the nodal department of the Government of India (Department of Personnel and Training) stated on its website that file notings need not be disclosed under the RTI Act. This was challenged by citizens, who appealed to the central, and various state information commissions. Despite government efforts, these various information commissions held that, as per the definition of information in the RTI Act, file notings could not, as a class of records, be excluded. This forced the government to try and amend the RTI Act itself. Unfortunately, the government tried to perpetuate the myth that, in amending the RTI Act, they were actually trying to strengthen rather than weaken the act. In a letter addressed to the noted RTI activist Anna Hazare, the Prime Minister states:

"File notings were never covered in the definition of 'information' in the RTI Act passed by Parliament. In fact, the amendments being currently proposed to expand the scope of the Act to specifically include file notings relating to development and social issues. The overall effort is to promote even greater transparency and accountability in our decision-making process".

Fortunately, the argument did not convince the public, especially as more than one information commission had held that the RTI Act, in its present form, did include file notings. People's organizations reacted strongly to this attempt to weaken the RTI Act and restrict its scope and coverage. They organized a nationwide campaign, including a *dharna* (sit-down protest) near the Parliament. Political parties were lobbied, the media was contacted, and influential groups and individuals were drawn into the struggle. A point by point answer to all the issues raised by the government, in favour of this and other proposed amendments, was prepared by RTI activists and publicly conveyed to the government, with the challenge that the government should publicly debate the issues.

The government beat a hasty retreat in front of this onslaught and the amendment bill, as approved by the cabinet, was never introduced in Parliament. One would have expected that by now the government would have

from the correspondence and other documents that comprise the remaining file. There are strict conventions about how notes are to be recorded – and even the colour of ink to be used – and usually the file and the consequent notes move up and down the hierarchy, starting from near bottom, moving up to the appropriate decision-making level, and then coming down for implementation of the decision and storage of the file.

learned to leave the RTI Act alone, but that was too much to hope for. A Press bureau release on December 01, 2005, stated: "it has been decided however that file noting relating to identifiable individuals, group of individuals, organizations, appointments, matter relating to enquiries and departmental proceedings shall not be disclosed"¹⁸. The controversy rest ,albeit temporarily, with January 31 2006 decision of the Central Information Commission which unequivocally concluded that, "*we are of the firm view, that, in terms of existing provisions of the RTI Act, a citizen has the right to seek information contained in "file noting" unless the matter covered in under section 8 of the Act*"¹⁹. In 2009 fresh rumours started circulating that the government was once again proposing to amend the RTI Act. The real agenda remained "file notings" though this time around they were calling it "discussion/consultations that take place before arriving at a decision". Other aspects were also included and mostly involved either non-issues (like whether information commissioners had to all sit together to give orders, or could they do so individually), or issues that could easily be tackled by amending the rules (like defining "substantially funded" or facilitating use by Indians residing abroad), without touching the Act itself. Another issue that made its appearance mainly thanks to the report of the Administrative Reforms Commission, was the effort to exempt so-called "frivolous and vexatious" applications. The first report of the Second Administrative Reforms Commission (ARC), presented in June 2008, had the unfortunate recommendation that the RTI Act should be amended to provide for the exclusion of any application that is "frivolous or vexatious".

Meanwhile, a threat from a new quarter, the judiciary, emerged. In 2007, an RTI application was filed with the Supreme Court (SC) asking, among other things, whether SC judges and high court (HC) judges are submitting information about their assets to their respective chief justices.²⁰ This information was denied even though the Central Information Commission subsequently upheld the appeal. The main issue was whether the office of the Chief Justice of India (CJI) was under the purview of the RTI Act. The matter was then appealed to by the Supreme Court Registry before the High Court of Delhi, where a single judge ruled that the CJI was covered under the RTI Act.²¹ A fresh appeal was filed by the Supreme Court in front of a full bench of the Delhi High Court which has

¹⁸ Neeraj Kumar, "*Treatise on Right to Information Act, 2005*", (Bharat law House New Delhi 3rd Ed., (2011).

¹⁹ (CIC) (No. ICPB/A-1/CIC/2006, *Satpal v. TCIL*).

²⁰ The Supreme Court of India and all the high courts had resolved that all judges would declare their (and their spouse/dependent's) assets to the respective chief justice, and update it every time there was a substantial acquisition. This was seen as a means of promoting probity and institutional accountability.

²¹ The judgment of the High Court of Delhi dated 2 September 2009, W.P. (C) 288/2009.

also, since, ruled against the Supreme Court²². The Supreme Court has now taken the somewhat unusual and perhaps unprecedented step of filing an appeal against the order of the full bench of the Delhi High Court in front of itself.

Interestingly, the real issue was no longer the assets of the Supreme Court judges. In fact, perhaps at least partly in response to public pressure and perception, judges of the Supreme Court and various high courts (including Delhi) had already put the list of their assets on the web. The dispute seemed to be about more sensitive issues, arising out of recent controversies about the basis on which high court judges were recommended for elevation to the Supreme Court²³. Newspaper reports suggested that some members of the higher judiciary were concerned that if the office of the Chief Justice of India was declared to be a public authority then the basis on which individual judges were recommended or ignored for elevation would also have to be made public. Therefore, even as the Supreme Court prepared to listen to an appeal from itself to itself, great pressure was exerted on the government to save them the embarrassment of either ruling in their own favour or ruling against themselves. This the government could do if it amended the RTI Act and excluded the office of the Chief Justice of India (and presumably other such "high constitutional offices") from the purview of the RTI Act.

Even while the appeal against the single judge order to the full bench of the Delhi High Court was ending, the then CJI wrote a long letter to the Prime Minister, trying to make a case for the exclusion of the CJI from the scope of the RTI Act. Among other things, he contended that *"Pursuant to the decision of the Delhi High Court and in view of the wide definition of information under section 2(f) of the RTI Act, several confidential and sensitive matters which are exclusively in the custody of the Chief Justice of India may have to be disclosed to the applicant-citizens exercising their right for such information under the RTI Act. Undoubtedly, this would prejudicially affect the working and functioning of the Supreme Court as this would make a serious inroad into the independence of the judiciary ... In this scenario, I earnestly and sincerely feel that Section 8 of the RTI Act needs to be suitably amended by inserting another clause to the effect that any information, disclosure of which would prejudicially affect the independence of the judiciary should be exempted from disclosure..."* All this came together in October 2009, when just after the annual conference, organized each year by the CIC, the nodal department of the Government of India (the DoPT) organized a meeting of chief information

²² Judgment of the High Court of Delhi dated 12 January 2010, LPA No. 50-1/2009.

²³ The current system in India gives exclusive power to a Collegium of Supreme Court judges, headed by the Chief Justice and comprising four senior-most judges, to decide on whom to elevate.

commissioners and information commissioners from across the country to discuss the proposed amendments.

Conclusion

The RTI Act has been lauded by democracy advocates all over the world since it is at par (or even better) than similar laws enacted in countries in the West. For instance, in the US and UK, the respective information disclosure acts require the applicant to disclose his personal details, whereas, in India, no such details are required. The RTI Act is one legislation that is indeed the pride of Indian democracy. The RTI Act, as it stands today, is a strong tool to uphold the spirit of democracy. The need of the hour is that the RTI Act should be implemented to ensure that the objects of the RTI Act are fulfilled. Any attempt to dilute the provisions of the RTI Act will only quell its' success. These decisions showed that higher judiciary could only preach accountability to other organs of state, viz. legislature and executive (sometimes it includes lower judiciary also), but when it comes to following their own preaching they are fearful. They always comment on the rampant corruption in other walks of life, but when someone points a finger towards them they become irate.

The Apex Court has itself mentioned in several cases that "society's demand for the honesty of a judge is exacting and absolute and the standards of judicial behaviour, both on and off the bench, are normally extremely high, therefore a judge must keep himself absolutely above suspicion. But when the time came to follow in practice these theoretical ethical standards, they withdrew from there on the paper commitment of accountability"²⁴. If the judiciary is to save its honour and independence it needs to act on its own without waiting for the legislature to intervene to enact a law for disclosure of assets by the judges. The legislature is all set to bring an enactment on disclosure of assets by judges, which is already in pipeline²⁵. Though the newly introduced Bill was taken back for reconsideration, the reasons for doing so were not in favour of the principle of "independence of judiciary"²⁶. It is the right time for the judiciary to introspect and save its independence, which it itself has established as part of the basic structure of the Constitution of India. However, if this potential has to be actualized, a much more concerted push has to be given to strengthening the RTI regime in the next few years. In struggles as fundamental as those for power

²⁴ *K. Veeraswamy v. Union of India*, (1991) 3 SCC 655.

²⁵ The Judges (Declaration of Assets and Liabilities) Bill, 2009 is presented before the Rajya Sabha on July 29, 2009, Available at: [http://www.judicialreforms.org/files/Judges%20\(Declaration%20of%20Assets%20and%20Liabilities\)%20Bill%202009.pdf](http://www.judicialreforms.org/files/Judges%20(Declaration%20of%20Assets%20and%20Liabilities)%20Bill%202009.pdf).

²⁶ Manninen Juha, "Anders Chydenius and the Origins of World's First Freedom of Information Law", published by Anders Chydenius Foundation, available at www.chydenius.net/eng/ visited on 21.12.2012.

and control, there is no time to waste. If the people do not come together and recapture the power that is rightfully theirs, vested interests will exploit this weakness and grow stronger and more invincible with each passing day. So, the people of India move ahead, and the world watches with bated breath!

Judicial Response to the Problem of Right to Food in India

*Parikshet Sirohi**

Introduction

India is home to the largest population of malnourished people in the world. One data says that half of its women and children malnourished. Legally, the 'Right to Food' has been a contentious economic, political and social issue in India for several decades. The Indian judiciary has also been grappling with this issue for several years now. There have been many significant judicial interventions in this regard - most notably, those in the case of *PUCL v. Union of India & Ors*¹ wherein the Hon'ble Supreme Court of India in its order issued after the very first date of hearing i.e. September 17, 2001, was pleased to affirm asunder, "...We direct all the State Governments to forthwith lift the entire allotment of food grains from the Central Government under the various schemes and disburse the same in accordance with the schemes"². This order of the Court laid the foundation for a justiciable Right to Food for all Indians. The Hon'ble Court then went on to unambiguously direct the Central Government to immediately release 5 MT of foodgrains for distribution amongst the poorest sections of society in 150 poverty-stricken districts across the country. In the

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¹ Writ Petition (Civil) No. 196 of 2001 filed before the Hon'ble Supreme Court in April 2001 following a large number of starvation deaths in the state of Rajasthan. The petition alleged that these persons were deprived of the required employment and food relief as mandated by the Rajasthan Famine Code of 1962. This case took place at a time when the country's foodgrain stocks were at unprecedented high levels and even then, people in large parts of the country continued to face hunger and malnutrition. The Apex Court, through a series of directions in this matter from 2001 onwards, has attempted to lay down the law with regards to ensuring nutritional security in the country. Available at <http://www.pucl.org/reports/Rajasthan/2001/starvation-writ.htm> Last visited on May 17, 2019 at 1540 hours.

² Order dated September 17, 2001 of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 196 of 2001 titled *PUCL v. Union of India & Ors*. Available at <http://supremecourtfindia.nic.in/jonew/bosir/orderpdfold/18655.pdf> Last visited on May 19, 2019 at 2300 hours.

words of the Apex Court, "...the Union of India had the responsibility to ensure food security of the country"³.

The journey towards a justiciable Right to Food is not a new one. The judiciary in India has, from time to time, recognised this right. The next section of this Paper attempts to chronicle some of the efforts made by the judiciary in this regard.

The Journey towards a Justiciable Right to Food

In the celebrated case of *Sunil Batra v. Delhi Administration*⁴, the Apex Court laid down that even prisoners enjoy a right to adequate and nutritious food. Borrowing from Justice Corwin's remarks on American constitutional law, V.R. Krishna Iyer, J., in his judgment opined that a person would not lose his basic right to proper, wholesome and nutritious food just because (s)he happened to be incarcerated. The Court laid down that this visitorial power of the Board of Visitors⁵ was to be given a wide interpretation and made it mandatory for the members of the Board of Visitors, both official and non-official, to inspect the barracks, cells, wards, work sheds and other buildings of the jail generally and in particular, the food that was cooked and served to the prisoners.

While deciding the case of *People's Union for Democratic Rights v. Union of India*⁶, P.N. Bhagwati, J. quoted from Sir W. Paul Gormseley's address at the silver jubilee celebrations of the Universal Declaration of Human Rights (UDHR)⁷ at

³ Order dated August 12, 2010 of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 196 of 2001 titled *PUCL v. Union of India & Ors.* Available at <http://supremecourtindia.nic.in/jonew/bosir/orderpdfold/1139485.pdf> Last visited on June 1, 2019 at 2300 hours.

⁴ AIR 1980 SC 1579.

⁵ In every prison, there is the institution of the Board of Visitors which includes judicial and administrative officers and also members of the public. Such members include District & Sessions Judges, District Magistrates and Sub-Divisional Magistrates among the members. Bureau of Police Research and Development, *Model Prison Manual for the Superintendence and Management of Prisons in India*, p. 287 (New Delhi, 2003).

⁶ (1982) 2 SCC 494.

⁷ Declaration adopted by the United Nations (UN) General Assembly on December 10, 1948 after the failure of the League of Nations and the experience of the two world wars. The Declaration consists of 30 Articles which, although not legally binding, have been elaborated in subsequent international treaties, economic transfers, regional human rights instruments, national constitutions, and other laws. The International Bill of Human Rights comprises of the UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) along with its two Optional Protocols. In 1966, the General Assembly adopted the two detailed Covenants, which complete the International Bill of Human Rights and in 1976, after the Covenants had been ratified by a sufficient number of individual nations, the Bill became international law, to be followed by all. Available at <http://www.un.org/en/universal-declaration-human-rights/> Last visited on May 29, 2019 at 1130 hours.

Banaras Hindu University (BHU)⁸ and opined that: "...the question may be raised as to whether or not the Fundamental Rights enshrined in our Constitution have any meaning to the millions of our people to whom food, drinking water, timely medical facilities and relief from disease and disaster, education and job opportunities still remain unavoidable."

In 1987, a Bench of the Apex Court headed by O. Chinnappa Reddy, J. during the adjudication of *Union of India v. Cynamide India Ltd*⁹, laid down that profiteering, by itself, was an evil prevalent in our society. When this act of profiteering happened to take place with respect to the scarce resources of the community like foodstuffs and life-saving drugs, the situation became diabolical and absolutely untenable. This was a menace which has to be lettered and curbed. According to the Court, the Essential Commodities Act, 1955 was legislation towards that end, in keeping with the duty of the State enshrined in Article 39(b)¹⁰ of the Constitution towards securing the ownership and control of the material resources of the community in order to best subserve the common good.

In the case of *Kishen Pattnayak v. State of Orissa*¹¹, certain districts in Orissa had witnessed a continuing phenomenon of drought, starvation deaths and famine. While laying down guidelines for the district administration to provide food to the affected population on a priority basis in the event of a natural calamity, the Bench headed by M.M. Dutt, J. opined that it would be the personal responsibility of the District Collector to review the relief measures undertaken in the area. He should either visit the area himself or depute a senior officer to take stock of the situation as soon as such an incident was reported. He should also immediately satisfy himself with regards to the adequacy of labour employment, food position and other relief arrangements in the district. In case he considers it necessary to further strengthen the relief measures, he should furnish concrete proposals promptly with necessary justification through the

⁸ Formerly known as Central Hindu College, is one of the oldest higher education institutions in India and serves as a public central university located in Varanasi, Uttar Pradesh (UP). Established in 1916 by Pt. Madan Mohan Malaviya, with over 12,000 resident students, it claims the title of the largest residential university in the whole of Asia. It celebrated its centenary year in 2015-2016. Available at <http://www.bhu.ac.in/> Last visited on January 12, 2019 at 1900 hours.

⁹ AIR 1987 SC 1802.

¹⁰ Constitution of India, Article 39: Certain principles of policy to be followed by the State:
The State shall, in particular, direct its policy towards securing-
(b) that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good.

¹¹ AIR 1989 SC 677.

Revenue Divisional Commissioner to the Board of Revenue or the Special Relief Commissioner.

In the instant case, the Court directed that the entire procurement of paddy should be immediately entrusted to the Food Corporation of India (FCI)¹² and the State Cooperative Marketing Federation, which was specialised agencies when it came to making such purchases and possessed an adequate number of godowns to store the grains so procured. Further, these agencies were mandated to have their local centres throughout the State for purchase of surplus paddy. Lastly, the Court opined that no produce from the farmers of the drought-affected area should ordinarily be refused by the procuring agencies named above.

In *Shantistar Builders v. Narayan Khimalal Toame*¹³, Ranganath Misra, J. laid down that the right to life is guaranteed in any civilized society and the same is also the position in our Constitution¹⁴. Further, the right to life is not merely the physical act of breathing and the basic needs of man have traditionally been accepted to be three - food, clothing and shelter. Thus, the right to life would take within its ambit, the right to food, the right to clothing, the right to decent environment and reasonable accommodation to live in. This decision has, since, been quoted with approval in several cases, most notably in *Chameli Singh v. State of UP*¹⁵.

In its judgment delivered in the case of *Jilubhai Nanbhai Khachar v. State of Gujarat*¹⁶, the Apex Court made it clear that the Founding Fathers of our Constitution believed in the concept of a welfare State as envisioned under the Directive Principles of State Policy. The basic prerequisites for ensuring this kind of a State are that everyone should be entitled to a minimum amount of material well-being, such as food, clothing and decent housing. Expansion of living standards should certainly be the mandate of the State and it should take every step possible to further this end, by either using the existing physical resources and scientific knowledge or by expanding them. Further, the Bench comprising

¹² Indian Government owned corporation which was established as a statutory body on January 14, 1965 to implement the objectives of the National Food Policy, 1964. It is one of the largest corporations in the country, and probably the largest supply chain management in Asia. Every year, it purchases roughly 15-20 per cent of the country's annual wheat output and 12-15 per cent of its annual rice output. These purchases are made from the farmers at the Minimum Support Price (MSP) which is fixed by the Central Government. Available at <http://fci.gov.in/> Last visited on April 29, 2019 at 1335 hours.

¹³ AIR 1990 SC 630.

¹⁴ Constitution of India, Article 21: Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹⁵ AIR 1996 SC 1051.

¹⁶ AIR 1995 SC 142.

of K. Ramaswamy and N. Venkatachala, JJ. opined that the State has a right and duty to act in this regard whenever private initiative failed.

In the case of *Harit Recyclers Association v. Union of India*¹⁷, the petitioner prayed for the issue of a writ of *mandamus*¹⁸ commanding the Central and State Governments to investigate into a health hazard that was suffered by the students of a Government school in Trilokpuri, East Delhi. The petitioner contended that these children had been forced to eat contaminated food which was served to them under the Mid Day Meal programme administered by the Delhi Government. The Delhi High Court while agreeing with the petitioner, once again laid down that the right to food was a basic human right and the need for food was a basic human need. Dipak Misra, C.J. picturesquely opined as under:

A civilized society does not countenance starvation. In a cultured society, the cry for food is not thought of. All across the globe, nutrition, health and education have been recognized as the basic needs of a member of the society as a man cannot be allowed to have animal existence. When food is not available to meet the cry of hunger, authors have gone to the extent of saying that is tantamount to the nullification of life. Biological growth is dependent on food. It is not for nothing that it has been said in the days of yore that a hungry man can commit any sin and a man in demand of food cannot conceive any kind of poetry or look at the moonlit sky.

While evaluating the functioning of a Government scheme for lactating mothers and pregnant women, in the course of its hearing in the case of *Laxmi Mandal v. Deen Dayal Harinagar Hospital*¹⁹, the Delhi High Court postulated that the right to health, as defined in Article 12.1 of the UDHR was an inclusive right which extended not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.

¹⁷ (2010) 170 DLT 476 (DB).

¹⁸ It is one of the five types of writs which can be issued by courts in India, and means 'we command' in the Latin language. It is issued by a superior court to compel a lower court or a government officer to perform his / her mandatory or purely ministerial duties correctly. The word '*mandamus*' has appeared in a number of orders issued by the sovereigns of England in the years following the Norman Conquest, and the first instance of a *mandamus* being used to enforce the right of a private citizen was seen in the year 1615. Available at <http://www.legalservicesindia.com/article/592/Analysis-Of-Writ-Of-Mandamus.html> Last visited on March 24, 2019 at 1345 hours.

¹⁹ (2010) 172 DLT 9.

Writing for the Bench, S. Muralidhar, J. went on to opine that, "...A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels".

In *Emergent Genetics India (Pvt.) Ltd. v. Shailendra Shivan*²⁰, the plaintiff was a private limited company engaged in research, development, processing and sale of agricultural seeds in India. The suit alleged that the defendants had violated the plaintiffs' copyright in the sequences of their hybrid seeds. A Bench of the Delhi High Court headed by S. Ravindra Bhat, J. opined that "...food security lies at the heart of agriculture, and food sovereignty. It is an undoubted material resource, as are agricultural practices such as seed breeding." The Court went on to extol the virtues of copyright law and discussed one basic tenet of intellectual property law according to which, the needs of the inventor/creator to earn royalty as a result of his invention should always be attempted to be balanced with the needs of the society to have access to better products. However, in cases where there is a conflict between the two, and this conflict cannot be harmonised, the rights of the society must necessarily prevail over the rights of the individual. In view of the above, copyright in the sequence of these seeds as claimed by the plaintiff, could not be allowed to prevail over the right of the society to have access to adequate food to meet its requirements.

During the adjudication of *PUCL (PDS Matters) v. Union of India*²¹ the Justice D.P. Wadhwa Committee²² submitted its various reports before the Supreme Court. *Inter alia*, these reports contained detailed guidelines for revamp of the Public Distribution System (PDS)²³ / Targeted Public Distribution System (TPDS)²⁴ and

²⁰ (2011) 125 DRJ 173.

²¹ (2013) 2 SCC 688.

²² Also known as the 'Central Vigilance Committee on Public Distribution System', this committee was created by the Supreme Court of India, while hearing Writ Petition (Civil) No. 196 of 2001 titled *PUCL v. Union of India*. It was headed by Hon'ble Mr Justice D.P. Wadhwa, Former Judge, Supreme Court of India, and was asked to look into the maladies affecting the proper functioning of the PDS and to suggest remedial measures. In particular, this Committee was directed to focus on the following aspects: (a) Mode of appointment of FPS dealers; (b) Ideal commission or rates that should be paid to the FPS dealers ; (c) Modalities to improve the functioning of already-existing Committees; and (d) Measures to increase transparency in allotment of the foodgrains meant for sale at ration (or FPS) shops. Available at <http://www.prsindia.org/uploads/media/Food%20Security/Justice%20Wadhwa%20Committee%20Report%20on%20PDS.pdf> Last visited on January 19, 2019 at 1900 hours.

²³ Administered by the Department of Food & Public Distribution, Ministry of Consumer Affairs, Food & Public Distribution, this scheme is one of the oldest welfare measures in India. It was launched by the Central Government in June 1947 and is jointly managed by the Central and State Governments. Subsidized food and non-food items like wheat, rice, sugar and kerosene are distributed to India's poor through a network of half-a-million fair
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included various short-term and long-term measures for improvement of the scheme, including complete computerisation of records, augmentation of storage capacity, better transportation for procured foodgrains, Global Positioning System (GPS)²⁵ tracking of vehicles and Fair Price Shops (FPSs)²⁶, better accountability and monitoring, electronic weighment, etc. The Court incorporated all these suggestions in its final order while disposing of the matter.

In *Swaraj Abhiyan v. Union of India & Ors*²⁷, certain important aspects of the National Food Security Act (NFSA)²⁸ including the setting up of grievance redressal machinery and a Food Commission in every State, as mandated by the Act, came up for adjudication before the Apex Court. Despite the fact that the National Food Security Bill was passed by both Houses of Parliament and received Presidential assent on September 10, 2013, almost four years had elapsed and the authorities and bodies mandated to be set up under the Act had not been set up till July 2017. The Act *inter alia* mandated that every State

price shops (also known as ration shops). Available at <http://dfpd.nic.in/public-distribution.htm> Last visited on June 3, 2019 at 0855 hours.

- ²⁴ Launched in 1997 in order to benefit the poor and keep budgetary food subsidies under control, following the failure of the existing PDS system. Conceptually, the transition from a universal PDS to the TPDS was a move in the right direction, as it was designed to include within its ambit, only the poor households. Available at http://planningcommission.nic.in/reports/peoreport/peo/peo_tpds.pdf Last visited on June 10, 2019 at 1430 hours.
- ²⁵ Space-based radio-navigation system which is owned by the United States (US) Government and operated by the US Air Force. The US Government created the system, maintains it and makes it freely accessible to anyone with a GPS receiver. It is a global navigation satellite system that provides geolocation and time information to a GPS receiver anywhere on or near the Earth, wherever there is an unobstructed line of sight to four or more GPS satellites. This system does not require the user to transmit any data and operates independently of any telephonic or internet reception, though these technologies can enhance the usefulness of the GPS positioning information. Available at <http://www8.garmin.com/aboutGPS/> Last visited on June 10, 2019 at 1900 hours.
- ²⁶ National Food Security Act (Act No. 20 of 2013), Sec. 2 (4): "Fair Price Shop" means a shop which has been licensed to distribute essential commodities by an order issued under section 3 of the Essential Commodities Act, 1955, to the ration card holders under the Targeted Public Distribution System.
- ²⁷ Writ Petition (Civil) No. 857 of 2015.
- ²⁸ Enacted by the Parliament of India on September 12, 2013 to provide food and nutritional security to the people by ensuring access to adequate quantity of quality food at affordable prices which would enable them to live their life with basic human dignity. It aims to provide subsidized foodgrains to approximately two-thirds of the country's population and came into force retrospectively from July 5, 2013. The Act converted into legal entitlements, all existing 'food security' programmes of the Central Government and under the provisions of this law, beneficiaries of the Public Distribution System (PDS) were entitled to five kg of cereals per person per month at the following prices: rice at ₹3 (4.7¢ US) per kg, wheat at ₹2 (3.1¢ US) per kg and coarse grains (millets) at ₹1 (1.6¢ US) per kg. Available at dfpd.nic.in/nfsa-act.htm Last visited on March 10, 2019 at 1100 hours.

Government was required to put in place an internal grievance redressal mechanism²⁹ and that for each district, there should be a Grievance Redressal Officer³⁰. Similarly, Sec. 16 of the Act mandated the setting up of a State Food Commission in every state³¹. Each of these provisions of the NFSA was mandatory and yet even after four years, they had not been fully implemented by some State Governments.

At the time of filing the petition, states like Andhra Pradesh and Madhya Pradesh (MP) had not constituted the State Food Commission in their respective jurisdictions, whereas in states like Maharashtra, appointments had been made, but the mandate of the Act was not fulfilled on account of the fact that there was no member in the Commission belonging to either the Scheduled Castes or the Scheduled Tribes. In other states like Bihar, appointments had been made but there were still certain vacancies in the Commission. The Apex Court directed the Union Food Secretary to immediately convene one or more meetings of all the States and Union Territories (UTs) to take stock of the implementation of the NFSA, and also brainstorm over finding ways and means to effectively implement the provisions of the Act in letter and spirit. Further, the Court directed that the Union Food Secretary should emphatically request and commend every State/UT to notify appropriate rules for a Grievance Redressal Mechanism under the provisions of the Act and also designate appropriate and independent officials as District Grievance Redressal Officers. State and UT Governments were directed to constitute, establish and make fully functional, a State Food Commission under the provisions of the NFSA by the end of the year (2017). Since the Act specified a very large number of functions to be performed by the State Food Commission, the Chief Secretary of each State/UT was directed to ensure that proper arrangements were made to provide adequate infrastructure, staff and other facilities for the meaningful functioning of this Commission.

Having discussed some of the important judicial pronouncements in the area of Right to Food in this section, the author shall now proceed to discuss the PUCL

²⁹ NFSA, Sec. 14: Internal grievance redressal mechanism: Every State Government shall put in place an internal grievance redressal mechanism which may include call centres, helplines, designation of nodal officers, or such other mechanism as may be prescribed.

³⁰ NFSA, Sec. 15: District Grievance Redressal Officer:
(1) The State Government shall appoint or designate, for each district, an officer to be the District Grievance Redressal Officer for expeditious and effective redressal of grievances of the aggrieved persons in matters relating to the distribution of entitled foodgrains or meals under Chapter II and to enforce the entitlements under this Act.

³¹ NFSA, Sec. 16: State Food Commission:
(1) Every State Government shall, by notification, constitute a State Food Commission for the purpose of monitoring and review of the implementation of this Act.

case, which is, in popular parlance, often referred to as the 'Right to Food case'³², in further detail in the ensuing sections of this Paper.

Background of Right to Food case

In September 2001, a Public Interest Litigation (PIL)³³ was filed by the People's Union for Civil Liberties (PUCL)³⁴ seeking legal enforcement of what the petitioners claimed was the 'Right to Food'. The petition was filed at a time when foodgrains were rotting in Government granaries due to inadequate storage facilities, while the poor across the country continued to die of hunger and starvation. The Apex Court, through a series of directions and interim orders, stepped in to stem the rot and corruption prevailing within the PDS and issued several orders strengthening various social security schemes³⁵. The author shall discuss several important orders and directions passed by the Apex Court in this case, in a considerable degree of detail in the ensuing sections of this Paper.

During a visit to Jaipur city in early 2001, the petitioners saw that there was an FCI godown which was overflowing with grains, which were rotting on account of faulty storage facilities and unseasonal winter rainfall. The grains had fermented and people were being forced to consume these rotten and spoilt foodgrains. Government data revealed that in 2001, FCI godowns stored in excess of 60 MT of grains, whereas the buffer stock requirements were only in the region of 20 MT³⁶. The Central Government was thus storing over 40 MT of foodgrains over and above the buffer stock norms. It was thus apparent that

³² *Supra* Note 1 at p. 1.

³³ Writ petition wherein the rule of *locus standi* is relaxed. Such litigation is introduced in a court of law, not by the aggrieved party but by the court itself or by any other private party. It is not necessary, for the exercise of the court's jurisdiction, that the person who is the victim of the violation of his or her right should personally approach the court. PIL is the power given to the public by courts through judicial activism. However, it needs to be ensured that the person filing the petition must prove to the satisfaction of the court that the petition is being filed for public interest and is not just as a frivolous litigation by a busy body. Available at [http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=a4a599a3-ee92-41da-aa0b-b4201b77a8bd&txtsearch=Subject: %20Jurisprudence](http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=a4a599a3-ee92-41da-aa0b-b4201b77a8bd&txtsearch=Subject:%20Jurisprudence) Last visited on June 4, 2019 at 1445 hours.

³⁴ Veteran leader Jaya Prakash Narayan founded the People's Union for Civil Liberties and Democratic Rights (PUCLDR), in 1976. The idea was to develop it as an organisation free from political ideologies, so that people belonging to various political parties may come together on one platform for the defence of Civil Liberties and Human Rights. Today, the organisation supports grassroots movements which focus on organizing and empowering the poor rather than using state initiatives for change. Available at <http://www.pucl.org/history.htm> Last visited on April 9, 2019 at 1355 hours.

³⁵ <http://www.hrln.org/hrln/right-to-food/pils-a-cases/255-pucl-vs-union-of-india-a-others-.html> Last visited on January 22, 2019 at 1400 hours.

³⁶ <http://fci.gov.in/stocks.php?view=46> Last visited on April 13, 2019 at 1900 hours.

Government agencies were storing these grains despite not having the carrying capacity to do so, and the situation became far more serious when juxtaposed with the fact that people were dying of starvation. Agriculture in India is hit by numerous problems like increasing farm debt, massive disguised and seasonal unemployment, and natural disasters like droughts and hailstorms. It is in this backdrop that starvation remains a tangible and pressing threat to many across the country. According to figures of the Government of India, about 30 crore people still live in extreme poverty across the country and face deprivation in terms of access to basic services, including education, health, water, sanitation and electricity³⁷. In response, the Human Rights Law Network (HRLN)³⁸ which argued the case on behalf of the petitioners, sought recognition of the 'Right to Food' for all citizens of the country, from the Supreme Court.

As we already know, the PDS in India, is, by far, the world's largest and most comprehensive edifice to safeguard national food security. It manages large-scale procurement and distribution of foodgrains, grants farmers a reasonable price to maintain production levels of cereals, while also providing for the distribution of foodgrains and other basic commodities at subsidized prices to qualifying families. The petition pointed out that *inter alia*, the distribution leg of the PDS was often irregular and sometimes entirely absent. In view of the availability of resources, the petition brought to the notice of the Court, the negligence of the Central and State Governments in executing various provisions of the PDS and TPDS. The petitioners marshalled agricultural statistics before the Court in an attempt to demonstrate that even though food production had increased considerably during the 1990s, endemic hunger continued to prevail at unacceptably high levels. In Rajasthan, for instance, close to 50 MT of foodgrains were lying idle in the Government's reserves while nearly half of the rural population continued to languish at Below Poverty Line (BPL)³⁹ levels. Even worse, poor storage conditions had caused deterioration of

³⁷ United Nations, *India and the MDGs: Completing the Task* (New Delhi, February 2015).

³⁸ Collective of lawyers and social activists dedicated to the use of the legal system to advance human rights, struggle against violations and ensure access to justice for all. A non-profit, non-governmental organization, it started out in 1989 as a small group of concerned lawyers and social activists from tiny premises in Bombay. Today, this organisation has evolved into a nationwide network of more than 200 lawyers, paralegals, and social activists spread across 26 States and UTs. Available at <http://www.hrln.org/hrln/about-us.html#ixzz59p043N8b> Last visited on June 12, 2019 at 1440 hours.

³⁹ Economic benchmark used by the Government of India to indicate economic disadvantage and identify individuals and households in need of government assistance and aid. It is determined using various parameters which vary from state to state and sometimes within states also. This income-based poverty line only considers the bare minimum income that is needed to provide basic food requirements and does not account for other essentials such as

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much of the grains so stored. The petitioners further contended that wasting food due to improper storage in a poor country, was nothing short of a crime. Even though the amount of food being wasted far outweighed the amount needed to ensure food security for all, the Government continued to pay warehousing expenses instead of simply distributing the grains before they rotted, to those who were in dire need of food.

On February 10, 2017, i.e. nearly 17 long years after the first judicial intervention in the case, a Division Bench of the Apex Court headed by Madan B. Lokur, J. ended the case but not before prodding the Central Government enough to ensure passage of the NFSA, 2013⁴⁰. Over 160 interim orders were passed by the Apex Court in this case, spread over a period of over one-and-a-half decades. Top-level functionaries of the Central and State Governments / UTs *viz.* the Union Food Secretary, the Joint Secretary of the Department of Food & Public Distribution (Government of India) dealing with this subject, Chief Secretaries of States, Administrators of UTs, Principal Secretaries / Secretaries of the Food Department in States / UTs were either asked to enter personal appearance before the Court in this matter, or were asked to swear affidavits before the Court from time to time. In addition, the Ld. Attorney General, Ld. Solicitor General, Ld. Additional Solicitors General, Ld. Advocates General of States, Ld. Additional Advocates General and Ld. Standing Counsels for various States / UTs entered an appearance in this extremely significant matter and assisted the Court. The Court also obtained, from time to time, assistance from highly acclaimed professionals like Justice D.P. Wadhwa, Nandan Nilekani and the Right to Food Commissioners, each of whom is stalwarts in their own right.

The Response of the Supreme Court in the Right to Food case

In 2001, an incident was reported from south-eastern Rajasthan wherein 47 tribals and *Dalits* had reportedly starved to death. As already seen in the previous section, this tragedy occurred at a time when governmental warehouses were brimming with an excess of around 40 MT of foodgrains. Weeks later, the Right to Food Campaign⁴¹, which was a civil society network of

health care and education. Available at http://planningcommission.nic.in/reports/genrep/pov_rep0707.pdf Last visited on June 11, 2019 at 2005 hours.

⁴⁰ Act No. 20 of 2013.

⁴¹ Began with the filing of a Writ Petition before the Supreme Court in April 2001 by PUCL, Rajasthan. Briefly, the petition demanded that the country's gigantic food stocks should be used without delay in order to protect people from hunger and starvation. This petition led to a prolonged PIL in the case titled *PUCL v. Union of India and Others*, Writ Petition (Civil) No. 196 / 2001. Court hearings were conducted from time to time and significant interim orders were also issued. However, it soon became clear to Right to Food advocates that the

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activists and organizations, moved the Apex Court to secure food security for all citizens of the country. This case which was popularly known as the 'Right to Food' case, sought to transform the policy choices of the Central and State Governments in the area of distribution of food, into enforceable rights for the citizens. In its very first hearing in the case, the Apex Court directed all the State Governments to immediately lift their entire allotment of foodgrains from the Central Government under various schemes and disburse the same in accordance with these schemes⁴².

During the hearing of this case, the Court laid down most unequivocally that the right to food was necessary to uphold Article 21 of the Constitution of India, which guarantees the fundamental right to "life with human dignity". It decreed that any PDS shops if closed, were to be re-opened within one week, and the FCI was ordered to ensure that foodgrains did not go to waste. The states were given the responsibility of implementation of the following schemes: the Employment Assurance Scheme (EAS)⁴³, which may have been replaced by a *Sampurna Grameen Rozgar Yojana* (SGRY)⁴⁴, the Mid Day Meal scheme⁴⁵, the Integrated

legal process would not go very far on its own and this motivated the effort to build a larger public campaign for the Right to Food.

Bruno Jobert and Beate Kohler-Kech (eds.), *Changing Images of Civil Society: from protest to governance*, pp 80-82 (Routledge Studies in Governance and Public Policy, London, 2008).

⁴² *Supra* Note 2 at p. 1.

⁴³ First implemented on October 2, 1993 in 1778 blocks across the country. These areas were located in the rough, rugged and sparsely-populated areas of the country. Later on, the scheme was extended to the remaining blocks of the country in a phased manner. Its primary objective was to provide gainful employment during the lean agricultural season to all able-bodied adults in rural areas who were in need of work, and it was implemented as a Centrally-sponsored scheme on cost sharing basis between the Centre and the States in the ratio of 75:25. The programme was restructured on April 1, 1999, and was later on subsumed within the SGRY. Available at http://agritech.tnau.ac.in/agriculture/agri_majorareas_watershed_eas.html Last visited on March 1, 2019 at 1800 hours.

⁴⁴ Launched on September 25, 2001 by merging the on-going schemes of EAS and the *Jawahar Gram Samriddhi Yojana* (JGSY) with the objective of providing additional wage employment and food security, alongside the creation of durable community assets in rural areas. The programme is self-targeting in nature with provisions for special emphasis on women, persons belonging to the Scheduled Castes / Scheduled Tribes and parents of children who have been withdrawn from hazardous occupations. Minimum wages are paid to the workers through a mix of a minimum of five kg of foodgrains and at least 25% of wages are to be paid in cash. Available at <https://archive.india.gov.in/sectors/rural/index.php?id=13> Last visited on January 20, 2019 at 1630 hours.

⁴⁵ School meal programme designed to improve the nutritional status of school-going children nationwide. It supplies free lunches to primary and upper-primary school children in government, government-aided and local-body run schools. It currently serves over 120 million children in over 1.2 million schools and Education Guarantee Scheme centres and is

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Child Development Services (ICDS) scheme⁴⁶, the National Maternity Benefit Scheme (NMBS)⁴⁷ for pregnant BPL women, the Old Age Pension Scheme for destitute persons of over 65 years of age⁴⁸, the *Annapurna*⁴⁹ the scheme, the *Antyodaya Anna Yojana* (AAY)⁵⁰, the National Family Benefit Scheme (NFBS)⁵¹

the largest such programme in the world. Available at <http://mdm.nic.in/> Last visited on June 7, 2019 at 1430 hours.

- ⁴⁶ Programme which provides food, pre-school education and primary healthcare to children under the age of six years and their mothers. The scheme was first launched in 1975 but the Morarji Desai government discontinued it on a national level in 1978, even though it continued to remain in operation in certain parts of states like MP, Odisha and Rajasthan. It was later relaunched during the Tenth Five Year Plan by the Central Government. The widespread network of ICDS has an important role in combating malnutrition especially for children belonging to weaker sections of society. The scheme had a budgetary allocation of ₹18,195 crores in the financial year 2014-15. Available at <http://icds-wcd.nic.in/icds/icds.aspx> Last visited on April 13, 2019 at 1440 hours.
- ⁴⁷ Scheme launched by the Ministry of Women and Child Development, Government of India wherein pregnant women are given a grant of ₹ 500 per pregnancy and assistance under this scheme is made available for the first two pregnancies of each woman. First introduced in 1995, this scheme targets rural Indian women and assures that the process of pregnancy goes off smoothly. Available at <https://govinfo.me/national-maternity-benefit-scheme/> Last visited on February 12, 2019 at 2010 hours.
- ⁴⁸ Centrally-sponsored scheme of the Government of India which provides financial assistance to the elderly, widows and persons with disabilities in the form of monthly social pensions. The National Assistance Program consists of five sub-schemes *viz.* the IGNOAPS, the Indira Gandhi National Widow Pension Scheme (IGNWPS), the Indira Gandhi National Disability Pension Scheme (IGNDPS), the National Family Benefit Scheme (NFBS) and the *Annapurna* scheme which aims to provide food security to meet the requirement of those senior citizens who, though eligible, have remained uncovered under the IGNOAPS. Under the *Annapurna* scheme, 10 kg of free rice is provided every month to each beneficiary. Available at <http://nsap.nic.in/> Last visited on March 6, 2019 at 1300 hours.
- ⁴⁹ Centrally-sponsored scheme administered by the Department of Food & Public Distribution, Government of India wherein funds are released to the State Governments in order to enable them to arrange for distribution of 10 kg foodgrains per month free of cost to all such persons who despite being eligible for old age pension, were, for some reason, not receiving this pension. The beneficiaries under the scheme are selected by the *Gram Sabhas* and *Gram Panchayats* in order to ensure greater transparency. Available at <http://www.fcp.bih.nic.in/Annapurna.htm> Last visited on June 7, 2019 at 1540 hours.
- ⁵⁰ Centrally-sponsored scheme launched on December 25, 2000 to provide highly subsidised food to the 'poorest of the poor' families. First of all, the poorest families who exist in the Below Poverty Line (BPL) category, are identified through extensive survey and then the Government begins to provide them with an opportunity to purchase up to 35 kg of rice and wheat at a highly subsidised cost of ₹ 3 per kg in the case of rice and ₹ 2 per kg in the case of wheat. Once a family has been recognized as eligible for the AAY, they are given a unique colour-coded ration card which acts as a form of identification. Available at <http://pib.nic.in/feature/feyr2001/fmar2001/f280320011.html> Last visited on March 11, 2019 at 1440 hours.

and the PDS for BPL and APL⁵² families. Additionally, issues of chronic scarcity and man-made droughts and famines were highlighted as major areas of concern by the Court. The Hon'ble Apex Court further directed the Union of India to indicate as to how it will ensure that the schemes formulated by it are implemented and benefits received by those for whom they are intended⁵³.

In view of the record procurement of foodgrains in the year 2009-10, the Government of India was not able to properly store and manage the foodgrains reserves in an appropriate and cost-effective manner. Thus, the Court mandated that the Government of India should take certain long term and short term measures to correct this situation. While the permanent solution lay in constructing adequate storage facilities, the Union of India should, according to the Hon'ble Apex Court, consider constructing at least one large FCI godown in every State and consider the possibility of construction of one godown in every division if not in every revenue district of the State. The Court laid stress on the fact that the PDS required to be strengthened, especially in the predominantly tribal and drought-prone areas of the country. Similarly, the Court in its landmark order dated August 12, 2010, also suggested some short term measures to deal with this problem of rotting foodgrains:

- Increase in the quantum of food supply to BPL population;
- Opening of FPSs on all 30 days of the month;
- Distribution of foodgrains to the deserving population at a very low cost or no cost.⁵⁴

⁵¹ This scheme is an integral part of the National Social Assistance Programme (NSAP). Families living below the poverty line are entitled to get financial benefits after the death of the sole breadwinner under this scheme. This scheme was launched to assure some financial help in the event of the death of an earning member and ensures a one-time payable sum of ₹ 20,000/- to the bereaved family. Any kind of death, whether natural or accidental, makes the family eligible for this assistance. Available at <http://nsap.nic.in/guidelines.html> Last visited on March 18, 2019 at 1730 hours.

⁵² In India, the Planning Commission estimates the number and proportion of people living below the poverty line at national and state levels, separately for rural and urban areas. The Commission has been estimating the poverty line and poverty ratio since 1997 on the basis of the methodology spelt out in the report of the Expert Group on 'Estimation of Number and Proportion of Poor' (popularly known as Lakdawala Committee Report). Persons enjoying income levels above the poverty estimates are referred to as APL. Available at [http://www.arthapedia.in/index.php?title=Poverty,_Poverty_Line,_Below_and_Above_poverty_line_\(APL,_BPL\)](http://www.arthapedia.in/index.php?title=Poverty,_Poverty_Line,_Below_and_Above_poverty_line_(APL,_BPL)) Last visited on April 3, 2019 at 1600 hours.

⁵³ Order dated November 21, 2001 of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 196 of 2001 titled *PUCL v. Union of India & Ors.* Available at <http://supremecourtindia.nic.in/jonew/bosir/orderpdfold/32261.pdf> Last visited on March 11, 2019 at 2300 hours.

⁵⁴ *Supra* Note 3 at p. 1.

Guidelines Relating to the Functioning of various Government Schemes

In its order dated November 28, 2001, the Hon'ble Supreme Court laid down several important guidelines with regards to the usage of Government-owned media to popularise the various welfare measures of the Government. This order also laid down detailed guidelines with regards to the functioning of eight major welfare schemes that were being run by the Central Government:

- 1) TPDS: The Union Government argued before the Court that there was complete compliance with regards to the allotment of foodgrains in relation to the TPDS system. However, if any of the States were to give a specific instance of non-compliance, the Union of India was directed to do the needful within the framework of the scheme. Further, the States were directed to complete the process of identification of BPL families, issuance of cards to these families and begin distribution of 25 kg of foodgrains per family per month latest by January 1, 2002.
- 2) AAY: States and UTs were directed to complete the work of identification of beneficiaries and issuance of cards and commence distribution of foodgrains under this scheme latest by January 1, 2002. Since some *Antyodaya* beneficiaries may have been unable to lift their allotted quota of foodgrains on account of penury, States and UTs were directed to consider giving them their quota free of cost, after satisfying themselves regarding the identity of the beneficiary, etc.
- 3) Mid-Day Meal scheme: States and UTs were directed to implement the Mid-Day Meal scheme by providing every child enrolled in government and government-assisted primary schools, with a cooked mid-day meal with a minimum nutritional content of 300 calories and 8-12 grams of protein per child per school day, for a minimum of 200 days in a year. Those states which were providing 'dry rations' instead of cooked meals, were directed to start providing cooked meals within a period of three months from the date of the order, in all government and government-aided primary schools in half the districts of the state (in order of poverty) and within a further period of three months, this provision of cooked meals must be extended to the remaining parts of the State. The Union of India and the FCI were directed to ensure the provision of fair average quality foodgrains for the scheme in a timely manner. The States/UTs and the FCI were also directed to conduct a joint inspection of the foodgrains supplied under this scheme. In case the foodgrains were found to be

of poor quality at the time of the joint inspection, these would have to be replaced by the FCI, prior to lifting by the concerned State / UT.

- 4) Old Age Pension Scheme: The States/UTs were directed to identify the beneficiaries and to start making payments latest by January 1, 2002, and were also mandated to make pension payments to beneficiaries under this scheme in a prompt manner, i.e. by the 7th day of each calendar month.
- 5) *Annapurna* scheme: The States/UTs were directed to identify the beneficiaries and begin the process of distribution of foodgrains to the identified beneficiaries latest by January 1, 2002.
- 6) ICDS: The Court issued a direction to States and UTs to implement the ICDS in its full form, and to ensure that every ICDS disbursing centre in the country met the prescribed nutritional norms, provided as under:
 - Each child up to 6 years of age was to get 300 calories and 8-10 grams of protein;
 - Each adolescent girl was entitled to get 500 calories and 20-25 grams of protein;
 - Each pregnant woman and nursing mother had an entitlement of 500 calories and 20-25 grams of protein;
 - Each malnourished child was to get 600 calories and 16-20 grams of protein; and
 - There should be a disbursement centre in every settlement.
- 7) NMBS: All State Governments / UTs were directed to implement this scheme by paying to every pregnant woman who belonged to the BPL category, a sum of ₹ 500 through the *Sarpanch*⁵⁵ 8-12 weeks prior to her delivery, in the case of the first two childbirths.
- 8) NFBS: All States and UTs were directed to implement this scheme by paying to each BPL family, a sum of ₹ 10,000 within four weeks through the local *Sarpanch*, whenever the primary breadwinner of the family happened to pass away.

⁵⁵ Elected head of a village-level statutory institution of local self-government called the *panchayat* (village government) in India (*gram panchayat*). The *sarpanch*, together with other elected *panchas* (members), constitute the *gram panchayat*. The *sarpanch* is the focal point of contact between government officers and the village community. Recently, there have been proposals to give *sarpanches* small judicial powers under *Panchayati*. In some states of India such as Bihar, the *sarpanch* has been empowered to look into various civil and criminal cases and given judicial power to punish and impose fine on those violating rules. Available at http://sbm.gov.in/sbmreport/Report/Contact/SBM_SarpanchDetail.aspx Last visited on February 19, 2019 at 1745 hours.

The Court directed that in order for the people to be made aware of their legal right to food, this order should be translated into all regional languages by the respective States / UTs and prominently displayed in all *Gram Panchayats*⁵⁶, government school buildings and FPSs. Further, in order to ensure transparency in the selection of beneficiaries and their access to these schemes, the *Gram Panchayats* were mandated to display a list of all beneficiaries under the various schemes. Copies of the schemes and the list of beneficiaries were to be made available by the *Gram Panchayats* to members of public for inspection. The Court gave a direction to *Doordarshan*⁵⁷ and All India Radio (AIR)⁵⁸ to adequately publicise various welfare schemes of the Government and also this order of the Apex Court.⁵⁹

⁵⁶ Lowest tier of the Panchayat Raj Institutions (PRIs), set up under the Constitution (73rd Amendment) Act, 1992. Each *Gram Panchayat* is divided into wards and each ward is represented by a Ward Member, also referred to as a *Panch*, who is directly elected by the villagers. The *Panchayat* is chaired by the president of the village, known as the *Sarpanch*. The term of each elected representative is five years. The Secretary of the *Panchayat* is a non-elected representative, who is appointed by the State Government to oversee its activities. There are approximately 250,000 *Gram Panchayats* across the country.

Mahesh Chandra Chaturvedi, *India's Waters: Environment, Economy, and Development*, pp 74-75 (CRC Press, Boca Raton, 2012).

⁵⁷ India's public service broadcaster, which functions as a division of *Prasar Bharati*, and is one of the largest broadcasting organisations in the world in terms of the studios and transmitters. It offers a three-tier programme service *viz.* national, regional and local. While national programmes emphasise on events and issues of interest to the entire nation, regional programmes are beamed on DD National at specific times and also shown on regional language satellite channels. The content of local programmes is area-specific and covers local issues featuring local people. Available at <http://www.ddindia.gov.in/AboutDD/pages/Default.aspx> Last visited on January 9, 2019 at 1900 hours.

⁵⁸ India's national broadcaster and premier public service broadcaster, AIR has been serving to inform, educate and entertain the masses since its inception, truly living up to its motto of *Bahujan Hitaya: Bahujan Sukhaya* (in the greater public interest). One of the largest broadcasting organisations in the world in terms of the number of languages of broadcast, the spectrum of socio-economic and cultural diversity that it serves, AIR's home service comprises 420 stations which are located across the country, reaching nearly 92% of the country's area and 99.19% of the total population. Available at <http://allindiaradio.gov.in/Default.aspx> Last visited on January 11, 2019 at 1450 hours.

⁵⁹ Order dated November 28, 2001 of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 196 of 2001 titled *PUCL v. Union of India & Ors.* Available at <http://supremecourtindia.nic.in/jonew/bosir/orderpdfold/33378.pdf> Last visited on March 21, 2019 at 2100 hours.

Conclusion

Such a long-drawn judicial intervention in any one matter is completely unprecedented, with no parallels whatsoever, in the working of any judicial system the world over. This constant monitoring of the functioning of governmental efforts in the area of Right to Food contributed tremendously towards securing the justiciable Right to Food to all Indian citizens. In a case spanning the best part of two decades, the Apex Court monitored virtually every Government scheme in the area of food, health and nutrition. This was done at both at the Central and State levels by the Hon'ble Supreme Court which appointed its own officers for this purpose. These officers had the responsibility of bringing the prevailing ground reality to the courtroom.

This process commenced in 2002 when the Court appointed Dr. N.C. Saxena⁶⁰ and S.R. Sankaran⁶¹, two former bureaucrats, as Food Commissioners and empowered them to investigate violations of interim orders passed by the Court in this case. The Apex Court also gave the Commissioners the authority to monitor and report the status of implementation of these orders, to the Court. Later on, Dr. Harsh Mander⁶², a former National Advisory Council (NAC)⁶³ the

⁶⁰ Former Indian Administrative Service (IAS) officer of the 1964 batch, he retired as Secretary, Planning Commission, Government of India and also worked as Secretary, Ministry of Rural Development and Secretary, National Minorities Commission. He served as a Member of the NAC from 2004-08 and again from 2010-14. During 1993-96, he worked as Director of the Lal Bahadur Shastri National Academy of Administration, Mussoorie, which trains senior civil servants. He has served as a Right to Food Commissioner and monitored hunger-based programmes in India on behalf of the Supreme Court of India. He earned his PhD in Forestry from Oxford University in 1992 and has authored several books and articles. Available at <http://nset.gov.in/Items/NCSaxena.pdf> Last visited on February 7, 2019 at 2000 hours.

⁶¹ Indian civil servant, social worker and former Chief Secretary of the State of Tripura, he was known for his contributions for the enforcement of Abolition of Bonded Labour Act of 1976, which abolished bonded labour in India. One amongst the seven civil servants held hostage by the People's War Group in 1987, he was the chief negotiator of the State Government in the negotiations of 2004 to end Naxalite violence in Andhra Pradesh. The Government of India awarded him the third-highest civilian honour, the *Padma Bhushan*, in 2005, for his contributions to society, but he declined the honour. His social welfare activities earned him the moniker, 'People's IAS officer'.

"People's IAS officer S.R. Sankaran no more", *The Hindu*, Hyderabad, October 8, 2010.

⁶² IAS officer turned activist, who works with survivors of mass violence and hunger, as well as homeless persons and street children. He currently serves as Director of the Centre for Equity Studies, which is an autonomous institution engaged in research and advocacy on the issues of social and economic justice and equity, and served as a Special Commissioner to the Supreme Court of India in the Right to Food case. He is a founding member of the National Campaign for the People's Right to Information and served as a Member of the

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member took over one of these positions upon the retirement of Sankaran. The decision to appoint Commissioners of its own was on account of the fact that the Court realised that it would be impossible for two judges sitting in New Delhi to ensure that the orders of the Court were being implemented by reluctant governments at the Centre and the States.

On the hearing conducted on July 10, 2013, the attention of the Hon'ble Apex Court was drawn towards the National Food Security Ordinance, which was promulgated by the President of India w.e.f. July 5, 2013. While perusing the same, the Court noted that it contained several significant provisions for the benefit of children in the age group of six months to 14 years, while also making an attempt to reform the working of the PDS in both rural and urban areas. The measures which were suggested by the Court in the form of interim orders, and aimed at bringing about a greater degree of transparency and accountability, also found mention in this Ordinance. The Court expressed its happiness over the fact that the said Ordinance had also cast justiciable obligations upon the Central and State Governments on aspects relating to food and nutritional security.⁶⁴

On February 10, 2017, a Bench comprising of Madan B. Lokur and Prafulla C. Pant, JJ. finally decided to end the case. The Court laid down that, "...In view of the passage of the NFSA, 2013, nothing further survives in this petition. It is accordingly disposed off. In case the petitioner has any grievance with regard to the implementation or otherwise of the NFSA, 2013, he may file a fresh petition. In view of the disposal of the writ petition, all pending applications including applications for impleadment/intervention are disposed of."⁶⁵ Thus, it appears that the Central Government was able to convince the Court that the newly-enacted NFSA must be given a chance to function and that the legislation was

NAC from 2010-12. Available at <https://centreforequitystudies.org/governing-board/> Last visited on February 14, 2019 at 1900 hours.

⁶³ Advisory body which was established on June 4, 2004 to advise the Prime Minister of India, it was instrumental in drafting various important pieces of legislation including the MGNREGA, the NFSA, the RTI Act and the RTE Act. Sonia Gandhi served as its Chairperson for much of the tenure of the UPA and it comprised of ex-bureaucrats, members of civil society, academicians and lawyers. Available at <http://www.allgov.com/india/departments/ministry-of-youth-affairs-and-sports/national-advisory-council-nac?agencyid=7592> Last visited on April 11, 2019 at 1430 hours.

⁶⁴ Order dated July 10, 2013 of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 196 of 2001 titled *PUCCL v. Union of India & Ors.* Available at <https://www.sci.gov.in/jonew/bosir/orderpdfold/1747307.pdf> Last visited on February 5, 2019 at 1540 hours.

⁶⁵ Order dated February 10, 2017 of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 196 of 2001 titled *PUCCL v. Union of India & Ors.* Available at <https://www.sci.gov.in/jonew/bosir/orderpdf/2873174.pdf> Last visited on February 4, 2019 at 1550 hours.

capable of taking over after over one-and-a-half decades of monitoring by the Apex Court. The Central Government also argued that in case the Apex Court felt that its intervention in this matter was needed at any point in time, it could always go ahead and do so.

The constant monitoring of the functioning of governmental efforts in the area of Right to Food contributed tremendously to an already existing active grassroots campaign which enjoyed considerable public support⁶⁶. Another reason for the spectacular success of this case could be the fact that the petitioner was not any one particular person or one particular NGO⁶⁷; but an entire movement, comprising of people drawn from academia, civil society, economics and politics. Even before the first intervention of the Supreme Court came in the year 2001, the National Campaign on the Right to Food⁶⁸ was actively lobbying in the area of Right to Food, and there were groups which were active in virtually every state. This case enabled all of them to come together on one single platform, and ensure implementation of the orders of the Supreme Court. In the words of Dr. Saxena, "...Food is hugely political...That could be a very big reason why this case had the kind of impact (that) it did. But the court is only concerned with rights enshrined in the Constitution. Implementation of the orders, however, happened as a result of many factors."⁶⁹

Even though campaigners like Biraj Patnaik⁷⁰ are slightly disappointed with the fact that the case ended without a "...last order stating that access to food is a

⁶⁶ Apurva Vishwanath, "What are the lessons learnt from the Right to Food case?: Lessons learnt from the Right to Food case can be applied for other social issues that end up at the Supreme Court's doorstep every day", *Live Mint*, New Delhi, March 21, 2017.

⁶⁷ Non-profit, citizen-based groups which function independently of Government agencies. Also called 'civil societies', these are organized on the community, national and international levels to serve specific social or political purposes, and are cooperative, rather than commercial, in nature. The World Bank classifies NGOs into two broad categories *viz.* operational NGOs, which focus on development projects, and advocacy NGOs, which are organized to promote certain specific causes. Available at <https://www.investopedia.com/ask/answers/13/what-is-non-government-organization.asp> Last visited on May 13, 2019 at 1100 hours.

⁶⁸ *Supra* Note 41 at p. 11.

⁶⁹ N.C. Saxena, "Hunger, Under-Nutrition and Food Security in India", *CPRC-IIPA Working Paper 44*, p. 55 (New Delhi, 2014).

⁷⁰ Currently serves as Amnesty International's South Asia Director, and has previously served as Principal Adviser to the Supreme Court Commissioners on the Right to Food case where he was closely associated with the drafting and lobbying for the NFSA 2013. A holder of a Masters degree in management from the Institute of Rural Management, Anand (IRMA), he serves on the boards of several human rights organisations including the Centre for Equity Studies and the Program on Women's Economic Social and Cultural Rights. He was a Gurukul Senior Scholar at London School of Economics and Political Science (LSE) and was actively involved in the Right to Food Campaign in India from its very inception. Available

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fundamental right in as many words", the 'Right to Food case' is today the globally most-cited case on right to food and even judicial activism in this area. This case is today widely regarded as the country's most successful PIL ever, with opinion divided amongst experts as to whether the case which issued the longest continuing *mandamuses* anywhere in the world, should have been finally disposed off or not⁷¹.

at <https://www.nyubernsteinconference.org/speakers/biraj-patnaik/> Last visited on January 6, 2019 at 1900 hours.

⁷¹ *Supra* Note 66 at p. 19.

Gendered Skew of Acid Attack Cases and Role of Legislature and Judiciary

*Princy Chaturvedi**

Introduction

Acid Attack is one of the most horrifying forms of violence against women which is not restricted to a particular country, religion or race. Vitriolage literally means throwing oil of vitriol (concentrated sulphuric acid) on the body of a person with the intent of injuring or disfiguring him out of jealousy or revenge. In general, acid attack is defined as the act of throwing acid or a similarly corrosive substance on the body of another with the intention to disfigure, maim, torture or kill.

Gendered Skewness

Though vitriolage is gender- neutral offence as the acid can be used both against men and women but it has a specific gender biased dimension as most of the acid attacks are committed against women in India. The motive behind such attacks is also coupled with inequality and discrimination against women. The main factor responsible for these kinds of crimes is a male dominated society where some egoistic males cannot tolerate rejection of their love and marriage proposal or denial of dowry by a girl and find acid as an easy weapon to take revenge and ruin her life by disfiguring her face and body. It is used as a tool of patriarchal violence.

The Law Commission of India also mentioned in its report that the Majority of victims of acid violence are women. According to the report of Law Commission of India, "The attacker cannot bear the fact that he has been rejected and seeks to destroy the body of the women who have dared to stand against him."¹

Afroza Anwary, a renowned academician of Minnesota State University in his book mentioned that "men throw acid on women's face as a mark of their masculinity and superiority, to keep women in their place"²

* Research Scholar, Faculty of Law, University of Delhi.

¹ The 226th report, Law Commission of India 2006

² Afroza Anwary, Acid Violence and Medical Care in Bangladesh; Women's Activism as care
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The injuries inflicted due to the acid attacks are of very different nature and the victims have to suffer lifelong pain and other health complications. Their life becomes hell as their medical complications increases with the increase in their age. Cases of acid violence are conspicuous by their absence in National Crime Report Bureau. There is a lack of data on acid crimes in India because it has only recently i.e. in the year 2013 been recognized as a specific offence under Indian Penal Code. Before the Criminal Law Amendment Act 2013, acid attacks were covered by NCRB under the head “offences against women” and were not mentioned separately. Therefore, there is no national database to statistically track cases of acid violence in India. Many cases go unreported. On the basis of research conducted by Acid Survivors Foundation India, estimated cases of acid violence in India vary from 500 to 1000 a year.

Legislative Provisions

Before 2013, cases of acid attacks were covered under section 326 of Indian Penal Code which deals with Causing Grievous Hurt by throwing a corrosive substance but the scope of this section was very restricted. Criminal Law Amendment Act, 2013 added following new sections in the Indian Penal Code to make acid attack a separate offence.

Section 326A: Voluntarily Causing Grievous Hurt by Use of Acid, etc

This section provides punishment for causing grievous hurt by throwing acid. Under this section when a person causes permanent or partial damage or deformity to, or burns or maims or disfigures or disable any part or parts of body of a person or causes grievous hurt by throwing acid or by administering acid to that person or by using other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt then he shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life and with fine:

- Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim.
- Provided further that any fine imposed under this section shall be paid to the victim.

Section 326B: Voluntarily Throwing or Attempting to Throw Acid

This section deals with the throwing of acid which does not result in injury or attempt to throw acid. When a person throws or attempts to throw acid on any person or attempt to administer acid to any person or attempt to use any other means with the intention of causing permanent or partial damage or deformity

or burns or maiming or disfigurement or disability or grievous hurt to that person shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years and shall also be liable to fine.

The explanation I of the section says that "acid" includes any substance which has the acidic corrosive character of burning nature, capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability.

Explanation II says that damage or deformity need not be irreversible. For the purpose of Section 326A and Section 326B, permanent or partial damage or deformity shall not be required to be irreversible.

Section 100 of IPC also provides that right of private defence of the body may extend to cause death when there is an act of throwing or administering acid or attempt to throw or administer acid which may cause a reasonable apprehension of grievous hurt.

Sec 166A states that if any police officer fails to record any information given to him under sub-section (1) of section 154 of the Code of Criminal Procedure, 1973, in relation to cognizable offence punishable under section 326A, section 326B, section 354, section 354B, section 370, section 370A, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509, shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine.

Section 166B provides that whoever, being in charge of a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, contravenes the provisions of section 357C of the Code of Criminal Procedure, 1973, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.

Provisions under Code of Criminal Procedure, 1973

Section 357A of the Code of Criminal Procedure provides for the Victim compensation scheme. According to it, every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation. It also states that If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make a recommendation for compensation.

Where the offender is not identified, but the victim is identified, and no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for the award of compensation. On receipt

of such recommendations or on the application, the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for an immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer.

Section 357B states that the compensation payable by the State Government under Section 357A shall be in addition to the payment of fine to the victim under Section 326A or Section 376D of the Indian Penal Code.

357C. Treatment of Victims

It is mandatory on the part of the all public and private hospitals to provide immediate first aid medical treatment to the victim and such treatment shall be free of cost for acid attack victims. They are also under an obligation to immediately inform the police of such incident.

Judicial Response

*State of Karnataka v. Joseph Rodrigues*³ was a landmark case involving an acid attack. In this case accused threw acid on a girl, Hasina for refusing his job offer. This deeply scarred her physical appearance changed the color and appearance of her face and blinded her. The accused was convicted under section 307 of IPC and sentenced to imprisonment for life. A compensation of Rs. two lakhs was paid by the accused. This compensation was in addition to trial court fine of Rs. 3, 00,000. In this case, for the first time, a large sum of compensation was given to the victim to meet the medical expenses and cost of plastic surgeries.

The Supreme Court on February 2013⁴ in the matter of *Laxmi v. Union of India & others* directed the States and Union Territories to frame rules to regulate the sale of acid and other corrosive substances and made the acid attack a non-bailable offence. The Hon'ble Court also asked the Central and the State government to work together and make necessary rules under the Poison Act, 1919 for making the acid attack a non-bailable offence. Court also found that easy and cheap availability of acids in the open market has proved to be a major factor responsible for increasing acid attacks on women and issued following directions to the State Government and Union Territories that

³ Decided in Hon'ble High Court of Karnataka on 22nd August 2006

⁴ Writ Petition CRL. No. 129 of 2006

- (i) Over the counter sale of acid is completely prohibited unless the seller maintains a log/register recording the sale of acid which will contain the address of the person to whom it is sold.
- (ii) All sellers shall sell acid only after the buyer has shown:-
 - a) A photo ID issued by the government which also has the address of the person.
 - b) Specifies the purpose of procuring acid.
- (iii) All stocks of acid must be declared by the seller with the concerned Sub Divisional Magistrate within 15 days.
- (iv) No acid shall be sold to any person who is below 18 years of age.
- (v) In case of undeclared stock of acid, it will be opened to the conserved Sub Divisional Magistrate to confiscate the stock and suitably impose fine on such seller up to Rs. 50,000/-.
- (vi) The concerned Sub Divisional Magistrate may impose fines up to Rs. 50,000 on any person who commits a breach of any of the above directions.

Despite all these directions of the Supreme Court acid is easily available in the open market without any check on the buyer.

In *Vinodhini Acid Attack Case*⁵ 23 years old Vinodhini, a software engineer employed in Chennai suffered severe burn injuries when Suresh Kumar, 32, a construction worker, threw acid on her in Karaikal at around 10.30 pm on November 14, 2012. The attacker, who was known to Vinodhini's father Jayabalan, had been stalking her, insisting that she marry him. She sustained 40% burns and lost her vision. She died three months later in a hospital. On 20th August 2014 Additional district sessions judge sentenced the accused Suresh to life imprisonment and an additional two two-year jail terms for causing injuries using dangerous weapons. He was also fined Rs 1 lakh, half of which was directed to be given to Vinodhini's family as compensation. The court directed that failure to pay the penalty will cause him to spend another three years in prison. The case was fast tracked and decided in 4 months which is a huge achievement for the Indian Courts traditionally predisposed to take years to arrive at conclusions and pass judgments.

In the case of *Mohammad Kamal Hussain v. State Govt. of N.C.T. of Delhi*⁶, deceased Ayesha was married to the accused in the year 1995 and out the wedlock they had two kids- a son and a daughter. Mother of the deceased also used to live with them. Accused was an alcoholic and used to beat his wife on minor issues.

⁵ <http://timesofindia.indiatimes.com/city/chennai/Stalker-gets-life-term-in-Vinodhini-acid-attack-case/articleshow/21947489.cms> last visited on 15th April 2014 at 11 pm.

⁶ Delhi High Court Judgement delivered on 11th February 2009 in Criminal Appeal No. 37/2005

He was jobless also and did not want to do any work. Deceased and her mother were rag pickers. On the night of 27th January 2003, a fight took place between the accused and deceased. Accused tried to beat the deceased but her mother intervened and saved her daughter. The accused then threatened them of dire consequences. Next day, when the mother of the deceased went to pick up the children from school. Accused came to the house with a bottle full of acid in his hand. Deceased was resting on a bedsheet at that time. He threw the whole acid on the deceased and when deceased started screaming due to the burning he ran away from there. Deceased was taken to the hospital only when her mother came back from the school. She remained admitted in the hospital for one month but her condition kept deteriorating and finally she died on 28th February due to the septicemia. Her post mortem report revealed that she suffered 30% burn injuries due to acid burning. The court convicted the accused under section 302 of the Indian Penal Code. He then filed an appeal in High Court and contended that she could have saved if specialized treatment was given to her. The court rejected his contention and held that explanation of section 299 clarifies "where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skillful treatment the death might have been prevented."

In *Satish Kumar Gulati v. State (Government of NCT of Delhi)*⁷, there was marital disputes between the accused and his wife and the accused used to torture and harass as he had doubts on her character. Unable to bear the harassment the wife decided to take divorce. On the day of the incident when the wife was sleeping accused made her awake and started fighting with her. After that, he went outside the room by saying that he is going to fetch milk. After some time, he came back with a jug filled with acid in his hand and threw the acid on the wife while she was lying on the bed. While throwing acid he said "Mein aaj tujhe khatam kardeta hoon." Due to the burning sensation, her wife started crying. On listening her scream neighbors gathered there and called the police. After some time police came in a PCR van and took the deceased to the hospital. In the hospital, deceased gave her statement that her husband brought acid in a jug and threw it on her. After that, she died the same day. Her statement was considered a dying declaration. Post mortem details revealed that the cause of that was shock resulted due to the acid attack. And she had suffered 50 per cent burn injuries. Police also recovered the jug from the place of incident and the forensic report find the traces of acid in the jug. While deciding the matter the court corroborated medical and forensic evidence with the dying declaration of

⁷ Judgement delivered by High Court of Delhi on 11th February 2010 in Criminal Appeal No. 100 of 1997

the deceased and held the husband liable for causing the murder of his wife and convicted him under section 302 of Indian Penal Code.

*Raju Ram v. State*⁸ is another case where acid was used by the husband against her wife and kids. Champa was married to the accused Raju in 1992. Raju was addicted to liquor and used to beat her wife and two daughters. He used to demand money from her wife and his brother. On 4th October 2002 after a fight between them, Champa left her matrimonial home with her daughter and went to her brother's home. Next day Raju came to his brother's home and threw acid on Champa and both daughters. Due to the burn injuries, her younger daughter Hadbu died. Accused was then charged under section 302, 307 and 498A of Indian Penal Code. Post mortem report of their daughter revealed that she died due to the shock received because of the excessive corrosive burn injuries. Addition Session Judge convicted the accused under all the above mentioned sections of the Indian Penal Code.

The accused then filed an appeal in Rajasthan High Court, challenging his conviction by the trial court. The high court rejected his appeal and held, "The coming of Raju in night hours with concentrated sulphuric acid and throwing of that on Champa and minor girls in such a quantity that ultimately caused the death of Hadbu, is sufficient to establish the intention of killing Hadbu. The evidence available on record is also adequate to prove the commission of an offence punishable under section 498 A of Indian Penal Code. On objective appreciation of evidence and scrutiny of record, we are convinced with learned Public Prosecutor that the trial court did not commit any wrong in accepting the prosecution story." The court maintained his conviction.

In *Subhash v. State*⁹, accused was the maternal uncle of the deceased. He used to misbehave and asked for sexual advances from the deceased. On the day of the incident, they had a quarrel and the Deceased Nirmala scolded him for misbehaving with her. The accused threatened Nirmala that she has to bear the consequences for the same. In the night when the deceased was sleeping with her sisters in her room. Accused came there and threw acid on them which he was carrying in a jug. On hearing their noise her father came from his room. He then took his daughters to the hospital. Deceased was first taken to the Sanjay Gandhi Hospital and after giving first aid medical treatment, hospital shifted him to JPN Hospital. She had received 62% burn all over her body covering the lower abdomen, thighs, legs and genital region injuries. Twenty days after the incident she dies due to infection in burn wounds. The post mortem report of the deceased suggested that death is caused because of the septicemia resulted from

⁸ Judgement Delivered by Rajasthan High Court on 29th March 2010 in D.B. Criminal Appeal Noo. 778/2003

⁹ Criminal Appeal No. 584/2012

the dermo-epidermal burn. The court held that the death of the victim is caused due to septicemia consequent upon infected dermo-epidermal burns. Such an infection could be caused by chemical injury only. Therefore, her death is resulted because of infection caused by acid attack only and not by any other infection. The court upheld the judgement of the trial court and sentenced the accused with imprisonment for life.

In November 2013, Hon'ble Delhi High Court in the case of *Mahender v. State*¹⁰ termed acid attacks as one of the most "horrifying forms of gender based violence". In this case, the accused poured acid on his wife after she asked for the divorce which resulted in her death. Accused called the victim to meet him. When the victim reached near Britannia Chowk, Shakurpur, Delhi accused poured acid on her which he was carrying in a bottle. He kept the bottle in his jacket. The court sentenced the accused to imprisonment for life and a fine of rupees ten thousand.

In the case of *Nitin Kumar Arora v. State NCT of Delhi*¹¹, In this case, the deceased got married to accused in the year 2005. After a few days of marriage, her husband and mother in law started harassing her for the demand of dowry. Due to the harassment and torture, the mother of the deceased brought her back to her place a few months prior to the incident. After coming back to her paternal home deceased started working in a cosmetic shop. On 20.11.2006 accused came to the shop where the victim was working and a verbal fight took place between them. The owner of the shop asked the accused to get out and not to create a scene at her shop. Accused left from there but after 15 minutes he came back with a bottle of acid and threw it all over the face, neck and upper body of the deceased. She was then taken to GTB Hospital where she died after a few days. Post mortem report revealed that death was happened due to shock and septicemia which resulted due to excessive burn injuries. She had suffered 40% burn injuries. Additional Session Judge held the accused liable under section 302 of Indian Penal Code and sentenced him to rigorous imprisonment for life and a fine of rupees fifty thousand. The court also directed that imprisonment for life, in this case, would be whole life imprisonment without any commutation. An appeal was filed in Delhi High Court against the judgement of the trial court by the accused but the High Court also upheld the conviction pronounced by the trial court.

Another case that pushed the state to bear all the expenses of providing medical treatment including plastic surgery was *State v. Pramod*¹². Accused had an infatuation towards the victim. He proposed the victim but she refused. In order

¹⁰ CRLA. 788/2011, Judgment delivered on 01, 2013

¹¹ CRLA 182/2010 Delhi High Court judgement delivered on 30th August 2013

¹² Judgement Delivered on 5 July 2014 by Delhi High Court, unreported

to take revenge, he started following her and recording her all activities. One day, as soon as the victim passed the Pramod, the attacker spray acid on her face. Due to the contact of acid, the girl felt that her face was burning and her clothes were also burnt. After filing the FIR under section 307, the case went into the court. By analyzing each and every situation and difficulty faced by the victim, the court declares an order to take a tough step against the attacker. Court ordered that the government of NCT of Delhi is liable to pay all the expenses including plastic surgery of the girl. Accused was convicted under section 326A and a fine of rupees Rs. 50,000 was levied upon him.

Conclusion

Despite the introduction of many legislative provisions and positive response of judiciary towards the rehabilitation of victims of acid attacks, incidences of acid attacks are on the rise. It is a need of the hour that the amendments introduced by legislature and directions issued by the Supreme Court should be implemented strictly. There is an urgent need that the provisions related to regulations on the sales of acids should be executed at the grass root level. Moreover, the attitude of this male dominating society also needs to be changed and they should start respecting the women.

Effect of Patenting and Competition Law on the Pharmaceutical Industry and Public Health Issues in India: Contemporary Analysis

Avinash Kumar & Prof. (Dr.) Sanjay Prakash Srivastava***

1. Introduction

*Right to Health*¹ has been incorporated² in almost all the Constitutions of the world including India³ and have been recognized by the national, regional and in the many international documents. However, despite the number of provisions in the national and international instruments; there are papers, pledging public health issues across the globe.⁴ Pharmaceutical (“hereinafter *Pharma*”) Sector is a very critical sector in maintaining public health and life of the people. Why it is so, has been answered by World Health Organisation (“hereinafter *WHO*”), it says that due to the pressure to maintain sales, “*there is an inherent conflict of interest between the legitimate business goals of manufacturers and the social, medical and economic needs of providers and the public to select and use drugs in the most rational way.*”⁵

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¹ Right to health indicates the individual's health issues, but in the larger context, it relates to a public health issue.

² Incorporate as either fundamental right or the legal right.

³ Though not explicitly but the Constitution also recognizes this right under Art. 21. In the case of *N.D. Jayal v. Union of India*; the Apex Court held that “*Right to access to quality and affordable medicines is an important component of the right to health*”. The court further held that “*the right to access to medicines gets violated in the midst of many anti-competitive practices*”.

⁴ For more details see <https://www.livemint.com/Opinion/qXD81719wXXDQVpGyyARrO/Seven-charts-that-show-why-Indias-healthcare-system-needs-a.html> (accessed on 01.02.2019).

⁵ Available at <http://www.who.int/trade/glossary/story073/en/> (accessed on 15.02.2019).

Enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being⁶ thereby public health issue is the greatest concern of the state.⁷ The issue comes when public health and patients struggle with high prices for pharma products⁸ due to the non-competitive market. The above issue may be solved with the removal of patenting procedures or by not allowing patenting of the pharma products. But on the other hand, it is proved that after disallowing the patenting of the pharma products, the pharma industry would stop expanding on the research and development (“hereinafter *R&D*”) of new medicines (say the life-saving medicines for the advanced disease).

Hence, the issue needs the greater concern of the legislature, researcher and academician, as they are expected to find a solution or a balancing approach so as to maintain the competitive environment as well as encouragement for the inventors. Competition law has rarely been used to address excessive pricing of pharma products⁹ while the IPR Laws have achieved success in protecting rights of the inventors but have failed to achieve a balanced approach to protect the actual user, as the IPR laws have nothing to do with the actual user.

2. Right to Health

The right to health is an inclusive right. Art. 21 of the Constitution provides that, “No person shall be deprived of his life or personal liberty except according to the procedure established by law” which also includes right to health, which substantially includes the access to affordable good-quality medicines. In Part VI of the Constitution also, there are several provisions in respect of health. Further, Art. 48 makes the state duty bound to provide a raised standard of living and adequate nutrition to people. This includes equal and timely access to basic health services, health-related education and information must be provided to all without discrimination. There are other national instruments including Mental Health Act, Prevention of Food Adulteration Act, The Drug and Cosmetic Acts, Pre-Natal Diagnostic Technique Act, Occupational Safety and Health Laws etc. which deals with the public health issues. But it is found that none of the above statutes has dealt with the provisions relating to competitive prices of the drug.

Besides the national instruments, there are various international instruments which deal with public health issues. The promotion of human rights is one of

⁶ Preamble to the WHO Constitution.

⁷ Difficulties are not limited to low-income countries, but this has also been observed in developed countries.

⁸ Prices for the medicines to treat hepatitis C, Cancer etc. are found too much costly.

⁹ Many practices in the pharma industry involve concerns of competition. Healthy competitive policy in pharma sector is needed to ensure quality and affordable services.

the principal purposes of the United Nations. The Declaration of Alma Ata 1978¹⁰ strongly highlights the need for urgent action to protect and promote the health of all people worldwide. Many whose resolutions have timely emphasized the need for universal access to healthcare.¹¹ Art. 6 of the Convention on the Rights of the Child states that “*States Parties recognize that every child has the inherent right to life*” and “*States Parties shall ensure to the maximum extent possible the survival and development of the child.*”¹² The Committee on the Rights of the Child has highlighted the issue of HIV-AIDS as it affects children being orphaned and it affects their health and development.¹³

The regional instruments also provide for the protection of human life e.g. Art. 2 of European Convention on Human Rights provides that “*the state must never arbitrarily take someone’s life and must also safeguard the lives of those in its care. The state must carry out an effective investigation when an individual dies following the state’s failure to protect the right to life.*”¹⁴ Art. 4 of the African Charter establishing the right of every human being to “*respect for life and integrity of his person.*”¹⁵ Inter-American Commission on Human Rights recently in *Odir Miranda v. El Salvador, 2009* heard the case relating to the failure of states to provide medications and decided in favour of the petitioner.¹⁶

3. Pharmaceutical Industry in India

India being the 2nd largest country in the world has been the largest market for the pharma industry too. It ranks 4th in terms of volume and 13th in terms of value globally.¹⁷ India has become a prime destination for manufacturing of branded, generic medicines with the strong export element,¹⁸ also fulfilling approx. 95% of pharma needs of the country.¹⁹ India and Japan are the only

¹⁰ The first international declaration highlighting the issue of primary health care services was adopted at the International Conference on Primary Health Care on 6–12 Sep 1978.

¹¹ Available at http://www.cci.gov.in/sites/default/files/PharmInd230611_0.pdf (last seen on 11.08.2018).

¹² Convention on the Rights of the Child, 1989.

¹³ U.N. Commission on the Rights of the Child, 27th Session, 721 mtg. 5, U.N. Doc. CRC/C/15/Add.155 (2001).

¹⁴ In *McCann vs. The United Kingdom* 1995, 21 EHRR 97, para 197. European Court of Human Rights has described Art.2 as one of the most fundamental provisions.

¹⁵ African (Banjul) Charter on Human and Peoples’ Rights, 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

¹⁶ The petitioners alleged that El Salvador’s refusal to purchase the triple therapy and other medications for HIV-AIDS treatment failed to guarantee the rights to life and health.

¹⁷ Available at http://circ.in/pdf/Pharmaceuticals_Sector.pdf (accessed on 04.01.2019).

¹⁸ It is estimated that around 40% of the generic drugs in the US are supplied by India.

¹⁹ FICCI Report 2005.

countries where western MNCs do not dominate the pharma industry.²⁰ Until 1970s India was highly dominated by the non-domestic MNCs and characterised by relatively high drug prices.²¹ The above achievements since its inception are considerably great.

In the last two decades, the number of pharma industry has increased to more than 20000 units. The Mashelkar Committee has recognized 5877 companies in the country, on the basis of production capacity.²² Out of these 5877 companies, only 250 companies control 70% of the market share. Indian pharma sector is a high technology concentrated industry, not limited to drug manufacturing but also having the technology for R&D. The key feature is its expertise in generic drugs manufacturing.²³

4. A key issue in the Pharma Industry in India

The key issue in the pharma industry is about patenting of drugs/ medicines, and exemption from competition law. Patent rights provide the incentive for originators, allowing them exclusivity to produce the patented drug for a limited period. Competition law provides the stick, preventing originators from abusing their exclusivity and protecting the entry of generics into the market at the expiry of patents.²⁴ There is reasoning in favour of both, but it is not clear as to who should be given the preferential treatment. Puzzlement is there as to, if we give excessive importance to the Competition Law and Policy, the patent rights holders would be discouraged for doing R&D, as in competitive environment it is difficult to recover the amount invested in R&D.

²⁰ Sudip Chaudhuri, *The WTO and India's Pharmaceuticals Industry- Patent Protection, TRIPS, and Developing Countries*, OUP, 2005, pg. 18.

²¹ Domestic firms were in a position to supply only 25% of the total use.

²² There are a number of illegal and unregulated manufacturing units in the country which produces spurious drugs. See Report of the Expert Committee on A Comprehensive Examination of Drug Regulatory Issues, including the Problem of Spurious Drugs, Ministry of Health and Family Welfare, India, 2003, para 13, pg.3.

²³ A drugs generic name is the pharmacological name of the compound assigned either by WHO's International Non-proprietary Names Committee or by the US Adopted Name Council. Drugs whose patents have expired are also included in the category of generics. Commodity generics marketed by a wide variety of companies. Branded generics are either unpatented drugs sold under a brand name or patent-expired products sold under a generic name. (See Zafrullah Chowdhury, *The Politics of Essential Drugs: The Makings of a Successful Health Strategy: Lessons from Bangladesh*, Zed Books Ltd. London, 1995, pg. 8).

²⁴ Kale Warsha and Pearl Marcus, *Lessons from Europe: Competition law in India's pharmaceutical sector*, 07 Aug 2009, available at <http://www.legallyindia.com/20090807126/Legal-opinions/Lessons-from-Europe-competition-law-in-India-s-pharmaceutical-sector> (accessed on 11.01.2019).

It is pertinent that unlike other consumer goods, the consumers are not free to choose pharma products, the medicines and its brands. The medicines are prescribed by the doctor and consumers might not have any idea, despite the availability of other cheaper and better substitutes available in the market.²⁵ The doctor creates an artificial demand for expensive drugs. There is a high probability that the manufacturer of generic drugs which do not have strong marketing may be forced out of the market and thereby result in the elimination of competition.²⁶

In most countries, regulation of drug prices is born out of public expenditure due to the state's role in public health issues. A substantial portion of the population is covered through health insurance and public health schemes started by the government, whereby consumers are not affected directly by the high prices of drugs or medical services. As opposed to this, a substantial portion of the Indian people is dependent and has to meet all the medical expenses on his own, making the pharma sector regulation mandatory.

5. Patenting of Pharma and its Effect on Consumers

Far or less, the pharma industry has been dominated by the patent holders and the stakeholders did not allow the competitors to produce the generics of the patented drugs. The situation became miserable, when the expectation that newly introduced competition law would find a way, was totally conflicting with the expectation. The patent things were excluded from the purview of competition law and policy under Sec 3²⁷ and Sec 62²⁸ of the Competition Act, 2002. The patent company was allowed to make violations of Sec 3 (5) of the Act or to say they were allowed to have agreements violating competition law and principles.

The patent company start paying to the competitor for not introducing the generic medicines;²⁹ even though the patent period expired (such payments are

²⁵ Self-reliant domestic drug industry emerged with the capacity to manufacture and provide at a low cost a wide array of bulk and finished drugs.

²⁶ Round table conference on Generic Medicine II, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M\(2014\)2/ANN3/FINAL&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2014)2/ANN3/FINAL&doclanguage=en) (accessed on 12.01.2019).

²⁷ The Copyright Act, the Patents Act, the Trade and Merchandise Marks Act, the Trade Marks Act, the Geographical Indications of Goods (Registration and Protection) Act, the Designs Act, the Semi-Conductor Integrated Circuits Layout-Design Act and the right relates to exclusively to the production, supply, distribution or control of goods for export are excluded from the purview of Competition law.

²⁸ The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

²⁹ See Zafrullah Chowdhury, *The Politics of Essential Drugs: The Makings of a Successful Health Strategy: Lessons from Bangladesh*, Zed Books Ltd. London, 1995, pg. 8).

known as reverse payments). The agreement between the branded and generic medicine companies is an example of the politics of drugs which was clearly visible in the below case.³⁰ Abbott had a patent on Hytrin, which amounted \$542 million in the US in 1998. When Abbott's patent on Hytrin was expiring, Abbott calculated that entry of a generic version of Hytrin would eliminate over \$185 million in Hytrin sales in just six months. Abbott paid Geneva approximately \$4.5 million per month to keep Geneva's generic version of Abbott's proprietary drug off the U.S. market, potentially costing consumers hundreds of millions of dollars a year. The above case is as per the patent laws but in clear conflict with the competition law and policy, being anti-competitive prohibiting entry of the other market player into the market.

It is noteworthy that only generic entry in the pharma sector may reduce the price after the expiry of the patent. The abuse of IPRs where the patent holder refuses to grant compulsory license and a backdoor mechanism to retain patent on it for a minimum period of three years is adopted in the name of data exclusivity. The Patent Act does not provide for prevention, as this act only concern itself with granting patent monopoly and not its abuse.

Further, sometimes the patent holder buyout the competitors and sometimes monopoly over its product after the expiry of the patent period may be retained through Evergreening by bringing small changes in the product and then claiming a patent right for another twenty years.³¹ Though, Evergreening of the patent is prohibited by the Indian Patent Act. In India, enhancement of the known efficacy or the mere discovery of any new property or new use for a known substance or mere use of a known process unless such known process results in a new product or employs at least one new reactant are not considered as the invention.³² Indian Patent Act has another mechanism to prevent patent monopoly under Sec 84 by the grant of Compulsory License.³³ This is to ensure that the patents do not impede the protection of public health and nutrition and patents rights are not abused by patentees. Compulsory licensing serves to strike a balance between two disparate objects of rewarding patentees for their invention and making patented products particularly pharma available and affordable to the larger public. This is granted to companies to produce generic versions of patented drugs.³⁴ However, in all cases, the compulsory license is not granted and it is here that the

³⁰ *Abbott Laboratories v. Geneva Pharmaceuticals*, July 1, 1999, US Court of Appeals for the Federal Circuit.

³¹ Available on <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.398.5945&rep=rep1&type=pdf> (accessed on 11.04.2018).

³² Section 3 (d), Patent Act, 1970

³³ This would be welcoming efforts to give authority to grant the compulsory license to the CCI in consultation with the patent authorities, rather than the other way around.

³⁴ The first compulsory license in India was granted to Natco Pharma Ltd.

Competition Commission of India (hereinafter CCI) can play an effective role. The CCI may apply Competition law and policy if pharma enterprises are engaging in overpricing of patented drugs or if the pharma companies are irrational in giving license to the competitors. In other words, if the terms of the license are unreasonable the CCI may impose fine or something.

It is also necessary to mention herein that though IPR is expressly excluded from the purview of anti-competitive agreements in Sec 3 there is no such exclusion provided in sections dealing with abuse of dominant position and combinations. These two provisions empower competition authority to grant a compulsory licence or take any other appropriate action in case of abuse of IPR through explicit provisions.

It is also notable that due to the MNCs dominated role in the pharma sector in early times, under Designs Act, 1911, only those foreign players could have entered into India that had technological capabilities to bring medicines. However, due to the strong patent regime, the cost of medicines was highly unaffordable.³⁵ Since 2001, automatic approval was allowed up to 100 per cent foreign equity in the pharma sector this somehow was responsible for the domestic industry maintaining its competitive edge. But still the price was high and access to such products was not guaranteed to all the social strata.³⁶

The miserable condition existing in the pharma industry led the government to accept the Ayangar Committee report which recommended "*adopting the patent system prevailed in Germany. The Germany patent system confers an exclusive right to the inventor to manufacture and sell products according to a given process. The government enacted the Patents Act, which allowed process patent protection for pharma products for a period of 7 years.*" The above law fortified domestic manufacturing of essential drugs and to adopt a competitive environment in the Pharma sector. The Act also allowed Indian manufacturers, specialized in reverse engineering to apply for the process and produce indigenous drugs. TRIPS agreement mandated to bring 'Product patents' and 'Process patents' in all fields of technology, but this has not been adopted in the Indian Patent Act.

Recently, the 'product patent' has been added in the Indian Patent Act through the 2005 amendment.³⁷ The 2005 Amendment further strengthens the patent

³⁵ In fact, average drug prices in India were among the highest in the world.

³⁶ Unused Patents," (1964) Weekly Notes, *Economic & Political Weekly*, Vol. 16(21), p. 42 accessed on Nov. 4, 2015, from http://www.epw.in/system/files/pdf/1964_16/21/unused_patents.pdf.

³⁷ Available at http://www.cci.gov.in/sites/default/files/PharmInd230611_0.pdf (accessed on 11.07.2018).

regime which further aggravated the price of a patented drug.³⁸ It was expected that the implementation of product patent would increase R&D, but this expectation was not fulfilled. India continued to import pharma products from other countries. The flourishing domestic generic pharma industry has to wait for the patent to expire before it was able to introduce a generic.

In the case of *FTC v. Actavis*³⁹. The US Supreme Court rejected the argument that a reverse payment during the term of a patent would be automatically shielded from antitrust scrutiny, absent patent fraud. It was held that while a patentee has the right to exclude others from infringing its patent, compensation to foreclose any *possible* challenge to that patent and keep competitive pricing at bay might have significant adverse effects on competition. By such a judgment US Supreme court made a balance between competition law enforcement and rights of a patentee.⁴⁰

The further developments took place in the pharma industry was good for the consumers as these eliminated incentives to the foreign MNCs and encouraged domestic pharma companies specializing in making generics. The national firms were helped thru R&D by the government. Hindustan Antibiotics Ltd and Indian Drugs and Pharmaceuticals Ltd significantly contributed to R&D and both the companies split-over the private sector. Central Drug Research Institute, Indian Institute of Chemical Technology and National Chemical Laboratory offered various supports to the pharma sector.

Still, the above provisions though protected the patent right holder, but could not do anything in favour of the consumer at large. The above provisions under Sec 3 and Sec 62 of Competition Act may be limited to the extent of non-violations of competition principles or this may be formulated as the pharma industry is allowed to have the agreement in violation of constructive competition principles, but may not be allowed to have the anti-competitive agreements.

6. Competition Law and the Pharmaceutical Industry

Competition law is the best means of ensuring access to goods and services at competitive prices. This would help consumers to have equitable access to healthcare facilities. Thereby, Competition provisions should be made applicable to the health delivery system and the patenting procedure, as well. As the role of

³⁸ India signed this agreement in 1994. Though in the beginning nothing substantial could be done, with the amendments in the statutes as per the spirit of the TRIPS agreement, the reflection of the above international instrument affected the national pharma industry too.

³⁹ 526 US 756 US SC Washington DC

⁴⁰ Available at <http://www.conventuslaw.com/archive/india-pay-for-delay-agreements-on-the-cci-radar/> (accessed on 08.02.2019).

the pharma industry in day to day life of the individual growing up, the gap needs to be addressed.

The Patent system by allowing a dominant position can block-out competition but on the other hand, the patent is also necessary. Hence, the competition law requires working in tandem with a diverse set of laws, rules and regulations.⁴¹ It is evident that there is a high market concentration in this sector.⁴² The consumers demand is essentially supply driven; the pharmacist has no incentive to be price-sensitive.⁴³ The usual assumption, that market mechanisms stabilize prices does not hold entirely true for the pharma industry.⁴⁴

6.1 Anti-Competitive Practice

Pharma value chain entering into collusion for profits and high trade margins, nexus between doctors and pharma companies, diagnostic tests ties (doctor gets a cut from each reference), a physician referring his patients to a specialist for further treatment, eliminating small pharma players, price fixing, depriving patients the best possible medicines and services at the lowest possible prices, collusive agreements, and tied selling, are the few examples of anti-competitive and can be covered by competition law. Though not all the practices can be covered under Sec 3 (5) of the Competition Act most of the above practices may be categorised as the anti-competitive by giving the broader implications of the Competition Act.

Anti-competitive practise in any sector is prohibited and thereby it is also prohibited in the pharma sector. For curbing the above anti-competitive practices, there are multiple legal and policy options including drug price control rules, competition law and policy and, patent laws may be utilised. The following practices in the pharma sector appear to be anti-competitive:

6.1.1 Anti-Competitive Practices by Doctors

The doctors though contribute mostly to the anti-competitive practices in the pharma industry, out of which 'irrational drug prescription' is the most

⁴¹ Available at http://www.cci.gov.in/sites/default/files/PharmInd230611_0.pdf (accessed on 11.12.2018).

⁴² Sakthivel Selvaraj, *How Effective is India's Drug Price Control Regime?* Harvard School of Public Health, 2007. Available at <http://www.hsph.harvard.edu/research/takemi/files/RP256.pdf> (accessed on 15.02.2019).

⁴³ V.R. Fuchs, *Physician-Induced Demand: A Parable*, Journal of Health Economics, Vol. 5, 1996. Available at [http://dx.doi.org/10.1016/0167-6296\(86\)90011-1](http://dx.doi.org/10.1016/0167-6296(86)90011-1) (accessed on 15.12.2018).

⁴⁴ Amit Sengupta, *Study of National Health System in India with regards Access to Health Care and Medicines*, 2010. Available at http://www.haiap.org/wordpress/wp-content/uploads/2008/08/Dr.-Amits-Project_india.pdf (accessed on 11.01.2019).

unreasonable practice by the doctors.⁴⁵ They prescribe comparatively more expensive drugs⁴⁶ in profit considerations and therefore interrupt free and fair competition.⁴⁷

6.1.2 *Anti-Competitive Practices by Pharmacists*

Another set of anti-competitive practices is played by the pharmacists. The pharma company owners are forming cartel⁴⁸ (though cartelisation is prohibited under Competition law) through their association namely All India Organisation of Chemists and Druggists (hereinafter AIOCD).⁴⁹ The AIOCD launch boycotts against pharma companies to make huge margins.⁵⁰ The above situation is not good both from the competition perspective and it is also not good for the pharma industry. This may create market concentration, barriers to price competition and lack of freedom in consumer choice.

Another practice companies would certainly come under Section 3(4) is the practice where the pharmacist does not provide the cheaper version even if the doctor prescribed the same. This may be because of 'exclusive supply agreement' prohibited under in Section 3(4) of Competition Act. The exclusive supply agreement is distortive to competition principles.

6.1.3 *Anti-Competitive Practices by Hospitals*

The hospitals in collusion with doctors and pharmacists are also contributing to anti-competitive practices in the pharma sector. Hospitals usually in agreement with drug manufacturers exploit consumers. The Andhra Pradesh state consumer forum fined a private hospital for entering into an agreement with a

⁴⁵ Instead of writing costly medicines, doctors should prescribe the cheapest and qualitative drugs.

⁴⁶ The basic tenet of competition law and policy is to avail the best possible services at the affordable prices.

⁴⁷ Profit should not be the driving factor for doctors.

⁴⁸ Nitya Nanda and Amirullah Khan, *Competition Policy for the Pharmaceuticals Sector in India*, CUTS International in Pradeep Mehta (ed.), *Towards a Functional Competition Policy for India*, 2004, pg 189.

⁴⁹ Almost 60% of all pharmacists are members of AIOCD. Pharma companies boycott the manufacturers' product until a favourable margin arrives. It is not good from the consumers' perspective. Determining the price of the product through an agreement leads to cartelisation which is strictly prohibited under the Competition Act, as falls under Sec 3 (4). Doctors or the chemists selling in lieu of commission or higher margin need to penalize and deter such behaviour.

⁵⁰ AIOCD mandated to obtain a *no-objection letter* before a new drug could be sold there. See Daniel Pearl and Steve Stecklow, *Drug Firms' Incentives Fuel Abuse by Pharmacists in India*, Wall Street Journal, 2001.

drug manufacturer to supply drugs at prices above the market price. Hidden costs, which is an issue in many hospitals is also anti-competitive in nature.

6.1.4 Tied Selling⁵¹

Tied selling of medicines is another problem is found where the consumers are suffering. The consumers are forced to buy drugs from a particular shop. The above practice is wide-ranging in the case of private hospitals and doctors. The hospitals and doctors in consideration of profit compel the patients to diagnostic testing and others reports from a particular testing agency.

6.1.5 Combination of Anti-competitive Practices

Mergers and Takeovers in the pharma sectors have grown considerably in the past few years.⁵² Except for the existing anti-competitive practices within the national domain, and few cases of abuse of dominant position, the concerns of the pharma industry is the recent aggressive M&A especially the MNCs merging with the national pharma industry.⁵³ Also, the collaborations and agreements are making the above concerns sharper.⁵⁴

Though sometimes M&A is beneficial for the national economic or economic integration, sometimes it is considered bad in law and policy, as and when done with the intention of curbing competition or if it really curbs the competition. Though mergers do not distort the competition the recent M&A was seen as a threat for Indian competition.⁵⁵ The regulation of combination under Sec 5 & 6 of the Competition Act has not been introduced rigorously as this may adversely affect the economy. For the application of Sec 5 & 6, it is necessary that the company would touch the threshold limit prescribed by the CCI. It is noteworthy that the threshold limit prescribed under the competition act,

⁵¹ Tied selling is restricting the choice of consumers are prohibited under section 3(4) of Competition Act.

⁵² The United States-based Myland Inc acquired Matrix laboratory in 2006, Fresenius Kabi acquired Dabur Pharma in 2008, Japan-based Daiichi Sankyo acquired Ranbaxy Labs Ltd in 2009, Sanofi Aventis acquired Shantha Biotech in July 2009 and Abbott Labs acquired Piramal Healthcare in 2010.

⁵³ Pharma MNCs captured an approx 35% market share by 2017.

⁵⁴ Bayer and Zydus Cadila agreed to set up a joint venture namely Bayer Zydus Pharma, Sun Pharma with MSD (Merck & Co) to market and distribute Merck's Januvia (sitagliptin), Janumat with Sitagliptin & Metformin and Par Pharmaceutical with Edict Pharmaceuticals etc. Hikma Pharmaceuticals invested in Unimark Remedies & API intermediaries. For more details see Espicom Business Intelligence Report, 2011.

⁵⁵ Maira Committee report 2011. URL:<https://donttradeourlivesaway.files.wordpress.com/2012/06/maira-committee-report.pdf> Accessed on 17-2-2016

though revisited regularly⁵⁶ by the commission are general in nature and deals with every sector.

Firstly, the issue becomes a concern when a foreign country having a strong market position merges with an Indian Company, as it has a tendency to create dominance and it is feared that dominance might be abused.⁵⁷ It is apprehended that it may eliminate a significant direct competitor in a relevant sector, particularly where there are a few substitutes and a new entry is difficult.

Secondly, the Pharma industry being less in value and assets never falls under the threshold limit and even if the M&A of the pharma industry affects the competition that cannot be regulated. In the 2011 Competition Bill, the sector-wise threshold limit was introduced which could not be passed by the parliament. The legislature should pass section wise threshold limit to tackle the above situation. The commission has failed to examine the pharma industry as the threshold limit is very high.⁵⁸ Since 2011, the CCI has passed orders in six M&A deals in the pharma sector. All six of them got approved.⁵⁹ The combination between Ranbaxy and Sun Pharma created some issue as an examination of Combinations was undertaken under Sec 29 of the Competition Act. The CCI initially raised objections to this merger citing the reason that the merger may adversely affect the competition.⁶⁰ However, CCI, later on, cleared the M&A with a condition that the companies have to divest eight drugs together – Tamlet brand for Sun Pharma and Eligard, Terlibax, Rosuvas, Raciper, Terlibax, Triolvance and Olanex for Ranbaxy.

⁵⁶ The commission revised the threshold limit several times. High-level Committee under the chairmanship of Arun Maira was set up to look into the takeovers of pharma companies. The Committee recommended approval by CCI for all pharma M&A deals. The committee also recommended tightening the takeover rules. For more details see Sangeeta Singh and Aman Malik, *Pharma deals set to face closer scrutiny*. Available at <http://www.livemint.com/2011/10/10233455/Pharma-deals-set-to-face-close.html> (accessed on 15.04.2019).

⁵⁷ Prachi Gupta, *Competition Issues in the Pharmaceutical Sector*, *Competition Law Reports*, 2013. Available at <http://www.cci.gov.in/sites/default/files/annual%20reports/ar2014.pdf> (accessed on 08.02.2016).

⁵⁸ Kumar Amitabh, *Creating a culture of competition*, *The Financial Express*, 28.01.2005 available at http://www.cci.gov.in/images/media/articles/culture_competition_28_1_2005_FE_20080409115245.pdf (accessed on 29.03.2019).

⁵⁹ The merger of RBIPPL with PPL; merger of ORLL into OCPL; merger of Mitsui & Co. Ltd and Arch Pharma labs; G & K Baby Care private limited and Danone Asia Pacific Industry; OCPL and HHPL; PHPL into PEL

⁶⁰ Available at <http://www.dnaindia.com/money/report-cci-says-sun-s-takeover-of-ranbaxy-may-hurt-competition-2016279> (accessed on 18.02.2019).

6.3 Role of Competition Commission of India

To protect the customers as a competition law expert CCI should test all haphazard ways of commercial life to iron out distortions and market strategies that are not desirable for healthy competition. CCI should look at this issue in depth and by giving wider interpretation to Section 3(4) (a) or Section 4(1)(c) of the Act bring within its scanner these issues. Further, while regulating the combination in the pharma sector, it is recommended that the threshold limit should be brought down. CCI should work in coordination with NPPA to bring competition issues at drug prices and maintain a competitive environment in the pharma industry.

CCI never interferes in the working of other regulatory bodies, but it is felt that in this sector the government regulations themselves create an obstruction for the competition, and therefore it is strongly felt that CCI should assume a position in all stages of drug procurement. One of the impediments in the application of competition law is found that it is very difficult to determine the relevant market in case of the pharma industry.

In *M/s Santuka Associates Pvt. Ltd. v. AIOCD & Ors*⁶¹, *Santuka Associates Pvt. Ltd.* alleged the abuse of dominant position by the AIOCD u/s 19 on grounds, *inter alia*, limiting and restricting the supply of drugs, threatening and coercing drug manufacturer USV to terminate its clearing and forwarding agency arrangement with the informant. AIOCD was directed to cease and desist anti-competitive practices within 60 days by virtue of Sec 3 and AIOCD was also directed to:

- i) To stop obtaining no-objection certificate for appointment of stockists and the pharma companies, stockists, whole sellers to be liberty to give discounts to the customers;
- ii) Inform that PIS charges were not mandatory and PIS services could be availed by manufacturers or pharma firms on a voluntary basis.

In *Hiranandani Hospital Case*⁶² CCI examined the conduct of super speciality hospital of Mumbai which refused maternity service to complainant. Cryobank International India and Hiranandani hospital had an exclusive agreement. The hospital was a dominant player in the field of maternity services in and around that area. The Hospital had abused its dominance by restricting the patient's choice. The commission declared the agreement null and void and imposed a penalty of Rs.3.8 crore.⁶³ The Commission also imposed a penalty of Rs.60 crore

⁶¹ 2013 COMPLR 223 (CCI)

⁶² Case no 39 of 2012.

⁶³ <https://www.indianbarassociation.org/wp-content/uploads/2013/02/The-Role-of-Competition-Commission-of-India-in-consumer-welfare.pdf> accessed on 12-2-2016

against GlaxoSmithKline and Rs.3 crore penalties were imposed on Sanofi India for indulging in unfair trade practices.

The cases of violation of competition principles are much more and the CCI has not been so effective in indicting them.

7. Concluding Remarks

Unlike other sectors, the pharma industry is influenced by a host of practices including price regulations, drug procurement by government agencies, insurance, nexus among players in the pharma industry and service providers (cartelisation), patent laws, safety policies, drug regulation, drug advertising regulation etc. Hence, the regulatory mechanism should play a crucial role to work with all such diverse set of laws, policies and regulation.⁶⁴

Though the consumers' interest has received paramount significance in the Competition Act, exclusion of patent laws led to a non-competitive environment. If consumers' interest has not been kept in the wisdom of pharma industry regulation and patent laws; in the country like ours where a maximum number of people is from lower social strata would obviously suffer. In such a situation, there is no use of developing life-saving medicines which cannot be afforded by the maximum number of people in India.

The purpose of regulating the pharma industry should not be to tear down the existing structure but to focus on promoting competitive outcomes and efficiency rather than promoting competition *per se*. The promotion of generic drugs in select categories e.g. the life-saving medicines needs greater concerns, mandatory price negotiations for patented drugs, checking anti-competitive practices like tied-selling, providing adequate incentives for *R&D*,⁶⁵ regulation of data exclusivity,⁶⁶ monetary trade margins in the pharma industry are few select categories which need to be regulated. This required from both the perspective of maintaining consumer welfare so as to reach the benefit to the people from all social strata and also to the business community. Any misbalance in the pharma industry may adversely affect public health.

⁶⁴ Available at http://www.cuts-ccier.org/pdf/Regulatory_Framework_and_Challenges_in_Indian_Pharmaceutical_Sector.pdf (accessed on 04.09.2019).

⁶⁵ The pharma industry relies on large costs of R&D for development of a successful product and often the success rate for any given R & D project is rather low. To encourage innovation some form of incentive as patent protection is required to be given, otherwise, companies would not invest in R&D. However, in most of the cases, there is a conflict between these two sets of Rights, i.e. Patent monopoly and consumer benefit. Therefore, by ensuring a healthy and effective competition policy a balance is required to be made between these two sets of interest.

⁶⁶ No data exclusivity should be granted as it is not in the best interest of the country and it is not required under TRIPS.

Counterbalancing the Right to Speech with Hate Speech!

Divya Sugand & Vatsal Saxena***

(A) Introduction

Following the eruption of the controversy regarding the alleged raising of anti-national slogans by unidentified students at the Jawaharlal Nehru University and the subsequent student-administration face-off¹, and more recently, the arrest of groups of youngsters in Madhya Pradesh, Himachal Pradesh and Bihar for allegedly shouting anti-India slogans and celebrating the victory of the Pakistani cricket team in the ICC Champions Trophy 2017 finals against India², there has been a heated discussion regarding the scope and extent of “Right to Freedom of Speech and Expression” under “Article 19(1)(a) of the Indian Constitution” guaranteed to all citizens of India, accompanied by a rising clamour to define and penalise “hate speeches”.

Quite apart from such incidents, it is common knowledge that speeches invoking memories of incidents such as communal riots, or of past injustices, and thereby seeking to polarize the electorate across constituencies on grounds of religion, caste, class, etc. have been old political tools put to use with varying degrees of success over the years. Hate speeches may also be delivered for reasons which are not purely political. But what exactly is a hate speech? Where should the line between a hate speech and all other exercises of the ‘freedom of speech and expression’ be drawn? It is in the context of these questions and controversies that it becomes all the more important to explore the judicial

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¹ Internet Desk, “JNU row: What is the outrage all about?” *The Hindu*, available at: <http://www.thehindu.com/specials/in-depth/JNU-row-What-is-the-outrage-all-about/article14479799.ece> (last visited on August 16, 2018).

² Times News Network, “19 arrested for cheering Pakistan’s Champions Trophy Victory”, *Times of India*, available at: <http://timesofindia.indiatimes.com/india/19-arrested-for-cheering-pakistans-champions-trophy-victory/articleshow/59243368.cms> (last visited on August 16, 2018).

interpretation of hate speeches and to add one's own viewpoint to the ever-growing body of discussion on this topic.

(B) Definition

With no universally recognized definition of a "hate speech" and with the arrival of the dynamic age of technology, it has become all the more difficult to fit hate speeches into a straightjacket definition. However, the following definitions may give us insights into the constituent elements of a hate speech.

Helen Darbishire defines it as an "expression or expressions that incite(s) hatred, particularly racial, national or religious in nature."³

As per the Black's Law Dictionary⁴, "It is a speech that carries no meaning other than the expression of hatred for some group, such as a particular race especially in circumstances in which the communication is likely to provoke violence."

In the landmark case of *Pravasi Bhalai Sangathan v. Union of India*⁵, Dr. B.S. Chauhan, J. observed the following with regard to the definition of hate speeches: "Hate speech is an effort to marginalize individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimize group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on vulnerable groups that can range from discrimination to ostracism, segregation, deportation, violence, and in the most extreme cases, to genocide. Hate speech also impacts a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy."

The 267th Report of the Law Commission of India⁶ defined it as "an expression which is likely to cause distress or offend other individuals on the basis of their association with a particular group or incite hostility towards them. There is no general legal definition of hate speech, perhaps for the apprehension that setting a standard for determining unwarranted speech may lead to suppression of this liberty."

³ Ritika Patni and Kasturika Kaumudi, "Regulation of Hate Speech", 2 *WBNUJS Law Review* (2009).

⁴ *Black's Law Dictionary*, 8th edition, at 4381.

⁵ (2014) 11 SCC 477, 485.

⁶ Law Commission of India, 267th Report on Hate Speech, available at: <http://lawcommissionofindia.nic.in/reports/Report267.pdf> (last visited on August 16, 2018).

What can be gathered from these four definitions, therefore, is that regardless of the context in which a particular hate speech was delivered, it is the “incitement or provocation of hatred” with or without a clear intention to ensure that such provocation or incitement leads to violence against one or more communities that are central to all hate speeches, even if a hate speech found to have been delivered during election campaigning might not have necessarily intended to start a cycle of violence against one or more communities, but simply to polarize the electorate of a particular constituency by appeals to the religious sentiments of any community or communities.

(C) The Indian Regime

Following the remarks made by a politician⁷ in March 2009 against a minority community, while on a campaign trail, the subsequent protests and the First Information Reports lodged against him in that connection, a need was felt to develop a separate law dealing with hate speeches in addition to the provisions already in existence, but nothing came out of it. Years later, following a series of hate speeches delivered by another politician in 2012 in different cities of Andhra Pradesh⁸, the demands for a specialised law on hate speeches arose again⁹ ¹⁰, but remain unfulfilled even today, even though hate speeches are covered under multiple legislations. The same has been dealt with, later on in this article.

In the *Pravasi Bhalai Sangathan case*¹¹ it was stated by the Hon’ble Supreme Court of India that “given such disastrous consequence of hate speeches, the Indian legal framework has enacted several statutory provisions which directly or indirectly make the delivery of hate speeches an offence.”

The constitutional validity of the provisions for hate speech has been persistently upheld on the ground of ‘public order’, an exception under Article 19(2) of the

⁷ Reuters Staff, “Varun Gandhi arrested over Muslim Hate Speech”, Thomson Reuters, available at: <http://in.reuters.com/article/idINIndia-38758620090329> (last visited on August 16, 2018).

⁸ Times News Network, “Akbaruddin in Trouble for Hate Speech”, Times of India, available at: <http://timesofindia.indiatimes.com/city/hyderabad/Akbaruddin-in-trouble-for-hate-speech/articleshow/17803821.cms> (last visited on August 16, 2018).

⁹ Rajeev Dhawan, “India has many forms of 'hate speech', but no grounds for a tighter law”, DailyMail India, available at: <http://www.dailymail.co.uk/indiahome/indianews/article-2334785/India-forms-hate-speech-grounds-tighter-law.html> (last visited on August 16, 2018).

¹⁰ Baba Umar, “Getting away with Hate Speeches in India”, Al-Jazeera, available at: <http://www.aljazeera.com/indepth/features/2014/04/getting-away-with-hate-speeches-india-201442474555948198.html> (last visited on August 16, 2018).

¹¹ (2014) 11 SCC 477, 486.

Constitution. In *State of U.P. v. Lalai Singh Yadav*¹², the Supreme Court upheld the “the constitutional value of ordered security and identified ordered security as a constitutional value that is to be safeguarded and courts should give preference to the State if their intent is to protect safety and peace. Here the principle of ordered security is enunciated as a positive principle, without which creativity and freedom are meaningless.”¹³ In this judgment, it was observed by V.R. Krishna Iyer, J. that –

“The State, in India, is secular and does not take sides with one religion or other prevalent in our pluralistic society. It has no direct concern with the faiths of the people but is deeply obligated to not only preserve and protect society against breaches of the peace and violations of public order but also to create conditions where the sentiments and feelings of people of diverse of opposing beliefs and bigotries are not so molested by ribald writings or offensive publications as to provoke or outrage groups into possible violent action. Essentially, good government necessitates peace and security and whoever violates by books and bombs societal tranquillity will become the target of legal interdict by the State.”

The laws dealing with hate speeches have thus been given below under the following sub-headings:

1. *Constitutional Provisions*

1.1 *Article 19(1)(a) r/w 19(2)*

‘Right to Freedom of Speech and Expression’ under Article 19(1)(a), has often been a subject of heated debate and has hit the headlines time and again due to it being one of the most obvious and most important parts of the day-to-day lives of people of all socio-economic backgrounds. This right is undoubtedly essential for true democracy and should, therefore, be guarded against unnecessary and unfair curtailment. Thus, it is subject to certain “reasonable restrictions” given in Article 19(2) viz. “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”.¹⁴ However, these conditionalities were later introduced by the first amendment¹⁵ and sixteenth amendment¹⁶ of the Constitution. It must be noted that none of the conditions explicitly mentioned hate speech as one among it.

¹² (1976) 4 SCC 213, 217.

¹³ *Supra* 6 at 43.

¹⁴ Constitution of India, 1959, art. 19(2).

¹⁵ Constitution (First Amendment) Act, 1951.

¹⁶ Constitution (Sixteenth Amendment) Act, 1963.

Most hate speeches are inherent of such nature as to invite restriction under more than one of the aforementioned grounds because they aim to disturb public order by inciting an audience to commit an offence or a number of offences against one or more communities. To elaborate further on the scope of Article 19(2), the following observation by R.F. Nariman, J. in the landmark ruling of *Shreya Singhal v. Union of India*¹⁷ may be quoted here:

“...This leads us to a discussion of what is the content of the expression “freedom of speech and expression”. There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Art. 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, etc.”

The expression “public order” mentioned in Article 19(2) is one of wide import which has been touched upon in more than one Supreme Court judgment. The importance of this expression can be clearly seen from the fact that it is the harm caused – or feared to be caused – to not just one or two individuals, but to one or more communities, and therefore the public at large, which forms the single most important touchstone on which to test the impact of the alleged hate speech in order to properly decide whether or not it is a hate speech in the true sense of the term.

To throw more light on this expression, it would be pertinent to quote the observations of A.N. Ray, C.J. in *Rev. Stainislaus v. State of Madhya Pradesh and Ors.*¹⁸, which went as follows:

"The expression public order is of wide connotation. It must have the connotation which is meant to provide as the very first Entry in List II. It has been held by this Court in *Ramesh Thappar v. State of Madras*¹⁹ that “public order” is an expression of wide connotation and signifies the state of tranquillity which prevails among the members of a political society as a result of the internal regulations enforced by the Governments which they have established.”

¹⁷ (2015) 5 SCC 1, 130-131.

¹⁸ (1977) 1 SCC 677, 683.

¹⁹ AIR 1950 SC 124, 125.

A hate speech, therefore, can also be defined as one which poses a threat, direct or indirect, to 'public order' in the sense of the term used in the Indian Constitution, even though the phrase "public order" itself has not been – and cannot be – cast into any mould so far and should be interpreted by the Courts of law on a case-to-case basis with regard to justice, equity and good conscience.

However, the Constitution does not give an inexhaustible remedy or one that may be invoked at one's convenience. This was aptly stated in the case of *Jafar Imam Naqvi v. Election Commission of India*²⁰:

"The matter of handling hate speeches could be a matter of adjudication in an appropriate legal forum and may also have some impact in an election dispute raised under the Representation of The People's Act, 1951. Therefore, to entertain a petition as PIL and to give directions would be inappropriate... A Public Interest Litigation pertaining to speeches delivered during election campaign ... cannot be put on a pedestal of a real PIL. There are laws to take care of it. In the name of a constitutional safeguard entering into this kind of arena ... would not be within the constitutional parameters."

1.2 Article 25(1)

Article 25(1) gives all persons the freedom of conscience and the right to freely practice, profess and propagate religion subject to public order, morality and health. The inclusion of the word "profess and propagate religion" in this article, as profession and propagation cannot be exercised without speech and expression, establishes a direct link between the right to freedom of speech and expression and the right to freedom of religion. This link was recognised by the Apex Court in *Ratilal Panachand Gandhi v. State of Bombay*²¹ in the following words:

"...Thus, subject to the restrictions which this article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious beliefs as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution."

²⁰ (2014) 15 SCC 420, 425.

²¹ AIR 1954 SC 388, 392.

The “exhibition” mentioned in the observation above is by itself one of the forms of speech and expression sought to be protected by the freedom of speech and expression enshrined under Article 19(1)(a).

But the right to freedom of religion, like every fundamental right, is not absolute. The inclusion of the term “public morality” as a Constitutional restriction to the freedom of conscience and free profession, practice and propagation thus axiomatically means that nobody is free to lower the respect accorded to another religion in the estimation of the general public under the guise of propagating his own, or to do anything else which would constitute a threat to public order, morality and health. In the case of *Rev. Stainislaus v. State of Madhya Pradesh and Ors.*²², the Supreme Court emphatically rejected the existence of a fundamental right to convert a person or persons to one’s own religion with a reference to its earlier decision in *Ranjilal Modi v. State of Uttar Pradesh*²³, where this court had held that the right to freedom of religion guaranteed by Articles 25 and 26 of the Constitution is expressly made subject to public order, morality and health, and that:

“...It cannot be predicated that the freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order.”

Thus, any speech aiming to (or which is likely to) upset public tranquillity in the name of the practice, profession and propagation of one’s own religion is not protected under Article 25(1).

1.3 Article 51A

With every right comes a corresponding responsibility. It is due to this reason that the Indian Constitution enlists 10 Fundamental Duties under Article 51A. In relation to prevalent hate speeches, Dr. D.Y. Chandrachud, J. of the Bombay High Court, in the case of *Kamal R. Khan v. the State of Maharashtra*²⁴ observed that:

“The politics of hate and intolerance is an anathema to our constitution... Practising hate or intolerance towards any segment of society is fundamentally contrary to a constitutional order in which the fundamental duty of every citizen under Article 51A persists.”

²² (1977) 1 SCC 677.

²³ AIR 1957 SC 620, 622.

²⁴ (2009) 3 AIR Bom R 477, 486-87.

2. Criminal Provisions

2.1 The Indian Penal Code ,1860²⁵

The following substantive provisions of the Indian Penal Code (IPC) cover the words and expressions constituting hate speeches:

- "Sedition i.e. bringing or attempting to bring into hatred or contempt, or exciting or attempting to excite disaffection towards the Indian Government."²⁶
- "Promoting enmity between different groups on either grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony."²⁷
- "Imputations, assertions prejudicial to national integration."²⁸
- "Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs."²⁹
- "Uttering, words, etc., with deliberate intent to wound the religious feelings of any person."³⁰
- "Intentional insult with intent to provoke breach of the peace."³¹
- "Statements conducing public mischief."³²

2.2 The Code of Criminal Procedure, 1973³³

The following provisions of the Code of Criminal Procedure (CrPC) supplement the substantive provisions of the Indian Penal Code in dealing with matters related to purported hate speeches:

- "Power to declare certain publications forfeited and to issue search warrants for the same."³⁴
- "Power to ask for furnishing the security for keeping the peace in other cases."³⁵
- "Power to issue an order in urgent cases of nuisance or apprehended danger."³⁶

²⁵ Indian Penal Code, 1860 (45 of 1860).

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ Code of Criminal Procedure, 1973 (2 of 1974).

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

The scope and application of these provisions may be further explained by the following judgments—

1. IPC Section 153A's scope in relations to hate speeches was first discussed primarily in *Shib Sharma v. Emperor*³⁷ where the moot question before the Oudh Chief Court was whether a book entitled "*Chaman Islam ki Sair*" fell within the domain of this section.³⁸ It was observed by Thomas, C.J. that:

"Speaking for myself I look at such a matter, not as a Learned Judge of a High Court, but as a common ... citizen of a town in India. I would place myself in the position of a Mahomedan who honours his Prophet, and then consider what my feelings would be towards a Hindu who ridiculed that Prophet, not out of any eccentricity but in the prosecution of propaganda started by a class of persons who are not Mahomedans. In such a position from the hatred of the author, I would, as an ordinary man, proceed to hatred of the class to which the author belonged and which instigated the author. There cannot be the slightest doubt that the writing such as that of the book before me ... will certainly promote feelings of enmity and hatred between Hindus and Mahomedans."

With this observation, the Court held the accused guilty under the abovementioned section as well as under Section 295A of IPC.

2. While elucidating the scope of sections 153A and 505(2) of IPC, in *Bilal Ahmed Kaloo v. State of AP*³⁹, the Court held that "the common feature in both sections is that it makes the promotion of feeling of enmity, hatred or ill-will between different religious or racial or language or regional groups or castes and communities and doing acts prejudicial to maintenance of harmony an offence. It is necessary that at least two such groups or communities should be involved to attract this provision. Merely hurting the feelings of one community or group without any reference to another community or group cannot attract either of the two sections."⁴⁰
3. In the case of *Ramlila Maidan Incident, in re*⁴¹, while interpreting Section 144 CrPC, the following observations were made by Dr. B.S. Chauhan, J. :

³⁷ AIR 1941 Oudh 310, 314.

³⁸ Bhandari, M.K. and Narayan Bhatt, Mithilesh, "Hate Speech and Freedom of Expression: Balancing Social Good and Individual Liberty, *The Practical Lawyer* (2012).

³⁹ AIR 1997 SC 3483.

⁴⁰ *Supra* 6 at 13-14.

⁴¹ 2012 (5) SCC 1, 121-22.

“Section 144 Cr. P.C. deals with immediate prevention and speedy remedy. Therefore, before invoking such a provision, the statutory authority must be satisfied regarding the existence of circumstances showing the necessity of immediate action. The sine qua non for an order under Section 144 is urgency requiring an immediate and speedy intervention bypassing of an order. The order must set out the material facts of the situation. Such a provision can only be used in grave circumstances for the maintenance of public peace. The efficacy of the provision is to prevent some harmful occurrence immediately. Therefore, the emergency must be sudden and the consequences sufficiently grave.”

3. Other Statutory Provisions

The following provisions of other statutory acts and the rules therein provide protection from hate speeches in the following manner:

3.1 *Information Technology Act, 2000*⁴² and *Information Technology (Intermediaries Guidelines) Rules, 2011*

- “Punishment for sending offensive messages through communication service, etc.”⁴³ Though this provision has now been struck down in *Shreya Singhal v. Union of India*⁴⁴.
- “Power to issue directions for interception or monitoring or decryption of any information through any computer resource.”⁴⁵
- “Power to issue directions for blocking for public access of any information through any computer resource.”⁴⁶
- “Due diligence to be observed by intermediary discharging his duties namely⁴⁷ - Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that⁴⁸ - “is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever”⁴⁹ - “threatens the

⁴² Information Technology Act, 2000 (21 of 2000).

⁴³ *Ibid.*

⁴⁴ (2015) 5 SCC 1.

⁴⁵ *Supra* 42, s. 69.

⁴⁶ *Supra* 42, s. 69A.

⁴⁷ Information Technology (Intermediaries Guidelines) Rules, 2011, r. 3.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation.”⁵⁰

3.2 Representation of the People Act, 1951⁵¹ (RPA,1951)

- "Disqualification from a person contesting the election if he is convicted for indulging in acts amounting to the illegitimate use of freedom of speech and expression such as the offences punishable under Section 153A, Section 505, etc. of the Indian Penal Code, 1860.”⁵²
- “Prohibition, inter alia, appeals on the lines of caste, community, religion, etc. either by the candidate himself or anyone on his behalf in furtherance of his electoral prospects and speeches promoting enmity between communities along various lines, respectively.”⁵³
- “There is a prohibition on the promotion of enmity on grounds of religion, race, caste, community or language in connection with election as an electoral offence and makes it punishable with three years’ imprisonment, or with fine or both.”⁵⁴

3.3 Protection of Civil Rights Act, 1955⁵⁵

- “Penalises incitement to, and encouragement of untouchability through words, either spoken or written or by signs or by visible representations or otherwise.”⁵⁶

The scope and application of some of these statutory provisions may be further explained by the following judgments of the Hon’ble Supreme Court of India –

1. In *Dr. Ramesh Yeshwant Prabhoo v. Shri Prabhakar Kashinath Kunte & Ors.*⁵⁷, the Court analysed Section 123(3A) of the RPA, 1951, stating that:

“...the said the provision is similar to section 153A, IPC as the promotion of, or attempt to promote, feelings of enmity or hatred as against the expression ‘Whoever...promotes or attempts to promote...disharmony or feelings of enmity, hatred or ill-will...’ in section 153A, IPC.” “The expression ‘feelings of enmity or hatred’ is

⁵⁰ *Ibid.*

⁵¹ The Representation of the People Act, 1951 (43 of 1951).

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ The Protection of Civil Rights Act, 1955 (22 of 1955).

⁵⁶ *Ibid.*

⁵⁷ (1996) 1 SCC 130, 148.

common in both the provisions but the additional words in Section 153A, IPC is 'disharmony...or ill-will'." "The difference in the plain language of the two provisions indicates that even mere promotion of disharmony or ill-will between different groups of people is an offence under section 153A, I.P.C, while under subsection (3A) of section 123 of the RPA, 1951, it is only the promotion of or attempt to promote feelings of enmity or hatred, which are stronger words, are forbidden in the election campaign."⁵⁸

2. In the recent Constitution Bench verdict of *Abhiram Singh v. C.D. Commanche (dead) through Legal Representatives and others*.⁵⁹, the following was observed by M.B. Lokur, J. (for the majority) regarding Section 123(3) of the RPA, 1951:

"The purpose of enacting Clause (3) of Section 123 of the Act and amending it more than once during the course of the first 10 years of its enactment indicates the seriousness with which the Parliament grappled with the necessity of curbing communalism, separatist and fissiparous tendencies during an election campaign (and even otherwise in view of the amendment of Section 153-A IPC). It is during electioneering that a candidate goes virtually all out to seek votes from the electorate and Parliament felt it necessary to put some letters on the language that might be used so that the democratic process is not derailed but strengthened. Taking all this into consideration, Parliament felt the need to place a strong check on corrupt practices based on an appeal on the grounds of religion during election campaigns (and even otherwise)."

We can thus conclude with the words of Dr. B.S. Chauhan J. in one of his judgments⁶⁰ on the same issue of hate propaganda:

"The root of the problem is not the absence of laws but rather a lack of their effective regulation. Effective regulation of 'hate speech' at all levels is required as the authors of such speeches can be booked under the existing penal law and all the law enforcing agencies must ensure that the existing law is not rendered a dead letter. Enforcement is being required in consonance with the proposition 'Salus Reipublicae Suprema Lex' (Safety of the state is the supreme law)"

⁵⁸ *Supra* 6 at 41.

⁵⁹ (2017) 2 SCC 629, 672.

⁶⁰ (2014) 11 SCC 477, 490.

(D) International Legal Regime

The international legal regime on hate speeches shows concern as serious as – if not greater than – the concern shown by nations regarding the speedy, effective and reasonable curbing of speeches that seek to drive a wedge between people of different religions, regions, cultures and communities and incite violence. The following text from the '267th Report of the Law Commission of India'⁶¹ provides a succinct summary of the international legal provisions that aim to provide safeguards against hate speeches:

“The working of the free speech doctrine very often points to the failure of this freedom in addressing the discriminatory, hostile and offending attitudes of some individuals and some small strata of the society. It was this viewpoint that led to the prohibition of ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’⁶² under article 20(2) of the International Covenant on Civil and Political Right, 1966. Similarly, articles 4 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 prohibits ‘dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin’ and mandates the signatory states to provide effective remedies and protection against such actions.”

“The issue of hate speech has assumed greater significance in the era of the internet since the accessibility of internet allows offensive speeches to affect a larger audience in a short span of time.” “Recognising this issue, the Human Rights Council’s “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression”⁶³ on content regulation on the internet, expressed that freedom of expression can be restricted on five major grounds, wherein one of the primary ground was hate speech (to protect the rights of affected communities)”⁶⁴

A comparison of the Indian standpoint with that of some other common law jurisdictions will reveal commonalities as well as differences. Discussed below are some of them:

⁶¹ *Supra* 6.

⁶² Roger Kiska, “Hate Speech: A Comparison between the European Court of Human Rights and the United States Supreme Court Jurisprudence” 25 *Regent University Law Review* 119 (2012).

⁶³ See *Supra* 6 at 41. Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 17th Session, A/HRC/17/27.

⁶⁴ *Supra* 6 at 17,18.

United States of America

One of the biggest contributions to the freedom of speech and expression came from the United States of America in the form of the First Amendment to the Constitution of the United States which reads as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

In the *Ramlila Maidan Incident case*⁶⁵, Swatanter Kumar, J. summarized the American position in the following manner:

"As a result of the widening of the power of judicial review, the US Supreme Court preferred to test each case on the touchstone of the rule of 'clear and present danger'. However, the application of this rule was unable to withstand the pace of the development of the law and, therefore, through its judicial pronouncements, the US Supreme Court applied the doctrine of the 'balancing of interests'. The cases relating to speech did not simply involve the rights of the offending speaker but typically they presented a clash of several rights or a conflict between individual rights and necessary functions of the government. Frankfurter, J., often applied the above-mentioned balancing formula and concluded that 'while the Court has emphasized the importance of 'free speech', it has recognized that free speech is not in itself a touchstone. The Constitution is not unmindful of other important interests, such as public order, if the free expression of ideas is not found to be the overbalancing considerations.'"⁶⁶

"Even in the United States there is a recurring debate in modern First Amendment jurisprudence as to whether First Amendment rights are 'absolute' in the sense that the government may not abridge them at all or whether the First Amendment requires the 'balancing of competing interests' in the sense that the free speech values and the government's competing justification must be isolated and weighted in each case. Although the First Amendment to the American Constitution provides that the Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of the Constitutional government to survive. If it is to survive, it must have the power to protect itself against unlawful conduct and under some circumstances

⁶⁵ *Supra* 28 at 29.

⁶⁶ *Niemotko v. Maryland*, 340 US 286, 292 (1951).

against incitements to commit unlawful acts. Freedom of speech, thus, does not comprehend the right to speak on any subject at any time⁶⁷."

Although Article 19(1)(a) of the Indian Constitution drew inspiration from the American experience of constitutionalism⁶⁸, there have been divergences between the jurisprudence in the United States and in India as to when speech may permissibly be restrained. Thus, some points of difference may be extracted as follows:

1. While the Indian Constitution allows for 'reasonable' regulation of the press, the US Constitution does not. As observed by Douglas, J. in *Kingsley Corp v. Regents of the University of New York*⁶⁹, and quoted with approval in *Lakshmi Ganesh Films, Hyderabad and others. v. Government of A.P. and ors.*⁷⁰:

"If we had a provision in our Constitution for 'reasonable' regulation of the press such as India has included in hers there would be room for argument that censorship in the interest of [communal harmony or] morality would be permissible."

2. 'The clear and present danger test', an innovation of the American judiciary, was first laid down by Holmes, J. of the United States Supreme Court in *Schenk v. United States*⁷¹ where while deciding constitutionally validity of restrictions on free speech, it was observed that:

"...the character of every act depends upon the circumstances in which it is done... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the Congress has a right to prevent."

⁶⁷ *Supra* 41.

⁶⁸ Statement of Dr Ambedkar, Constituent Assembly Debates, Vol.VII, 40, available at: <http://cadindia.clpr.org.in/constituent-assembly-debates/VII/1948-11-04> (last visited on August 16, 2018).

⁶⁹ 360 US 684 (1959).

⁷⁰ 2006 SCC OnLine AP 489, 495.

⁷¹ 249 US 47 (1919).

As per *Bridges v. California*⁷², it requires that “the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.” Thus, this test, stipulating the “only circumstances under which free speech may be restricted in the interests of public order”⁷³ has hence been found by Indian jurists to be “inapplicable to India, based upon fundamental differences between the US and Indian Constitutions”⁷⁴.

3. In *Brandenburg v. Ohio*⁷⁵, the United States Supreme Court distinguished between ‘incitement’ towards, and ‘advocacy’ of, violence on racial grounds – prohibiting the former while permitting the latter with the remark that “freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”⁷⁶.

In India, such an approach may not be desirable because of the protection which the Constitution of India affords to religious and cultural minorities and their rights to retain their identity as such⁷⁷, because people from different communities may freely misuse freedom of such a vast scope to further their own ends, political or otherwise, by inciting a certain level of hatred and contempt, if not violence, against another community. To this effect, the Supreme Court has concluded that ‘the public interest’ must ‘without a doubt have pre-eminence over any individual interest’ in the case of *Baragur Ramchandrappa and Ors. v. State of Karnataka and Ors.*⁷⁸ In this case, where a ban placed by the respondent - State on a book written by the petitioner - the author was challenged by the latter, it was observed by H.S. Bedi, J. that –

“The government thus has the power to nullify a publication which endangers public order, although the freedom of expression in this situation is undoubtedly restricted even though such freedom ‘is an indicator of the permanent address of human progress.’ It must also be noted that it would be difficult to examine all publications on a common yardstick and what may be a laughable allegation to a progressive people could appear as sheer heresy to a conservative or sensitive one.”

⁷² 314 US 252 (1941).

⁷³ *Terminiello v. Chicago*, 337 US 1 (1949).

⁷⁴ *Babulal Parate v. the State of Maharashtra*, AIR 1961 SC 884, 890-91.

⁷⁵ 395 US 444 (1969).

⁷⁶ *Supra* 6 at 29.

⁷⁷ See Part III, Constitution of India.

⁷⁸ (2007) 5 SCC 11, 20.

Canada

The Canadian Charter of Rights and Freedoms guarantees freedom of thought, belief, opinion and expression subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Pursuant to this, Section 319 of the Criminal Code of Canada, RSC 1985 sanctions public incitement of hatred.⁷⁹ In the *Pravasi Bhalai Sangathan case*⁸⁰, Dr. B.S. Chauhan, J. made the following observation after an analysis of various Canadian judgments while scrutinizing the Indian approach to hate speeches:

“The Supreme Court of Canada in *Saskatchewan (Human Rights Commission) v. Whatcott*,⁸¹ succeeded in bringing out the human rights obligations leading to control on publication of “hate speeches” for protection of human rights defining the expression “hate speech” observing that the definition of “hatred” set out in *Canada (Human Rights Commission) v. Taylor*⁸² provides a workable approach wherein three main prescriptions must be followed⁸³ –

First, the courts must apply the hate speech prohibition objectively. The question courts must ask is whether a reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred.

Second, the legislative term “hatred” must be interpreted as being restricted to those extreme manifestations of the emotion described by the words “detestation” and “vilification”. This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimation and rejection that risks causing discrimination or other harmful effects.

Third, the tribunals must focus their analysis on the effect of the expression at issue, namely, whether it is likely to expose the targeted person or group to hatred by others. The repugnancy of ideas being expressed is not sufficient to justify restricting the expression, and whether or not the author of the expression intended to incite hatred is irrelevant. The key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce discrimination.

⁷⁹ *Supra* 6 at 29.

⁸⁰ (2014) 5 SCC 477, 484-85.

⁸¹ 2013 SCC 11 (Can SC).

⁸² (1990) 3 SCR 892 (Can SC).

⁸³ *Infra* note 89.

Before that, the Canadian approach had also been discussed in the case of *Union of India v. Naveen Jindal & anr.*⁸⁴ wherein it was stated:

"Section 2(b) of Canadian Charter states that "Everyone has the freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." The section potentially could cover a wide range of action, from commercial to political, from journalistic privilege to hate speech to pornography."

A comparison between the American and the Canadian approaches has been done in *R. v. Keegstra*.⁸⁵ The Court rejected the 'clear and present danger' test, on the basis that 'it was incapable of addressing the harms hate propaganda causes' and hence inapplicable to Canadian constitutional and cultural norms.⁸⁶ Hate propaganda was found to have only 'marginal' truth value, outweighed by the significant harm inflicted by hate speech on the constitutional value of 'equality'. As noted in the majority judgment, Dickson, C.J. observed:

"The international commitment to eradicate hate propaganda and, most importantly, the special role gave equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression."

The standpoint of Canadian jurisprudence, therefore, is totally different from that of American jurisprudence on the question of hate speeches and the protection afforded to them by the Constitutions of these two democracies in that unlike the latter, Canadian jurisprudence never considered a test like the "clear and present danger" test to be fit for application in the first place, though now American jurisprudence too has moved away from it.

(E) Recent Developments

On March 23, 2017, the Law Commission of India, in consonance with the observations of the Supreme Court in the judgment of *Pravasi Bhalai Sangathan case*⁸⁷ asking for a detailed consideration of the topic of hate speeches, came out with its 267th Report which was dedicated entirely to the topic of "Hate Speeches" – the first report of its kind so far. The report, inter alia, reflected upon the jurisprudence in this area of the law in India, South Africa, the United States, the United Kingdom, the European Union, and Canada; listed down certain criteria for the determination of hate speeches; dedicated a chapter

⁸⁴ (2004) 2 SCC 510, 540.

⁸⁵ [1990] 5 SCR 697, 744-749.

⁸⁶ Kathleen E. Mahoney, "Hate Speech: Affirmation or Contradiction of Freedom of Expression", *University of Illinois Law Review* 789, 793 (1996).

⁸⁷ (2014) 11 SCC 477, 490.

to the review of the existing penal law prohibiting and punishing hate speeches, and ended with an Annexure that suggested amendments to the existing criminal law relating to hate speeches, also featuring a discussion on some of the non-legal recourses that could be taken to by governments and individuals to tackle the rapid rise of advocacy and incitement of hatred. The report identified six major criteria of hate speech which were –

1. The extremity of the speech
2. Incitement
3. Status of the author of the speech
4. Status of victims of the speech
5. The potentiality of the speech
6. Context of the Speech

The draft amendment Bill, named the Criminal Law (Amendment) Bill, 2017 suggests the insertion of two new sections in the Indian Penal Code – subject to the final assent of the government - as it exists in its current form, namely:

- 153C (Prohibiting incitement to hatred); and
- Section 505A (Causing fear, alarm, or provocation of violence in certain cases)

Also, changes were suggested in the First Schedule to the Code of Criminal Procedure under the heading “Offences under the Indian Penal Code (45 of 1860)” making the proposed Section 153C a cognizable and non-bailable offence punishable with imprisonment for two years, and fine up to Rs. 5000 under the jurisdiction of the Magistrate of the first class, and Section 505A a non-cognizable and bailable offence punishable with imprisonment for one year and/ or with fine up to Rs 5000, or both under the jurisdiction of any magistrate.

(F) The Conclusion

While approaches to cases involving hate speeches like the one adopted in American jurisprudence (namely, the "clear and present danger test") which accord so much significance to the protection of the right to free speech that they often overlook the benefits of banning a certain publication for the maintenance of communal harmony are harmful in that their adoption may result in the courts giving a free hand to the spread of hate propaganda, equally deleterious may be the lack of an objective test on which to judge which form of speech is likely to spread hatred and which one is not, as it will bring about an inconsistency that may stifle the very same cherished freedom of speech and expression that the courts were meant to protect. Even if a "one-size-fits-all" approach is undesirable for implementation in cases as sensitive as those involving the preservation of communal harmony and the alleged hurting of the sentiments of one or more communities, it is nevertheless desirable to have at

least a rough set of guidelines ready for the reference of the Courts in such cases to facilitate more informed and consistent decision-making.

Regarding the suggestion of the making of a separate law to deal with hate speeches, as the Supreme Court of India had ruled in *Pravasi Bhalai Sangathan case*⁸⁸, there is no need to follow this suggestion primarily for the three reasons that may be summed up as follows –

1. The forms of expression having a tendency to stoke communal tensions between two or more communities are already covered under multiple statutes which eliminates the need for passing a law meant purely to impose criminal liability on anyone and everyone whose expression or speech could have the aforementioned impact, though proponents of the latter demand may argue that a hate-speech-specific statute would be more desirable due to the consequent convenience that will arise with the passage of this Act.
2. According to the theory of separation of powers, to which Indian democracy has always subscribed both in letter (in the form of the Indian Constitution) and in practice, the judiciary is empowered to legislate only if there is no existing law to deal with a particular topic, in which case a legislation by the Supreme Court would no longer be just an option, but would become a Constitutional requirement. However, where there is no void to be filled, as in the case of this topic, interference by the judiciary is unwarranted.
3. Considering the large number of laws under which hate speeches are punishable, even if the Amendment proposed by the Law Commission of India is rejected, the parties aggrieved by expression aiming to incite violence or discrimination between communities are free to approach the courts of law under the existing statutory provisions, and that the actual problem under the current scenario is not the lack of the requisite laws to deal with hate speeches, but their effective implementation. It is incumbent upon the Courts, the lawmakers and the enforcers of the law i.e. the judicial, the legislative and the executive organs of the government to ensure that the law punishing hate speeches is not rendered a dead letter because of ineffective implementation.

This leaves only one solution to the burning question of “where to draw the line” – the adoption of the Canadian approach to hate speeches as discussed above.⁸⁹

⁸⁸ (2014) 11 SCC 477.

⁸⁹ *Supra* note 83.

The reasons for the desirability of this approach are obvious. The first test requires Judges to apply a very basic "reasonability" test which results in no prejudice to the interests of any party involved in the case and can be applied without harming the unique nature of each case because the Courts have been given the liberty of deciding each case on its own merits.

The second test amply clarifies which kind of "hatred" would be taken into account while considering the legitimacy of any given form of speech or expression challenged before the Court, and that only such speech would be considered hate speech as would have the effect of driving one community against another, manifesting itself through discrimination, violence, etc.

The third and final test lays down that the ultimate deciding factor which the tribunals must not ignore while deciding whether or not the impugned form of speech or expression is illegal should be the impact of a given speech on its audience. The repugnancy of the ideas being expressed being subjective (and therefore difficult to decide) and the motive of the author of the expression being immaterial (since no person could conceivably deliver a hate speech without having a certain impact in mind), the most dispassionate and impartial way to determine whether or not the expression at issue is a hate speech would be whether it can be reasonably expected to ignite hatred in the hearts and minds of the people of community "A" against those of community "B" (or more communities, in case more than one communities have been targeted), which could possibly expose community "B" to discrimination at the hands of community "A".

Therefore, it is suggested that Indian courts, while deciding cases that deal with hate speeches, adopt the Canadian approach to the extent permissible in view of the facts and circumstances of each individual case. There is, as of now, no requirement for the legislature to introduce a specific statute relating to hate speeches as this topic is already covered by sufficient laws to be able to deal with a hate speech in all possible manifestations. The remaining gaps (if any) can be plugged by creative judicial interpretation.

Start of a New Era with Privacy as a Fundamental Right: Where It Will Lead Us To?

*Divya Sharma**

The makers of our Constitution undertook to secure conditions favourable to the pursuit of happiness... They conferred as against the Government, the right to be let alone- the most comprehensive of the rights and the right most valued by the civilized man.

-- (Justice Brandeis, U.S. Supreme Court)

Introduction

We all know that man is a social animal and he needs the company of others where he can open up his feelings. But how much information is to be shared with others depends upon his own choice. Individuals always want to establish a boundary around themselves so that others must know the arena and the limits in which they have to act and need not to intrude in their privacy. Privacy is a state when one wants isolation, seclusion as well as non-interference by others. Everyone wants that right to privacy must be recognized by the state but even if it is not so then it is to be remembered that privacy is an inherent right. Man is born with some natural rights which no one can intrude and privacy is such a right which runs like a shadow with every human being.

The utmost need for privacy as a right stems from the changing pattern of society where we are shifting from groups to an individual. Concept of privacy has gained much more importance in the present scenario due to changing technological and social contexts. The right of privacy lies at the heart of individual autonomy and no one wants to compromise it at any cost. Though it seems paradoxical privacy which is the opposite of freedom is one of the important aspects which helps in the growth of an individual's freedom. Right of privacy has many dimensions and very frequently it clashes with morality. And because of this clash, we often get a remembrance of Hart Devlin Controversy on Privacy and Morality.

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International Jurisprudential Arena of Privacy

Privacy is a way by which we protect ourselves from unnecessary interference of others and even by state. Right to privacy serves as a base on which edifice of other rights is created. It is worthwhile to mention here that the Universal Declaration of Human Rights which is a milestone document in the history of human rights has recognized privacy as a basic human right. Article 12 of UDHR states that *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attack upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."* Not only UDHR but various other international instruments have also recognized privacy as an important fundamental right of human beings. The International Covenant on Civil and Political Rights (ICCPR), the UN Convention on Migrant Workers and the UN Convention on Protection of the Child are few of them which have specific reference to privacy as a right.

Article 8 of The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms states that *"Everyone has the right to respect for his private and family life, his home and his correspondence and there shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."* The Convention created the European Commission of Human Rights and the European Court of Human Rights to oversee enforcement. Both have been particularly active in the enforcement of privacy rights and have consistently viewed Article's protections expansively and the restrictions narrowly.

The Commission found in its first decision on privacy: *"For numerous Anglo-Saxon and French authors, the right to respect "private life" is the right to privacy, the right to live, as far as one wishes, protected from publicity. In the opinion of the Commission, however, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality."*¹

United Nations General Assembly Third Committee has also passed a new Resolution on the Right to Privacy in the Digital Age on November 21, 2016. The resolution recognized the importance of respecting international commitments in relation to the right to privacy. It underscores that any legitimate concerns

¹ Privacy and Human Rights: An International Survey of Privacy Laws and Practice, (Feb. 10, 2018, 6:30 PM), <http://www.gilc.org>.

states may have with regard to their security can and should be addressed in a manner consistent with obligations under international human rights law.²

Constitutional Jurisprudence on Right to Privacy in India

The word privacy has nowhere been defined in the Indian Constitution but the hints and traits can be gathered from the provisions of the Constitution itself. Privacy is one word which seems very simple to define but legally it is a complex concept carrying within itself clusters of rights. Indian Constitution is not static rather our respected judiciary has always evolved it from time to time. The best example of the progressive development of Constitutional Jurisprudence is Article 21 which has been given the maximum widest interpretation by the Indian courts. Right to privacy has various implications and dimensions which can be correctly made understandable while having a glimpse at the following cases.

In *M.P. Sharma and Others v. Satish Chandra*³, the question before the court was to check the constitutional validity of search warrant issued under Sec. 96(1) of CrPC. The court held *"A power of search and seizure is, in any system of jurisprudence, an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of the fundamental right to privacy, analogous to the American Fourth Amendment, there is no justification for importing into it, a totally different fundamental right by some process of strained construction."*

In *Kharak Singh v. The State of UP*,⁴ the Supreme Court had the occasion to consider the ambit and scope of the right to privacy when the power of surveillance conferred on the police by the provisions of the U.P. Police Regulations came to be challenged as being violative of Articles 19(1)(d) and Article 21 of the Constitution. The Court repelled the argument of infringement of freedom guaranteed under Article 19(1)(d) of the Constitution and *pointed out that the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."*

In *Govind v. State of M.P.*,⁵ 1975 2 SCC 148 the court stated that *"The right to privacy, in any event, will necessarily have to go through a process of case-by-case*

² Deborah Brown, New UN Resolution on the Right to Privacy in the Digital Age: Crucial and Timely, (Aug.10, 2018, 7:15 PM), <http://www.policyreview.info>.

³ AIR 1954 SC 300.

⁴ AIR 1963 SC1295.

⁵ AIR 1975 (2) SCC 148.

development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute." The court further stated that "Any right to privacy must encompass and protect the personal intimacies of the home, the family marriage, motherhood, procreation and child-rearing. This catalogue approach to the question is obviously not as instructive as it does not give an analytical picture of those distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as a unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty. Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists."

Mr. X v. Hospital Z,⁶ the court stated, "Right to privacy has been culled out of the provisions of Article 21 amid other provisions of the Constitution relating to Fundamental Rights read with Directive Principles of State Policy."

In **R. Rajagopal @ RR Gopal & Anr. v. State of Tamil Nadu & Ors.,**⁷ the Supreme Court held "The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone." A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy."

In **PUCL v. The Union of India and Others,**⁸ the Supreme Court held that "Right to privacy is a part of the right to life and personal liberty enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy; Article 21 is attracted. The said right cannot be curtailed "except according to the procedure established by law." The right privacy - by itself - has not been identified under the Constitution. As a concept, it may be too broad and moralistic to define it judicially. Whether the right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case."

⁶ 1998 (8) SCC 296.

⁷ 1994 (6) SCC 632.

⁸ 1997 (3) SCC 433.

After having a glimpse at the above case laws it can be safely concluded that there is no explicit provision of privacy right under the Indian Constitution. Right to privacy has been given a very strict narrow interpretation in M.P. Sharma and Kharak Singh case. However, the right to privacy has been recognized by the Indian courts as part and parcel of Article 21 of the Constitution of India. To recognize privacy as an intrinsic feature of Part III of the Constitution is the biggest achievement for the citizens of India which is made possible only by sincere efforts of the judiciary.

Right to Privacy Bill

Though judiciary has recognized the right of privacy the legislature has still to do its role by giving statutory support to this right. In this era of information and technology when everything is becoming "E" then we have to seriously ponder over to protect the privacy of citizens. Since there is no specific legislation in India that deals with the subject of the right to privacy, therefore, various attempts have been made by legislators to make a law on this subject but till date, the drafts of privacy bill have not become a law. Right to privacy bill was drafted in 2011 during the regime of UPA-II government but it is hanging in a fire since then.

On 28th November 2014, The Personal Data Protection Bill was introduced in Rajya Sabha. The objective of introducing this bill is to provide protection to the personal data of individuals who are collected by various organizations but is subjected to the risk of being misused. The personal data of individuals is usually used for direct marketing purpose without their consent. Because of this individuals have to face a lot of distress and annoyance. Many countries of the world have recognized this right as an extension of the right to privacy. Therefore, in India, there is a dire need for enacting a law that protects the data information of the individuals. With these objectives, the bill was introduced but it sadly it could not be turned into reality.

Another attempt was made by Mr. Baijayant Jay Panda, MP, who introduced The Data (Privacy and Protection) Bill, 2017 in the Lok Sabha. The main objective was to make the right to privacy a fundamental right for the citizens of India. In 2009 also Mr. B.J. Panda has presented a bill titled "The Prevention of Unsolicited Telephonic Calls and Protection of Privacy Bill". Other attempts regarding data privacy bill were made by Mr. Rajeev Chandrasekhar in 2010, Mr. Vivek Gupta in 2016 and Mr. Om Prakash Yadav in 2016. But all these attempts have been vain as till date we do not have any law in this context. In the absence of any specific legislation on privacy, the data protection right is somewhere covered under IT Act, 2000.

The present government of BJP has appointed Mr. B.N. Srikrishna, former Judge of the Supreme Court of India who will head a Committee of Experts. The

Committee will include representatives from the department of telecommunications (DoT), the IT ministry, the Unique Identification Authority of India (UIDAI) and the academic community. The purpose of this committee is to suggest a strong framework for data protection and issues concerning it. India has Information Technology Law which was enacted in 2000 to deal with the issues of data protection but it is not a comprehensive law that covers all the problems of the current scenario. Fresh legislation for protecting the data has become the need of the hour and sincere efforts on the part of government have become utmost important. Currently, we are moving towards extreme digitization and therefore our laws must also be up to date otherwise we will face a huge setback.

The Decision of Nine Judge Bench of Supreme Court of India on Right to Privacy in 2017

In the Indian Constitution, there are enlisted six fundamental rights which act as a backbone of individual liberty and overall growth. A man is born with certain inherent rights and privacy is one of such right as it relates with the right to live with dignity. Liberty can be enjoyed in the true sense only if one has the right to privacy. Liberty, dignity and privacy are interrelated rights and are utmost necessary for the overall development of an individual. Privacy is one such concept which has not been expressly mentioned in the Constitution.

Currently, in the present era, every person is facing the threat of invasion of his privacy due to the introduction of various digitization schemes by the government and non-governmental agencies. No one wants to compromise with one's privacy and it is the duty of the state to protect the privacy of its citizens. Every right which is not expressly mentioned in the Constitution has been enumerated by judicial activism and privacy is one of such rights which by the efforts of the judiciary has found a place in Part III of the Indian Constitution. Since a straight jacket formula cannot be laid down to define privacy, therefore, the current judgment on privacy will give us a clear path what may be embraced under this right and what may not be.

In August 2017, the Supreme Court of India created a history in the judicial field by giving a landmark judgment on right to privacy. The Supreme Court in its verdict has declared that privacy is not a simple legal right rather it falls under the category of fundamental rights. The decision came on the petitions in regard to Aadhaar filed by Shanta Sinha, Aruna Roy, Dr. Major General S.G. Vombatkere and retired Judge of Karnataka High Court Mr. K.S. Puttaswamy. The main objective behind filing the petition is to challenge the validity of Aadhaar as it violates the right to privacy.

Though the issue of Aadhaar has yet to be decided Supreme Court takes no time to declare that "Privacy is the Core of Human Dignity." The court has very elaborately discussed the meaning of privacy by giving it an enlarged dimensional view. Justice D.Y. Chandrachud, Justice J.S. Khehar, Justice R.K. Agarwal and Justice S. Abdul Nazeer have expressed their views by stating that there are certain rights which are born with the individual like the right to life and personal liberty and these are inalienable rights. Right to life and personal liberty has been enshrined in the Indian Constitution under Article 21 but it must be noted that these rights have not been the creation of the Constitution rather these are just recognized by it. And when the judiciary is giving due recognition to the right to privacy as a part of Article 21 it is also not creating a new right because the right to privacy is intrinsic and core part of the right to life with dignity. Just like a deep ocean which has hidden vast treasures in it which remain under its surface but can be taken only when someone explores it to its depth similarly the Indian Constitution has hidden rights like the right to privacy which the judiciary has recognized but has not created. Our Constitution contains some precious pearls in the form of fundamental rights contained under Article 21. The meaning of life has been given widest interpretation so as to give maximum benefits to the citizens and also to the aliens. A frozen attitude towards the Constitution is not good because our Constitution is a "LIVING LAW."

Due to the rapid technological advancement, there is an increasing danger of violation of the right to privacy by way of surveillance, profiling, data collection etc. The earlier concept of intruding of privacy simply means that one person is poking nose into others affairs. But in the present era, this simplified meaning has been changed into a complex one. Today it has become necessary to put a restriction on the power of the government and other private entities so as to secure one's right to privacy. Advancement in technology has permitted various state and non-state actors to enter into the premises of any person without asking that person. Therefore it has become the need of the hour to define the area and limits of the right to privacy. The consequence of this judgment will be that the state has to meet parameters of the Constitution before entering into parameters of privacy rights of any citizen. The scope of judicial review has become more widen with this decision because any act which will try to interfere into the right of privacy has to go through the rigid passage lay down by the judiciary in order to uphold the privacy right of the individuals.

Right to privacy will without a doubt confine the states meddling control over people, the maximum capacity of this correct might be acknowledged by information assurance laws that will represent how privately owned businesses gather and utilize information. Today, the commodification of information and new manipulative advancements utilized by organizations will fuel the

difficulties of security. In any case, existing data protection laws are as of now inadmissible to handle this test. The judgment should revitalize a discussion on how the present information assurance models should be re-evaluated in light of the changing flow of data security.⁹

By proclaiming that privacy is inborn to every single freedom in Part III of the Constitution, the Supreme Court has made privacy a basic element of other critical major opportunities, including appropriate to correspondence, free discourse and articulation, religion and a heap other vital crucial rights fundamental for a noble presence subject to sensible limitations of general wellbeing, ethical quality and request. By declaring the right to privacy as a fundamental right the Supreme Court of India has armed the common man against the unnecessary interference by the State and has also extended protection to informational privacy in this digital age.¹⁰

Impact of Decision of Right to Privacy on Other Avenues of Law

The above-discussed decision of right to privacy which is a unanimous judgment of nine-judge bench has opened new chapters for various avenues of law. The biggest impact of this judgment is on the members of the LGBT community. This decision has brought certain hope for LGBT people as they were already fighting for their rights and their hope has been fulfilled by the Supreme Court of India in September 2018 by reversing its own decision of 2013 where it upheld the constitutionality of section 377 of IPC. The impact of the decision of Right to Privacy given by nine-judge bench acted so strong that the Supreme Court held that adult gay sex is not a crime now. If two individuals of same-sex indulge in sexual activity in privacy they cannot be held liable under section 377 of IPC. This judgment has opened a new chapter, a new face and a new era in the lives of the LGBT community. Their privacy has been respected by the Supreme Court of India which is a commendable effort on its part. This judgment has widened the scope of the social arena of society. It would not be wrong to say that the new interpretation given to privacy right has forced the judges to open doors for a reinterpretation of section 377 of IPC. The following points will show the implications of the decision of the Supreme Court of India:

- Right to privacy includes the right to choose whether to have food or even medicine. It means now a person has the right to decide whether he wants to live or not. Justice J. Chelameswar wrote, “An individual’s

⁹ Akhil Deo, How the Right to Privacy Judgment Will and Won’t Impact India’s Data Protection Regime. (Aug.13, 2018, 5:30PM), <http://thewire.in>.

¹⁰ Krishnadas Rajagopal, *Right to Privacy: What the Supreme Court Verdict Means for the Common Man*, (Aug.13, 2018, 9:25 PM), <http://www.thehindu.com>.

right to refuse life-prolonging medical treatment or terminate his life is another freedom which falls within the zone of the right of privacy..."

- SC's privacy decision may drive cell phone companies to change information security and assurance settings.
- Purchasing on the web leaves electronic impressions that can be amassed to achieve conclusions on the idea of a person's nourishment propensities, dialect, wellbeing, pastimes, sexual inclinations, fellowships, methods for dressing, and so forth. Organizations can plunge into this repository of private information on web-based purchasing to target promoting at people. However, following the protection decision, internet business organizations should stay careful about sharing information went for focused promoting.
- The privacy judgment is probably going to set a level of check against unapproved 'item fiction' of private profiles taken off the web.¹¹
- To an extent the judgment has also stated that State can govern the eating habits of a person. To put in other words it is not the function to the state to determine the food habits of a person. Thus the decision will have an impact on beef imposing order by governments of various states.

Since privacy is a complex issue, therefore, this landmark judgment by the court has set at rest various conflicting decisions prevailing before this decision. Though it is not possible to define the area of privacy still Supreme Court has tried to interpret the concept in the widest manner possible. This decision has highlighted the need to enact comprehensive legislation on privacy on data protection.

Conclusion

Technology changes and advancement has forced us to think seriously about privacy rights. The age of digitalization has made us be more careful and cautious regarding our privacy matters. Right to privacy includes our individual physical privacy along with our informational privacy. Thus the need at present is to recognize this right and to ensure that an individual's data is protected and cannot be shared without his consent.

After the historic version of the Supreme Court of India on right to privacy now the ball is in the court of Parliament. It is now up to the legislature to define the contour of privacy under the ambit of Article 21 of the Indian Constitution. Before codifying the right to privacy it has to be seen by the government that it passes the test of reasonable restrictions imposed by the Constitution. Right to

¹¹ Krishan Kaushik, Ravish Tiwari, *A to Z of Privacy*, (Aug. 17, 2018, 10:30 PM), <http://www.indianexpress.com>.

privacy is not a close-ended right rather it is dynamic right. Before enacting legislation of this right the government has to give due consideration to the concern of intelligence agencies also. A balance has to be created in the individual right and the interest of the state.

As Justice Chandrachud has stated, "*Formulation of a regime for data protection is a complex exercise that needs to be undertaken by the state after a careful balancing of requirements of privacy coupled with other values which the protection of data sub-serves together with the legitimate concerns of the state.*" The declaration of privacy as a fundamental right by the Supreme Court is the biggest victory for the Indians. But it is to be remembered that it is only a first step taken by the judiciary as the robust regime is to be covered by the government.

“Fate Worse Than Death”

Critical Analysis of Acid Violence in India and Other Western Countries

*Himanshi**

Introduction

Acid Attack is a vitriol act or vitriol age which means violent assault¹. It involves throwing of corrosive acids on another person. Acid attack victims are both men and women but it is more specific to women. Women are responsible for giving birth in the society, unfortunately, they are made to lose their lives in the name of different brutalities such as acid attacks, physical abuse and burning her to death.

The acid attack has emerged as a brutal act that shows the gravity of the ongoing atrocities and human rights violations. The crime of acid attack is the intentional act wherein acid is thrown or poured on the face or other body parts of the victims. The barbaric crime of acid violence can be seen in many countries; however, it is more prevalent in countries like India, Bangladesh, Pakistan and Cambodia. The 226th law commission of India report as well as the Justice Verma committee report² admits the heinous crime of acid attacks has a specific gender dimension in India.

Acid attackers generally target young girls with the intent to disfigure the face of the victim. The most common types of acids used to attack victims are hydrochloric³, sulfuric⁴ and nitric acids⁵. The reason behind this atrocious crime is many, namely the rejection of love, marriage proposal, refusal to pay dowry, rejection of sexual advances property or family or marital disputes or family disputes like refusal to give divorce. Acid attack results in severe physical,

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¹ “Man who threw acid on women blame two others” LA Times 19 March 1992, retrieved 20 April 2016.

² This report was submitted by the Justice Verma committee on amendments to criminal law. This committee was constituted by the government of India on December 23, 2012.

³ Hydrochloric acid is used to make soy sauce, cosmetics, and traditional medicines and to polish jewelry.

⁴ Sulfuric acid is the world’s largest volume industrial chemical used to manufacture explosives, dyes, glue, wood preservatives, weaving and automobile batteries.

⁵ Nitric acid is used by goldsmith, jewelers, brass makers to purify gold and metals.

psychological and socio-economic consequences and makes the life of a victim worse than death. It is a complex and multi-dimensional problem that makes it very difficult for the survivors to return to normalcy.

Acid is thrown reportedly by the criminal on medium moving motorcycles or on public roads, as it is the easiest medium of escape even in the broad daylight. Therefore, acid throwing⁶ is an aggressive crime growing rapidly, in which the person doing the crime seeks to inflict severe mental or physical trauma on the innocent victim. Rampant sale of acid, without checking any proper documents during the time of sale, can be considered as one of the main reasons for spreading of this crime like a fire. Some activists have been calling for stricter restrictions on the sale of acids which are commonly used in the attacks.

It is estimated that the first acid attack case occurred in India in 1982 since then the severity of the acid attacks have increased in the region. The first acid attack case as recorded outside however was in 1967 in Bangladesh and in 1993 in Cambodia⁷.

In India there were no such specific legislations for the acid attacks and no provisions were made to define acid attack in Indian Penal Code⁸. It was only after 2013 that the need for amending the laws and providing importance to acid attack cases was felt.

This study investigates the issue of acid attack violence on innocent victims. The purpose of this research is to develop an increased understanding of acid attacks through a comparison in cases of different countries and to speculate the reason for its occurrence. Its objective is to identify and enumerate the different ways of understanding acid attack violence including the scale and scope of issue, to explore the sociocultural imperatives of shame, loss of face, and loss of honor, to understand various provisions under law for acid attacks and to determine the various reasons of motivation and causes for acid attacks with particular reference to other western countries.

What is Acid Attack?

Acid violence refers to the thought-out act of throwing corrosive acid on the face and body, with the intent to disfigure, torture, or kill the victim⁹, the acid melts

⁶ Acid shall mean and include any substances which have the character of acidic or corrosive or burning nature that is capable of causing bodily injuries leading to scars or temporary or permanent disability.

⁷ Welsh, Jane "It was like burning in hell" A comprehensive exploration of Acid attacks violence".

⁸ Bangladesh, India, Cambodia has ratified the convention on the elimination of all forms of discrimination against women.

⁹ Breaking the silence: addressing acid attacks in Cambodia (May 2010).

the flesh, sometimes to the bone¹⁰, and causes lifelong scarring, physical mutilation, and in some cases, permanent incapacity including blindness and immobility. Acid violence not only has a weighty physical impact but causes strong psychological suffering, with survivors often reporting depression, anxiety and post-harrowing stress.

When acid is thrown on a person, the results can be perturbing. Nitric, hydrochloric, or sulfuric acid all have a catastrophic effect on human flesh. It causes the skin tissue to melt, often uncovering the bones below the flesh, sometimes even dissolving the bone. When acid attacks the eyes, it harms these vital organs permanently. Many survivors have lost the use of their both eyes¹¹. The victim is devastated physically, psychologically and socially.

An acid attack on your body would completely change your life. Most survivors of an acid attack are forced to give up their schooling, their profession and all other important things in their life. This is because recovering from trauma is not easy for any of them and it takes up most of their time and because the disfigurement debilitates and handicaps them in every conceivable way.

The marks left by acid are not just skin deep, victims are most often faced with social isolation and ostracize that further damages their self-esteem, self-confidence and seriously weakens their professional and personal future. Women who have survived acid attacks have great difficulty in finding work and if unmarried, as many victims mostly are single girls, they have very little chance of ever getting married, which is socially isolating in a country like Bangladesh.

Although acid throwing is a type of violence known to have been prevailing all the way through history, there is a sheer rise in the number of cases recognized in recent years. Some of this increase has been attributed to better documentation and survivors reporting the attacks more often. However, there appears to be a substantive increase in the number of acid attacks committed in recent years.

Factors Responsible for Acid Attacks

To understand why acid attacks happen in India, it is important to understand the VAW (Violence against women) in this country. Numerous reports and studies of the various forms of VAW in India have been completed, particularly on the issues of domestic violence and dowry death¹². Statistics on domestic violence in India suggest that 45% of women are slapped, or beaten by their husbands

¹⁰ Bangladesh efforts to stop the violence, Jordan.

¹¹ Acidattacks.org

¹² See: Subhadra Panchanadeswaran and Catherine Koverola, The voices of battered women in violence against women 2005; 11; 736; Ram swami Mahalingam and Jana Haritatos, Essentialism and Cultural Psychology of Gender in Extreme Son Preference Communities in India, American Journal of Orthopsychiatry 2007.

(Ministry of women and child development). According to the crime against women report by the National Crimes Records Bureau (NCRCB), in 2007, 20,737 women reported being raped, 75,930 women reported being tortured and 38,734 women reported being molested. However, despite these grim statistics, due to the sheer scale of the country and other factors including under-resourcing at medical centres and police stations, there is considerable underreporting of this issue in India. Contributing factors of domestic violence in India are closely linked to those of acid attack violence and include societal stratification, changing gender roles, insecurity, shame and loss of honour, jealousy, patriarchy, aggression and frustration.

- o The law commission of India in its 226th report has asserted that the majority of acid attack victims are women – “particularly young women for spurning suitors, for rejecting proposals of marriage, for denying dowry etc. The attacker is not able to take the fact that he has been rejected by the women and seeks to destroy the body of the women who has dared to stand up to him”¹³. A renowned academician Afroza Anwari in his study emphasized that how acid is used by men on women as a mark of their masculinity and superiority over women to keep women in their place¹⁴. Acid is used as a weapon to silence and control women by destroying what is constructed as the primary constituent of her identity. Anwari in his study further maintained that in a patriarchal and conservative society, overemphasis is laid on the marriage of a girl. Women have been limited to their virginity and a fair complexion. Her romantic relationship prior to her marriage is odious¹⁵. When the girl turns down the proposal of vengeful lovers for marriage or is rejected by the family of hers, they resort to acid attack. There is also an economic aspect to acid attacks in view of globalization. The financial independence of women in a society of unemployed men creates antagonism in them.
- o “Deteriorating economic conditions, high unemployment rates among male bread-winners, the growing number of powerless households, and the absence of pastoral work for male labourers” are the major reasons for their pique. Thus, women who are burdened with the onus of earning for the family are often made a victim of acid by their husbands and In-laws when they fail to live up to their expectations as homemakers in their conservative sexual roles. Property disputes are another cause for such violence on women. The motivation of acid attacks on women can be attributed to various factors and feelings. Some men throw acid on

¹³ 226th Law Commission of India, Proposal for the Inclusion of Acid Attacks as specific Offences in the Indian Penal Code and a Law for Compensation for Victims of Crime 7 July 2009).

¹⁴ Afroza Anwari, Acid Violence and Medical Care in Bangladesh: Women’s Activism as Care Work. 17 *Gender and Society* 305, 306 (2003).

¹⁵ Commonly termed as a taboo.

women in order to demean them, some do to show their superiority over the women. Men want their everlasting control over women's fate.

- o Study of Indian News Reports, from January 2002 to October 2012 uncovered that victim's rejection for love and marriage proposals motivate attacks in 35% of the different news stories, providing an intention for the attack¹⁶. Furthermore, a leading organization working for acid attack victims published another report. The Campaign and Struggle Against Acid Attacks on Women (CSAAAW) found that sexual harassment or assault in response to women or girl refusing such advances or demanding that the violence should stop often precede such attacks. This shows the society's outlook on women. Women still cannot fight for the rights which are instilled in every person from their birth. In a patriarchal society, a woman is guided by the males and cannot take her own decisions or make their own choices. Women complexion her size is considered as the beauty of her which is why it gives much pleasure for the men to throw acids on the women in order to destroy their body and dreams. It comes from the thinking "If I can't have you, nobody else would.

Another reason may be dowry problems or other marital problems. Though taking dowry is a punishable offence, still it is largely prevalent in many areas. It is considered as the duty of the bride's family and has to suffer a huge social stigma if not complied with. In India, many women have claimed that they are attacked with acids due to failure to meet the monetary expectations of them in-laws. The study of the newspaper reports in India, exhibits nearly 20% of the attacks are occurred between unrelated people, due to business rivalry, sales disputes, land quarrels or due to families reprisal.¹⁷

- o However, whilst self-immolation or setting a woman on fire are considered by some as upright, the transformation of these types of traditions into the recent days burning of brides over economic greed, is a perversion of the auspiciousness of Sati. Kerosene, most often used as the ignition fluid in Dowry Violence, is commonly found in kitchens in India and is cheap, legal, and accessible. In cases where Dowry Deaths are investigated, often they are classified by authorities as Dowry Accidents whereby a stove has burst or there is a kitchen accident.
- o Thus, from the above discussion, it can be concluded that the men resort to acid attack as a means to intimidate women and to impose their authority on her. Such types of ferocious attacks foster his male ego and make him feel that he is the honoured maker of God and has created the male-controlled society. Females between 11 and 30 years are the most

¹⁶ Sujoy Dhār, India's Acid Attack Victim (August 20, 2013) *The Global Times*.

¹⁷ Acid Survivors Report Bangladesh, Annual report 2009 at 15(2009).

vulnerable to such attacks, in 36% of the acid violence women are attacked for refusing the marriage proposals. Therefore, the main cause that is seen to be behind acid attack is rejection for sexual advances.

Consequences or Effects of Acid Violence

Acid has a traumatic effect on the human body, often permanently blinding the victim. The aftermath being the inability to do many everyday tasks such as working and even mothering is rendered extremely difficult if not impossible. In Pakistan, there is a high rate of survival amongst the victims of acid attack according to their Acid survivor's foundation. Subsequently, the victims are faced with physical effects which require many deep surgeries, as well as psychological effects, which require involvement from psychologists and counsellors at each stage of physical recovery. The victims are often left with no legal recourse, limited access to medical or psychological assistance, and have no means to support themselves¹⁸.

Physical - Acid eats through two layers of the skin, i.e. the fat and muscle underneath, and sometimes not only eats through to the bone but even dissolve the bone. The deepness of injury totally depends on the strength of the acid and the duration of its contact with the skin. When thrown on a person's face, acid rapidly eats into eyes, ears, nose and mouth. Eyelids and lips may burn off completely. The nose sometimes melts, closing the nostrils, and ears shrivel up. Acid can rapidly destroy the eyes, leaving the victim blind. Skin and bone on the cranium, forehead, cheeks and chin may melt. When the acid squelches or drips over the neck, chest, back, arms or legs, it burns everywhere it touches. The biggest instant jeopardy for victims is breathing failure. Inhalation of acid vapours can create breathing problems in two ways: i) by causing a poisonous reaction in the lungs. ii) By swelling the neck, which constricts the airway and strangles the victim.

Like other wounds and injuries, acid attack is unparalleled the most painful of all. When the acid is thrown on the person it not burns the skin but also melts all the layers of the flesh and bones. It may also dissolve the bones. The damage depends on the amount of acid thrown and the duration in which it is remained exposed. If it is washed or treated immediately then the intensity of burn may be lessened. When the acid is thrown on the persons face, it spreads rapidly into the eyes, ears, nose and mouth. The eyelids and lips may burn off completely. The acid may quickly destroy the eye blinking of the victim. The nose may melt, closing the nostrils and can blind the victim. The skin everywhere on the skull, forehead, cheeks and chin dissolves. It was founded in one study that usually, 14% of the body surface area burns of the victims including the face with maximum burns

¹⁸ Acid violence as on www.acidviolence.org.

(81%) of the victim, head and neck majorly after the face (67%), upper limbs by (60%), and chest (54%). Also, many of them suffered (31%) complete or partial blindness¹⁹. Thick scars which pull the skin very tight and causes disfigurement are formed when the burn from acid starts to heal. For illustration, their eyelids may no longer handy, the mouth may no longer open; and the chin becomes joined to the chest²⁰.

Psychological - Acid assault survivors face many mental health issues upon recovery. Acid violence victims have been reported with higher levels of anxiety, depression, due to their appearance. According to the Rosenberg Scale, the women reported lowered self-esteem and increased self-awareness, both in common and in the social range.

Psychological consequences can even be worse as compared to the physical consequences. It has a deep impact not only on the victim but also on families of the victims. A trauma controls the victim and also on the people and has a deeply rooted bearing on the masses. When the acid is thrown the victim goes through psychological trauma knowing that their skin has burnt off, and the disfigurement or disabilities with which they have to live.

Some of the psychological problems which they bear are insomnia, nightmares, depression, fear of facing the world, headache, tiredness, fear of other acid attacks. Their mental state is deteriorated as they think themselves boycotted and castaway from society. The victim's life keeps on becoming worse as they see themselves in the mirror. It is also because in our society outer beauty is more important than inner beauty. This consequently sheds an adverse image on her empowerment.

Social And Economic - Acid attacks usually leave victims handicapped in some way, rendering them dependent on others for everyday activities, such as eating and running jobs. They face a lifetime of discrimination from society and they become lonely. Many acid survivors are not able to find work because of their impaired vision and they being physically handicapped, these dependencies are enlarged by this fact. As a result, divorce, abandonment by husbands is common in society. Besides, acid survivors who are not married when attacked are almost isolated from society, successfully ruining marriage forecasts. They become so conscious and embarrassed that people will stare or laugh at them and may hesitate to leave their homes dreading an opposing reaction from the outside world.

Victims who were not married are not likely to get married and those victims who have got serious debilities because of violence, like impaired vision, will not find

¹⁹ Acid Violence in Uganda.

²⁰ 226th report of law commission of India, proposal for the inclusion of acid attacks as specific offences in the Indian Penal Code and a law for compensation of victims of crime 7(July 2009).

jobs and earn a living. Discernment from other people, or debilities such as sightlessness, makes it very difficult for victims to fend for themselves and they become dependent on others for food and money.

The victims who are not married are not likely to get married as they suffer from many incapacities like loss of sight, deafness and many others and our peoples' mindset is not broad enough to accept a disabled person as their better half. They even do not get a job in spite of being highly qualified as they have lost their personality. Instead of helping them we people make their life more troublesome, as we sympathize them as we do not like to look at their faces for long. However, this approach needs to be changed as they are not suffering because of their wrong, but because of some ferocious animals roaming around the world freely. So far as economic consequences they are often discriminated on the basis of job offerings.

Thus, we can say that acid victims go through a phase worse than death. The physical marks on their body remind them continuously of the carnages committed on them, and a feeling of isolation and insignificance always haunts them.

Acid Attack: a Gender-Based Violence

Acid violence is gender-based violence, a form of discrimination under the convention on the eradication of all forms of discernment against women (CEDAW)²¹. The committee on the eradication on all forms of discernment against women, which monitors state compliance with the treaty, describe gender-based violence as "violence that is directed against the women because she is women or that affects women inexplicably²². The CEDAW committee has added further that gender-based violence both results from and spread traditional biased attitudes that restrain women to orthodox, subordinate roles and positions²³. Bangladesh, India, and Cambodia have ratified CEDAW and are thus obligated to combat all forms of discrimination against women, including acid violence.

²¹ See CEDAW, at art 1; CEDAW committee general recommendation no- 19- violence against women.

²² CEDAW Committee General Recommendation No. 19–Violence against Women. We note that, although CEDAW recognizes gender-based violence as something that occurs only to women, it is increasingly being recognized that men can also be subject to violence because of their gender. See, e.g., Judy A. Benjamin & Khadija Fancy, Women's Commission for Refugee Women and Children, UNICEF.

²³ See CEDAW Committee General Recommendation No. 19–Violence Against Women, (remarking that "traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision.") [Emphasis added].

Acid Violence Disproportionately Affects Women

The majority of victims as studied and researched are women. In Bangladesh, studies suggest that 68% to 90% of the acid burn victims are female²⁴. Our study of newspaper stories from India shows that 72% of the reported victims are female. A slight majority of the victims are women and girls 52%²⁵ in Cambodia. In Cambodia, where women commit acid attacks against other women which is very common – acid violence is gender based violence. The underlying gender inequality and discrimination, not the gender of the perpetrators, are the relevant factors in determining whether or not violence is considered gender-based.

Acid Violence Results from Gender Discrimination and Inequality

Although acid violence occurs in many countries it is most prevalent in the countries mentioned above. Acid attack occurs where there is gender discrimination i.e. where one gender is treated as superior to others. Bangladesh, India and Cambodia stand very low on the Global Gender Gap Index, which measures national, economic, educational, health and political equality between men and women. In 2009, Bangladesh, India and Cambodia ranked 93rd, 114th and 104th, respectively, out of 134 countries included in the Global Gender Gap Index. A strong societal group preference for sons is another indicator of the rating of girls relative to men. In 2006, 25.6 % of ever-married Indian women age 15 to 49 expressed a preference to have more sons than daughters²⁶.

Similarly, in 2008, Bangladesh had the highest ratio of son preference. Whereas in Cambodia it was found to be moderate²⁷. Society confines the women to her beauty based on her virginity, her size and her complexion which is the reason perpetrators often tend to destroy her beauty. One author who interviewed some suitors he noted that one of the reasons what to punish the women for being proud of her beauty. Women are mostly attacked because in a patriarchal society woman has no self-identity without a man. Mostly where the problem is with family members, the attackers' attack the females of that family to burden them as the female would not be accepted by the society thereafter will be completely dependent on their families. India and Bangladesh shared the same territory before 1947, so they have the same cultural history.

²⁴ See Acid Survivors Foundation, Bangladesh, Annual Report 2009; Bari & Choudhury; Zafreen *et al.*

²⁵ Cambodian Acid Survivors Charity (Casc), April–June 2010, Quarterly Report 4 (2010).

²⁶ Ch. 4: Fertility & Fertility Preferences, in *National Family Health Survey 2005–06: INDIA*. Among ever-married Indian men ages 15 to 49, 23.6% wanted more sons than daughters, and 30.6% did not want any daughters.

²⁷ See Jane E. Miller & Yana V. Rodgers, *Mother's Education and Children's Nutritional Status: New Evidence from Cambodia*, 26 *Asian Dev. Rev.* 131, 132 (2009).

In contrast, Cambodia is the state where the men population is low caused by decades of war and genocide²⁸. Even though the pattern of such inequality differs in every country, the most acid attack that is carried out is because of the discriminatory attitudes in society against women. Below we discuss the most common reasons for acid attacks and how each of them reflects gender discrimination and inequality.

Land or Business Disputes

In a Patriarchal society, women are considered inferior to men. They are always guided by the males in the family, first by her father than brother then husband then a son. She cannot choose or decide on her own. In this society women without a man has no identity and also is not protected. Women are treated so sensitively that in case of revenge women are attacked firstly because they are considered weak and secondly, they are confined only to their beauty and virginity.

People in cases of land disputes, often attack women of the family and not the opponent itself. They believe to cause more harm by attacking the female that for life they would not be able to bear it.

Land disputes are one of the leading motives for attacks in Bangladesh, a country in which land is scarce and coveted. According to the ASF³², it was the reported motive of 39% of cases from May 1999 to 2009. In a study of newspaper stories from India, of the reports that identified a motive, nearly 20% of the attacks were between unrelated people because of business disputes, sale disputes, or revenge between families. In contrast, reported acid attacks in Cambodia have rarely occurred over land disputes, as there has been only one reported case in which a person was attacked over a land dispute between 1985 and 2009²⁹. Business motives, however, has been more common in Cambodia.

Women are considered more vulnerable and that harm to her will be harm to the whole family. This underlines the notion that the women are considered as property as they are treated as a burden on their family also as unmarriageable material.

Acid Violence Perpetuates Gender Discrimination and Inequality

Acid violence not only reflects gender discrimination and inequality but also prolongs it. Society eschews survivors who have been burned. As noted above in the case, the victims are still fighting. They are burdened as if they are the attackers

²⁸ Domestic or intimate partner violence, sometimes related to dowry is endemic; it is almost perceived as an inherent part of women's lot in Bangladesh.

²⁹ See OECD Social Institutions & Gender Index, Gender Equality and Social Institutions in Cambodia.

and not the victims. They are deeply destroyed and are unable to face the society. People do not sympathize or help the victims rather they increase their problems. Victims have to face ignorance, discrimination after the attack. They have to fight daily for their lives. They are treated as a bad omen and has to cover their faces.

It is also studied that in India and Bangladesh victims are not allowed to attend marriages or child born ceremonies as they are treated as bad omen³⁰. It is said by people that it might destroy their marriage or the child might bear with disabilities if the victims shadow enters the occasion.

In these countries, women are treated as they have committed some immoral act. They are isolated by society. They are rejected for the jobs. They are left confined to the darkness of the room. There are many cases where the women family also boycotts her and she has no source to live.

Some believe this to be the fate of the victim or a result of her bad deeds in the past. Also, the questions are raised as to why only this girl has been attacked? It might be the fault of the girl. Thus, acid attack victims always face social stigma after the attacks.

Women are always considered as a property, objects of the men. They are ought to be as decided by the superior gender of the society i.e. men. They are not free to take or make decisions or live their life as per their rules. If a woman anytime chooses to make her own decisions or stand up to a man. She is punished by the males to regain their honour and superiority. It is believed that if women stand up to a man it spoils the reputation and honour of the man. So, in order to regain his own power and honour, he punishes the women. Acid attack is one of the common violence against women. This is the reason why acid attacks have been gender based violence.

Acid attacks are relational acts of violence and are rarely specifically motivated by a desire to promote fear among other women. Nonetheless, individual incidents of acid attacks may make women fearful of sinning social customs that keep them in lower positions. Acid violence has the effect of signalling, not only to victims but also to all women in a society in which such violence widely occurs, that they must not counter prevailing gender norms. Acid violence is a form of gender-based violence and discrimination under international law. Thus, governments have an associated obligation to exercise due diligence to forestall and adequately reply to acid attacks.

Legislation in India for Acid Attacks

In India, often incidences of acid attack grab the headlines of the Indian media. Unfortunately, in India, there was no separate legislation to deal with acid attacks

³⁰ See interviews with acid attack survivors, a statement by Cynthia Farid.

before the Criminal Law (Amendment) Act, 2013³⁷. The offence was registered under section 320, 322, 325, 326 and 307 of the Indian Penal Code (I.P.C.).

The crisis with the old provisions was that The United Nations General Assembly passed the Declaration on Elimination of violence against women in 1993, and India has ratified this declaration and is under an obligation to follow the same. Article 4 (f) of this declaration states that all states together shall come up with such recommendations for the safety of the women and also to make such laws and rules to prevent them. There ought to be separate provisions for granting amends to the victims of the attack. Now under Article 253 of the Indian Constitution, the parliament has the power to impose and make laws for these international agreements. Hence the Asian nation is underneath an obligation to curb the menace of acid attack. Now it is seen that the definition of grievous hurt does not contain all the aspects of acid attacks. Therefore, if the perpetrator causes only skin damage to the victim of acid attack, with no substantial damage to other organs, it would not come under the sphere of grievous hurt. Further, no provisions are there if there is a loss of financial gain of the victim. Now if the offender is not penalized under grievous hurt, then it will be covered under, hurt, which in turn invites the minimal punishment of three years.

Further, there was additionally a lacuna that, there was no provision for penalizing the accused of throwing acid. In respect of the above, it was felt that there was a need to formulate a real, efficacious, and specific legislation on the issue of acid attack and to cover all the loopholes that were existing within the previously existing law.

After 2013 sections 326A, 326B was introduced in the IPC.

Conclusion

Acid attack is worse than rape as in rape the person can hide their identity and can start a new life in a different country but in an acid attack, the victim has to move around the world with destroyed face³¹. Their destroyed body cannot be hidden by anyway. By this statement, we cannot say that rape is any lesser both are heinous offences and need to be stopped immediately. In the above cases, we have seen that the women have always been the target and reason is also the same the insecurity of men. The reason that they cannot see women moving forward or standing against them. Though the law deals with acid violence, there is a need for effective legislation to combat acid violence against women.

Acid attacks are intentional attacks of violence. Perpetrators throw, pour, and spray hydrochloric, nitric, sulfuric acid on the faces and bodies of the victims. Acid violence has shattering health consequences for victims. Short term effects include

³¹ Stated by the eminent judge in the Preeti Rathi acid attack case.

major pain and long-term effects can include blindness and loss of facial features. Acid law is prohibited under international law. It is gender-based violence which only targets women. International law recognizes it as a discrimination against women and perpetuates it.

In India and Bangladesh, women are often attacked by men for refusing the proposals for marriage, sex, or love. In Cambodia, perpetrators are mostly women attacking other women as the population of men in that country is low because of wars and grenade. They attack each other for men. In all three countries, victims often face discrimination and marginalization in society.

Acid attack is worse than any form of violence against women. It leaves her burning for her entire life. Some survivors though start living again, but many of them are living dead souls. Acid violence leaves them craving for the beauty, reputation and life they had before. They are treated as disabled person and are no longer able to live a normal life.

Acid attack survivors not only suffer from their pain that the perpetrator put them into but also has to suffer the taunts of the society. Society creates more problem for the victim. They blame the victim for their sufferings and not the attacker. For them, if any women have suffered is because of her own mistakes. Like in rape, people always say it is the fault of the women as she was wearing short clothes. So, in an acid attack, they say women might have done something to deserve this, or it is the fate of her karma.

Victims are treated as a bad omen. They are not allowed to attend any function as it is believed that her shadow would bring bad luck to the family. They are always unheeded.

They are ignored by the government too. They are left dependent on their families after the attack. Some are abandoned by their families too. There is no source of living for them. They are not offered jobs as people would not be able to look at their faces, they will sympathize them.

Acid violence has such hazardous results, that the government must take stringent actions to combat this kind of violence. Acid attacks are most common in Cambodia, Pakistan, Bangladesh, and India where the acid is cheap and easily available. One important way is to limit its easy availability to people. Bangladesh has adopted a new law that requires a license to use acid. Even though this law has not been fully or effectively implemented the rates of attacks in Bangladesh have been decreased each year since 2002. Cambodia has considered applying the same law but no such proposals have yet been made. Acid attacks are high both in Cambodia and India.

Governments must end the widespread liberty perpetrators enjoy by implementing the laws that provide for perpetrators prosecution and

punishment. Bangladesh has enacted criminal legislation improving criminal procedures in acid attack cases and heightening criminal penalties. However, India and Cambodia have not adopted laws that provide for adequate punishments. In all three countries, victims face difficulties in obtaining the require healthcare and justice. The acid attacker often gets bail and roam freely.

Women have always been subject to violence for some or the other reason. Not only acid violence but different kinds of violence by men. All types of violence are separately dealt with under the law but are always insufficient to women sufferings. As women have always been thought as inferior to men. They cannot stand up to him and if she does so she is liable for the punishment in order to restore the man's respect in the society. Men always try to confine the women in the walls. They cannot see them growing. It always taught to women that you're strong so don't raise your voice against a man. Whatever he is doing let him he is a man. Rather than teaching a man how to respect the women our society shuts the women.

Many laws have been created to combat the violence against the women but all laws are waste if they are not properly implemented. In India, there were no provisions for acid violence earlier to 2013, it was only after 2013 that the criminal amendment act was passed to separately deal with acid violence. It provided for punishment and also for providing medical aid to the victim. But framing laws is not enough unless it is properly implemented. In India, courts are buried under so many cases so it takes years for a trial to take place. The attacker roams freely. The victim has to go through many courts but it takes a lot of time to reach or get justice. The government should create a separate body to deal with such cases and give speedy trials and justice.

It is not only in India that the women are suffering it is everywhere even in the developed countries, but women are also not accepted equally by men. They are always treated as inferior and it is very difficult for men to obey women. So not only the creation of new laws would help but the implementation of same would be helpful.

Climate Change and its Impact on Environment

*Dr. Jasper Vikas George**

Introduction

Climate Change is the result of over ambitions of *homo sapiens*. The Industrial Revolution in many ways can be termed as the main cause of global warming which ultimately led to climate change. Industrial Revolution and Renaissance paved the way for information and transport revolution. Guttenberg's Printing Press lead to the printing of information at a faster pace than before and James Watt's steam engine provided speed to factorization as well as to transport services. Renaissance led to the growth of science like never before, and therefore, the emergence of big industrial cities such as Manchester and Birmingham, led to factory revolution, and with the help of colonialism, big markets were thus created worldwide for the consumption of mass production from the big factories of big cities.¹

In this race of development, the human beings have over-exploited the biosphere of Earth which led to the increase in the emissions of Green House Gases (GHG) and which has adversely affected the climate of the earth and the Change in Climate has further adversely affected the Environment. Therefore, there is an urgent need to maintain 1.5 degrees Celsius of global temperature of the earth and reduce the global carbon emissions to 45 per cent by 2030 and reach to net zero by 2050 for achieving the goal of stable temperature.²The main objective of the present research paper, therefore, is *firstly*, to examine what caused climate change and *secondly*, to analyse the impact of climate change on the environment and *thirdly*, to address the issue of climate justice and *finally*, to discuss possible solutions to address the issues regarding climate change.

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¹ Refer Thomas E. Lovejoy and Lee Hannah, *Biodiversity and Climate Change*, 1st Edition, (2019, Yale University Press) for more discussion on how biodiversity is affected by climate change and how due to climate change the biosphere is changing.

² Shouvik Chakraborty, "Environmental Policies Delinked from *Aam Aadmi: Is the Mask of Environmentalism Falling?*" in Rohit Azad, Shouvik Chakraborty, Srinivasan Ramani and Dipa Sinha (ed.), *A Quantum Leap in the Wrong Direction*, 1st Edition (2019, Orient Black Swan) at p. 216 and 217.

What is Climate Change?

Climate is the weather condition of a particular region prevailing over a period of time.³And climate change is a change in that consistent weather of a particular region. There are two schools of thought, according to one, climate change is a natural phenomenon and therefore, we cannot do anything for it, whereas, as per the other school of thought, due to increase in human footprints on this earth, the climate change is happening and therefore, human beings have a moral duty to curb the carbon footprints and try to rebuild the environment by following an international framework. The happening of events such as the rise in the summer temperatures all around the world like never before, the breaking of the polar ice caps, the shrinking of the glaciers filled with fresh waters, are the signs of climate change faced all over the world. There are many other environmental changes and catastrophe are happening all around the earth, adversely affecting the habitation of the Earth, such as floods and droughts, earthquakes and landslides, concentrated rains at one place, etc. There are several natural disasters predicted in future due to climate change. Shifting the environment of the region is adversely affecting the food system of the region, which is sowing the seeds of the new disaster, food insecurity.

The happening of the aforesaid events shows the impact of climate change on the environment of the earth. This gives rise to a plethora of questions such as, if the aforesaid events are happening due to climate change, then since when, this climate change started? What is going to be its consequences? Whether human activities are responsible for climate change? What maximum impact climate change can have on the environment?⁴What are the initiatives taken by the States to tackle this problem? These questions are necessary to ponder upon as they directly or indirectly affect the life of the mother earth including all living organisms. First of all, it is necessary to discuss the impact of climate change on the environment.

Impact of Climate Change on Environment

In the present times, climate change is one of the most serious environmental threat faced by man against the fight for food and hunger, poverty and

³ Refer Tracy Skillington, *Climate Justice and Human Rights*, 1st Edition (2017, Palgrave Macmillan) for discussion on what is climate change and transformations of climate change since the 1990s.

⁴ The aforesaid questions and many more were discussed in detail by Dominic Rose and Christian Seidel, *Climate Justice: An Introduction*, translated by Ciaran Cronin 1st Edition (2017, Routledge) p. 1&2. The author has put many moral or ethical questions in reference to the impact of climate change, such as, whether going for a short holiday is a good proposition or not via aeroplanes or not as it affects the GHGs and creates more carbon footings?

malnutrition and various other issues including health issues also dealing with different types of diseases. It can be said that Climate change is affecting not only the environment, but it is challenging the very existence of the humankind as well as other species including plants and animals. Climate change affects everything present on this earth and therefore it is pertinent to know its impact.

Impact of Climate Change on Agriculture

Climate change has a direct impact on agricultural productivity; therefore, it affects food along with many other things. Food is one of those essential things, along with clothing and shelter without which, one cannot think of the dignified existence on earth. And agriculture is the process which generates food. Agriculture depends upon various factors, such as, soil, water, sunlight, fertilizers, etc. available in a particular region, but, the most important thing which is essential for agriculture is 'suitable climatic conditions'. The agricultural growth is optimum in certain specific climatic conditions only and in the absence of such conditions crop fails. We cannot grow every crop everywhere. Every crop requires a particular type of climatic conditions, for better results. But, due to climate change, the climatic conditions of the irrigated land are changing, and it is rapidly losing its way.⁵

Similarly, temperature variations and major changes in the distribution of rainfall across the country are changing the land composition, which affects its suitability for the particular crop. It is crucial to analyse the impact of climate change on agriculture, as it is the most climate-sensitive field and for a country like India, which is primarily an agricultural country, the agricultural sector provides employment to more than half of the population and also provide food for the huge population of India. The significant increase in the carbon concentration of the atmosphere has caused warming, which is responsible for most of the climate change.⁶ In short, climate change directly affects food availability in the market and the stability of food production. The question of 'access to food' to the marginalized section of the society, therefore, becomes very crucial in the light of changing climatic conditions.

⁵ Refer Syed Sheraz Mahdi (ed.), *Climate Change and Agriculture in India: Impact and Adaptation*, 1st Edition (2019, Springer).

⁶ Carbon concentration in the atmosphere is increasing every year. 2015, 2016, 2017 and 2018 had set a global heat record consecutively for the fourth year in a row since records began in 1850. As per the Intergovernmental Panel on Climate Change (IPCC), the United Nations body for assessing the science related to climate change, out of last 22 years, 20 considered as warmest years on record.

The Effects of El-Nino and La Nina on Indian Agriculture

During the El-Nino effect, the sea surface temperatures of most parts of Central and East-Central Pacific periodically increases and opposite to this phenomenon is La Nina, in which same sea surface temperature of the ocean, decreases. Indian monsoon which is mostly responsible for the rainfall throughout the country is directly linked to these sea variations of the Pacific and Indian Oceans. EL-Nino leads to weak monsoons, dry conditions, which ultimately leads to droughts, which disturbs the agriculture cycle of India. Rising temperature is adversely affecting the monsoons, thereby, affects the Indian agriculture.

Impact of Climate Change on Migration

Climate change at various places has led to serious droughts for years, and at some places due to the increase in the water level of the oceans, the people have been forced to migrate to liveable places. Agricultural communities are worst affected as they were dependent upon a particular land, water and climate for years at a stretch whereas due to changes in the environment, they were forced to abandon their land for the sake of survival.⁷These Environmental Refugees are in search of the places of survival. In the case of climate change related catastrophe, due to the rise in the water levels of the ocean, the worst affected areas will be the coastal areas where the population is often, very high. In fact, the New Zealand government had considered creating visas for environmental refugees. The people of Tuvalu due to rising sea level had started leaving their homes/ land and had entered into different other countries for protecting themselves. Similarly, the people from Kiribati have also been displaced due to climate change and rise in sea level. Phosphate mining has also destroyed their environment and therefore in 2012, they had formally approved the idea of purchasing of land in Fiji as long term security.

Food Security and Climate Change

Crop responses to global warming through climate change is different everywhere. Rising atmospheric temperature forces agriculturalists to change the crop cultivated by them. There is a strong need to have Cropping Systems which can adapt to situations like droughts and other adverse conditions. Crop qualities obviously, especially of rice and wheat, would be affected by the increase in carbon dioxide (CO₂) and other Green House Gases in the atmosphere. There is a strong need to have crops which can mitigate the effects

⁷ Refer, Etienne Piguet and Frank Laczko (editors), *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration*, 1st Edition (2014, Springer) for more discussion on how climate change is causing forced migration to a very large population of the world.

of climate change.⁸Sub-Saharan Africa is facing the problem of drastic changes in temperature and increase in the precipitation levels, similarly, Mediterranean Basin and the Middle East are facing the extremes droughts, all this will affect the availability of the food in a particular region.

Impact of Climate Change on Air Pollution

The effect of climate change on Air Pollution is clearly visible throughout the world.⁹ Though air pollution and climate change are altogether different propositions, yet, the increase of composition of CO₂ in the atmosphere will affect both. Air pollution is already considered as the biggest threat to human existence and climate change is making the situation, worse. The major effect of the greenhouse gases is the sudden change in weather. The warming of the atmosphere will certainly increase the levels of ozone, smoke and pollen, disturbing the health of the human beings, especially living in big business cities, such as Delhi, Gurugram, Bombay, etc.

Impact on Oceans

Oceans are evidently facing the visible effects of climate change. There are many animal species who relocate themselves during warming of the ocean, such as, plankton, fish, etc. whereas, there are certainly other creatures of the eco-systems who would not be able to relocate themselves, to higher latitudes, such as, kelp forests, coral reefs, etc. therefore, mortality rate will be high among them.

The Impact of Climate Change on Human Health

Climate change causes extreme health problems including mental stress, vector-borne diseases, heat waves, heat stress, problems related to allergens, food security, air degradation, etc. to human beings.¹⁰ Climate change is leading to the excessive and recurring phenomenon of heat waves which causes a number of skin related problems to human beings. Similarly, the vector-borne disease can be very fatal.

⁸ In Shyam S. Yadav (editor), *Food Security and Climate Change*, 1st Edition (2019 John Wiley & Sons Ltd), the author has in detailed refer the statistics in reference to the impact of climate change on agriculture and what are the possible ways to mitigate it.

⁹ In Rais Akhtar and Cosimo Palagianio (Editors), *Climate Change and Air Pollution The Impact on Human Health in Developed and Developing Countries*, 1st Edition (2018, Springer), the author had in detail discussed the changing composition of different Green-house Gases in the Air and its impact.

¹⁰ In Liqiang Xu, *Impact of Climate Change and Human Activity on the Eco-environment: An Analysis of the Xisha Islands*, 1st Edition (2015, Springer-Verlag Berlin Heidelberg) the author in detail has discussed the impact of climate change on human beings.

Indian Response to Climate Change

India has not adopted any particular policy towards climate change as such, in fact, India is relying more on those statutes and acts, which are primarily enacted to check the environmental pollution in India. Water (Prevention and Control of Pollution) Act of 1974 was enacted to check the level of water pollution in India. Later, more comprehensive Environment (Protection) Act, 1986 was passed under which on a regular basis new regulations were passed, including Noise Pollution Rules 2000. But, these legislations are enacted with the purpose of preventing further deterioration of the environment and not to prevent and control climate change. Similarly, the Forest Rights Act 2006 and the Forest Conservation Act 1980 were enacted to prevent the destruction of ecology and to promote sustainable development. But, none of the above policies is tailor-made to control the pace of climate change, maybe because we have yet not accepted the fact that climate change is not a natural phenomenon but a non-natural one, and the process of climate change is accelerated by the human activities.

Climate Justice

Climate is changing rapidly and it will not differentiate between the rich and the poor. Climate Change is the end result of mindless growth. Climate justice as a field is developing to adjudicate who is and how much a person is required to pay for correcting the wrong. It is the developed nations only who had created more carbon footprints on the earth, which is the major cause of climate change and therefore, it is the duty of the developed nations to take more burden on themselves.

Due to excessive anthropogenic activities by the developed nations, in particular, the number of man-made disasters has increased in the past many years. The demand for climate justice, therefore, is to adjudicate, who will bear the burden of climate change and to what extent. The recurring problems such as, 'Water Distresses', will be tackled by whom, similarly who will take the steps to check the threat posed to marine ecosystem and corals and how to build a unified common consensus on carbon emissions to check changing temperatures and its effect on various living species. The rising of the water level in the seas in past years has posed a threat to the very existence of the small islands and therefore, the rules of citizenship need to be relaxed. In short, there is a strong need to set the rules of climate justice.

Suggestions and Summations

Learning from the past, we should take unified initiatives together to curb the emission of greenhouse gases within the permissible limits.

The Role Played by Developed Nations to Check Environmental Pollution

Developed Countries also need to make sure that the burden of improving the environment must be borne more by them, than the developing nations, who had least contributed to the offence in comparison to developed countries. Paris Agreement was one such agreement, where first time, the general consensus was made on many things including consensus on provisions like voluntary cooperation.¹¹ But, these measures are not enough and there is a very strong need to have every nation on a common platform so as to save the environment from drastic climate changes. We have to work in two ways to address the problem of climate change. *One*, is by controlling the pace of emission of Green House Gases by way of adopting self-regulation by the nations, by way of enacting stringent provisions to check the climate change and, *second*, by creating climate change adaptive technologies, for example, genetic engineering, which can be used as the tool to mitigate the effects of climate change. 'Carbon credits' are already used as a strategy to combat climate change.

According to the Brundtland Commission report of 1987, the use of fossil fuels in the past century has increased many-fold.¹² And therefore, it is necessary to check the over-exploitation of fossil fuels which induces CO₂ in the atmosphere. Keeping in mind the adverse effects caused by climate change on the health of human beings,¹³ there is a strong need to address the problem of climate change on a most urgent basis. And, the most important is to address the impact of climate change on human health on an urgent basis.¹⁴

Climate change is affecting everything on this earth, and we are running short of time, therefore, it is essential, for everyone to work for the saving of the environment by reducing carbon footprints on earth in a united way.

¹¹ In Daniel Klein, Maria Pia Carazo, Andrew Higham, *The Paris Agreement on Climate Change: Analysis and Commentary*, 1st Edition (2017, Oxford University Press) the authors had in detail discussed the provisions of the Paris Agreement 2015 especially Andrew Howard had analysed Article 6 of the agreement which provides provision for the voluntary cooperation of the member nations.

¹² Refer Asheem Srivastav, *The Science and Impact of Climate Change*, 1st Edition (2019, Springer) for a detailed discussion on the role of science in causing climate change. Chronic droughts and receding glaciers are caused due to excessive use of science.

¹³ Paul Auerbach, *Enviromedics: The Impact of Climate Change on Human Health*, 1st Edition (2017, Rowman & Littlefield Publishers).

¹⁴ Refer LiqiangXu, *Impact of Climate Change and Human Activity on the Eco-environment: An Analysis of the Xisha Islands*, 1st Edition (2015, Springer-Verlag Berlin Heidelberg) for detailed analysis of the causes affecting the health of the human beings due to climate change.

Analogizing Corporate Governance Approach of Director's Ambit in The United Kingdom and India

Hitendra V. Hiremath & Sonali Kapadia***

Introduction

Directors play a crucial role these days in day to day affairs of the company. They become the centre of attraction, as whenever things go wrong (and it was true in case of Enron, Satyam and other scandals) they are held liable for fraud etc. The Directors of Enron paid hefty amount as fine to the investors. As an outcome of these outrages and progressing concerns about corporate influence, directors have been at the core of the strategy face off regarding concerning administration change and examination and the role of directors became the matter of debate.

The foremost part of the directors – as agents of the shareholders, is to administer the capacity of the association and guarantee that it keeps on operating to the greatest advantage of all stakeholders. Given the many-sided quality of today's associations, that is no basic or direct errand. Today, board adequacy is a key execution driver of any organization. Directors must move far from being an elastic stamp to be a key possession for the organization. They have to set the tone from the top in advertising a transparent society that pushes compelling dialogues among the chiefs, senior administration, and different capacity and danger directors. Directors ought to look past the 'old kids organize' and select chiefs with individual zones of aptitude and contribute on a progressing premise on their formal and casual training. Autonomous directors ought to essentially help the working of the board through an essential understanding of the organization and the business. Directors must investigate

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their execution assessment and empower ceaseless criticism and correspondence cycle.¹

Compelling directors fabricate abilities among themselves and their associations that permit them to do both, ensure existing possessions (consistency part), and additionally, oversee dangers to future development (methodology oversight part). This segment of the site incorporates a scope of valuable productions identifying with enhancing the viability of the board, directors are also the gatekeepers, who work for the welfare of the stakeholders, not limiting to the stakeholders/shareholders but also for the growth of the company and the social responsibility.

In England, various committees were constituted by the London Stock Exchange, such as the Cadbury Committee, Greenbury committee, Hampel Committee, Higgs Committee, Turnbull Committee, United Kingdom Stewardship Code and the United Kingdom Corporate Governance Code 2012. It is important to note that the United Kingdom companies are into the business, hence, the regulations and norms in the United Kingdom are better. So the important point of studying these reports of the United Kingdom is to draw good elements of Corporate Governance which can be incorporated into legislation.

However, in India, CII has issued the recommendations in 1997 in relation to the Corporate Governance and after that various committees like Birla committee, Naresh Chandra Committee were constituted by SEBI, and Voluntary guidelines were left in 2009 which was followed by the Clause 49 of the Listing Agreement in the wake of the Satyam scam.

This article focuses on the role of directors under concerned legislations/reports of India and the United Kingdom, along with certain recommendations to make an effective impact on the role of directors in a firm/organization in India.

Role of Directors under the various United Kingdom reports

Cadbury Committee

The committee's inputs were mainly focused on the function of the board mainly focusing on the controlling and the reporting and on the working pattern of the

¹ <http://www.corpgov.deloitte.com/site/in/board-of-directors/> last visited on March 10, 2018. On board of directors relating to the actual working pattern of the board of directors and also their responsibilities towards the people associated with the company/firm/organization

auditors. The committee mainly focused on the review of the corporate governance of financial and accountability.² The committee was constituted by the financial reporting council of the London Stock Exchange which was concerned about the least level of the confidence in financial reporting of the listed companies.³ In constituting various committees to the company the board play an important role and a minimal role is played by the shareholders, so it is always necessary that board must be answerable in case of any faults to the shareholders.⁴ The committee was appointed after the scandalous collapse of many big United Kingdom companies such as Ferranti, Colorol Group, Pollypeck, Bank of Credit and Commerce International and Maxwell Communications in the late 1980s and early 1990s.⁵

The code of the good practice completely focused on the directions to the board, the directors of all listed companies which are registered in the United Kingdom. The code is based on the principles of openness, accountability and integrity.⁶ The report also pointed out that the board must comply with the norms of the code while reporting to the London Stock Exchange and to the shareholders.⁷ The committee actually reviewed the code existing at that point of time. It also suggested for review to be carried out by the London Stock Exchange as to how far the companies follow the rules mentioned under the code.⁸

Board

Under the report, Boards' effectiveness has been discussed and it points out that the board must have effective leadership which can actually lead and control the business. Under United Kingdom unitary board system all the people, be it the directors, executives and non-executives and the chairman must take up the responsibilities for which they have been appointed⁹

The effective role of the Independent Directors for which they have been appointed must commit themselves for the company and adhere to the

² Report of the Committee on The Financial Aspects of Corporate Governance, Para 1.1; 1.2, Available at <http://www.ecgi.org/codes/documents/cadbury.pdf> last visited on June 02, 2017

³ *Ibid.*, Para 2.1

⁴ *Ibid.*, Para 2.5

⁵ Jay Dahya, John J. McConnell and Nickolaos G. Travlos, *The Cadbury Committee, Corporate Performance and Top Management Turnover*, The Journal of Finance, Vol. 57, No.1, Feb. 2002. (At page 462). Available at <http://www.krannert.purdue.edu/faculty/mcconnell/publications/PublicationsPDFS/Cadbury...Turnover%20JF%20Feb2002%20V57%20N1%20461-483.pdf>, last visited on January 05, 2018

⁶ *Supra No. 2* Para 3.1;3.2

⁷ *Ibid.*, Para 3.8

⁸ *Ibid.*, Para 3.12

⁹ *Ibid.*, Para 4.2;4.3

companies' growth, also performance evaluation of the board needs to be done from time to time¹⁰

The committee under the report pointed out the effective role to be played by the directors and non-executive directors of the company, it also mentioned the need for the performance evaluation of the directors but the Committee failed to deal with the aspect of the consequence of the poor performance by the directors, the Committee also failed to deal with the aspect of the qualifications of the person/s who can be appointed as non-executive directors. However, the Committee has indirectly pointed out that the board decision needs to be influenced by the non-executive directors and that they should be appointed by the nomination committee¹¹

Directors Training

The committee pointed out that all directors must take an internal and external training in order to make the working structure of the company more effective and it suggested few schools and Institute which were established by the directors.¹²

Directors Responsibilities

The report pointed out that there should be a list of responsibilities which must appear in the report and accounts of the company in relation to the auditing of the company¹³

Audit Committees

The report points out that unlike the report of Treadway Commission of New York Stock Exchange¹⁴ (NYSE), the audit committee should consist only of the Independent Directors, keeping this in mind Committee suggested that the audit committee shall consist of 3 members out of which majority should be non-executive directors¹⁵ and external auditors ought to attend every meeting¹⁶ but the company didn't deal with the yardsticks for appointing the external auditors. It also pointed out that there should be a rotation of the auditing partners but it is not clear whether it meant the members or external auditors¹⁷

¹⁰ *Ibid.*, Para 4.5;4.6

¹¹ *Ibid.*, Para 4.11; 4.15

¹² *Ibid.*, Para 4.19; 4.20

¹³ *Ibid.*, Para 4.28

¹⁴ Hereinafter 'NYSE'

¹⁵ *Supra No. 2* Para 4.33; 4.35 points certain recommendations so as to the constitution of the audit committee

¹⁶ *Ibid.*, Para 4.35 (c)

¹⁷ *Ibid.*, Para 5.12

Even the committee pointed out that the remuneration payable to the non-executive directors should be based on the recommendation of the nomination/remuneration committee. Accountability of Directors towards shareholders

The committee suggested for the wide range of powers to the shareholders as to form their own committee and can question the directors at any point of time and it was suggested that most of the members if they miss the Annual General Meeting then they can question the directors at any point of time, however it said that the board and the shareholders must understand the importance of these meetings and attend it regularly.¹⁸

The important point is that the committee gave out the code of best practice which needs to be followed by the board¹⁹ and under the appendices, certain other parts are discussed.

Greenbury Report²⁰

The committee gave out the recommendations, as the existing Companies Act 1985 was inefficient as act dealt with the disclosure in the accounts but not specifically with the remuneration account.

This committee mainly dealt with the aspect of the director's remuneration and didn't concentrate on the role of directors in the board. However the report suggested that the directors must delegate the responsibility to a certain group of people who are competent with no personal financial interest in the company so that they can actually fix up the remuneration, as it is well known that the key packages offered by the company attract the talented people for the director's post.²¹ It is necessary that there must be full disclosure²² to the shareholders and to the regulators²³ the disclosure should all information pertaining to Individual Directors Remuneration, Share options which are given to outgoing directors,

¹⁸ *Ibid.*, Para 6.1 to 6.8

¹⁹ Annexure enclosed to the Cadbury Committee report points this out at.

²⁰ Directors Remuneration, Report of a Study Group chaired by Sir Richard Greenbury, 17 July 1995, Available at <http://www.ecgi.org/codes/documents/greenbury.pdf>, last visited on March 01, 2018.

Sir Richard Greenbury headed this committee so it is famously known as Greenbury report, the committee submitted its report on 17th of July 1995.

²¹ Greenbury Recommendations, Para 2, Available at http://www.ecgi.org/codes/documents/greenbury_recommendations.pdf, last visited on February 16th, 2018 Committees thought on remuneration that is offered by the company to the directors.

²² *Supra* No. 21 Chapter 5 of the report dealing with Disclosure under Greenbury report.

²³ *Ibid.*

pension entitlements and it should be approved by the shareholders at every annual general meeting.²⁴

Hampel Report 1998²⁵ (Review of Cadbury and Greenbury Reports)

On the Directors Remuneration part, the committee suggested that the remuneration must up to the market expectancy²⁶ whereas this expectancy was not dealt under the Greenbury reports. It also suggested that the remuneration that is given to the executive directors should be linked to their performance. Both the committees forced for the remuneration committee but didn't specify by the procedure²⁷

The committee laid down certain duties for the Directors in relation to acting in good faith for the betterment of the company and non-executive directors must stand up to the expectations of the company and must work in good faith and fulfil their responsibilities.²⁸

The committee felt that the remuneration paid to the directors should not be partly in the shares of the company.²⁹ This might be recommended on the nodes that this may derive the sufficient interest left with the directors, however, it pointed out that the remuneration committee are free to decide the package³⁰

In total it has laid down certain rules, duties and guidelines for the conduct of the directors along with certain other prospects pertaining to the applicability to the recommendations mentioned under both the reports in relation to financial disclosures and other things.

Turnbull Report 1999

Turnbull Report was on the guidelines of the Internal Code to the Directors.

²⁴ Greenbury Committee recommended under the report that everything which is been granted to the directors in the name of the remuneration should and must be disclosed to the shareholders and an approval need to taken, the committee report, however, did not suggest as what shall be the use of the taking permission of the shareholders, as already the remuneration would be given out. The information is just for the information to the shareholders on the amount spent by the company towards the remuneration

²⁵ Committee on Corporate Governance, January 1998 Available at <http://www.ecgi.org/codes/documents/hampel.pdf>, last visited on January 23, 2018. This committee was established in November 1995 as Sir Sydney Lipworth as the Chairman on findings of the Cadbury and the Grennburry Committee and what shall be the Implications of imposing it.

²⁶ *Supra* No. 21, Dealt under Part B of the of the Greenbury Report

²⁷ *Supra* No. 21, Under 2.11 of the Greenbury Report

²⁸ *Supra* No. 21, Under Role of Directors dealing with the Duties.

²⁹ *Supra* No. 21, Para 4.8 of the Greenbury Report

³⁰ *Supra* No. 21, Para 4.7 of Greenbury Report

It was suggested that the Directors need to decide as to what constitutes the Internal control of the company and have a sound system to look after it, however, it must look after the possible risks and how far the company can materialize or overcome such risks. It is interesting that under the internal control the company looked after only risk and no other things. Risk that to implementing the policies as decided by the board. The report also pointed out that the directors cannot be dependent on the mechanism created by them to review but they need to monitor it on their own and check the effectiveness.³¹ The report suggested that the review in the sense looking after the control of all the committees wherever it is necessary. However, it didn't mention as a board needs to do it but it cast the responsibility on the directors as well as on the board.³²

It is interesting here to point out that the report directly went on substantiating the possible and necessary risks that are covered under the internal controls rather it could have laid down certain guidelines or code in order how an internal control should be done and what is the due care that needs to be adhered by the directors while controlling it.³³

Higgs Report

Higgs Report was on the review of the role of the effectiveness of the non-executives director³⁴. The report talks about the role of the non-executive director on the four important nodes and is Strategy, Performance, Risk and People. The executive directors always have two roles to play for the company i.e. working for the company's growth and monitoring the activities of the company. Even they have to evaluate the performance of the board towards the growth of the company and make suggestions for the betterment of the board to increase the efficiency of the board keeping in mind the risk and various sought of people who are engaged or associated with the company's affairs. These are the suggestions which the report suggested for the incorporation under the code.

³¹ The Institute of Chartered Accountants in England & Wales, *Internal Control Guidance for Directors on the Combined Code*, Para 27, Available at <http://www.ecgi.org/codes/documents/turnbul.pdf>, last visited on December 21, 2018

³² *Ibid.*, Para 26 of Turnbull Committee Report dealing with the looking and administering the audit committee points this out and indirectly casts the responsibility

³³ Looking on primarily it looks like the report involves everything but while in the subsequent explanations the members have assumed that the people know what the Internal control is and how it is been done, rather they could have approached in a different manner and should have explained the internal control followed by the ways to control it.

³⁴ *Review of the role and effectiveness of non-executive directors*, January 2003, Available at <http://www.ecgi.org/codes/documents/higgsreport.pdf>, last visited on August 05, 2017

The report derived the new point on the senior independent director. The report suggested this be incorporated under the code and make the role of such director to fall in lines with the chairman of the board. It pointed out that such director must be directly in touch with the shareholders in order to deal with their grievances as the CEO does. The senior director must be the chair of the board if in case non-availability of the chairman. The report also suggested that the Independent director should be well informed about the company's affairs and suggested terms of engagement.

United Kingdom Stewardship Code 2010

United Kingdom Stewardship Code mainly focused on the Institutional investors and laid down a few guidelines and principles for the investors and did not describe anything about the role of the directors. However, looking on to the principles laid under the code it can be said that it is on the same lines with the role of the directors as pertaining to the disclosure, guidance on voting, working with other investors and reporting³⁵.

United Kingdom Corporate Governance Code 2012

The code provided that the executive directors should be remunerated based on their performance, based on their performance the board should have to decide to give out any other benefits and directors close to the retirement it is necessary that their perks or any other benefits must be extended on the behest of their performance³⁶. However, the code failed to point as to who needs to do the evaluation, as of now it has said that the board needs to decide, but will the board's decision not be influenced by the existing director, rather, it should have mentioned that such matters pertaining to remuneration should be dealt with by the Independent Directors or by the shareholders.

It was mentioned that the directors should follow the duties as stipulated under the Act. The code actually didn't suggest anything new; it was just a mere replica of the existing moral things which needs to be followed by the directors. However Corporate Governance Code 2016 dealt regarding the re-election of the

³⁵ Financial Reporting Council, *The United Kingdom Stewardship Code*, September 2012, Available at <https://www.frc.org.uk/getattachment/e2db042e-120b-4e4e-bdc7-d540923533a6/UK-Stewardship-Code-September-2012.aspx>, last visited on January 22, 2018.

³⁶ The United Kingdom Corporate Governance Code, Main Principles of the Code, Pg No 08 to 25 and Schedule A, Available at <http://www.slc.co.uk/media/5268/uk-corporate-governance-code-september-2012.pdf>, last visited on June 3, 2017.

directors based on their performance in order to continue in the post of Director³⁷.

Role of Directors in India

CII recommendations mainly concentrated on the type of the structure that the company must have, however the main recommendation in relation to board that was made is, if the Chairman is also MD of the Company and if the turnover of the company exceeds 100 crores than at least half of the board should be constituted of the Independent Directors. However, CII just issued the recommendations for the companies and they were not mandatory³⁸.

Birla Committee³⁹ came up with the report where it pointed out that at least one-third of the board members must be Independent Directors and in relation to the disclosure and transparency it pointed out that board have to play an active role.

Narayana Murthy Committee⁴⁰ first time pointed out that the board members need to be trained in order to increase the expertise and skill of the board. The members appointed to the board should be elected by the shareholders directly rather than the Management and the board should be informed with every quarter business risks and Risk Management strategies.

Yet another J.J. Irani Committee was constituted by the Ministry of Corporate Affairs wherein the Committee dealt with reviewing the old Companies Act protecting the stakeholders as well as all investors and the board to be more transparent on its part, the committee did not deal more on the role of the directors⁴¹.

³⁷ Financial Reporting Council, The United Kingdom Corporate Governance Code, April 2016, Available at <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance-Code-April-2016.pdf>, last visited on July 25, 2017.

³⁸ Report of the CII Task Force on Corporate Governance chaired by Naresh Chandra, November 2009, Available at http://www.mca.gov.in/Ministry/latestnews/Draft_Report_NareshChandra_CII.pdf, last visited on July 24, 2016

³⁹ *Report of the Committee Appointed by the SEBI on Corporate Governance under the Chairmanship of Shri Kumar Mangalam Birla*, Available at <http://www.sebi.gov.in/commreport/corpgov.html>, last visited on December 21, 2018. The committee was set up by the SEBI in 1999 in order to raise the standards of the corporate governance, it was the formal attempt by the SEBI in order to make out a corporate governance code

⁴⁰ *Report of the SEBI Committee on Corporate Governance*, February 8, 2003, Available at <http://www.sebi.gov.in/commreport/corpgov.pdf>, last visited February 22, 2018.

⁴¹ *Report on Company Law*, Available at <http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf>, and http://www.mca.gov.in/Ministry/pdf/press_release/Press_032005.html, last visited on 07th March 2018.

Voluntary Guidelines⁴² were issued by the Corporate Affairs Ministry and in particular certain responsibilities to the board were made such as training to the Directors, enabling quality decision making, evaluating the performance of the board of directors, Committees and the Individual Directors and board have to place systems to ensure compliance with laws. However, these guidelines were voluntary and the companies were not under the compulsion to follow it.

Clause 49 of the Listing agreement⁴³ came in the wake of the Satyam scandal and it gave out certain mandatory requirements need to be followed by the companies. The non-executive directors appointed to the board should not have any pecuniary relationship with the company in the past and they should not be the close relatives or friends of the majority shareholders, in order to change the working style of the board and every disclosure in relating to the risk mitigation plan of the company and it should be published in the annual general reports of the company. Certain non-mandatory requirements were also made on training the board members and mechanism for evaluating the non-executive board members.

Directors play an important role these days due to a huge expansion and foreign investments there is always the risk of financial frauds and in order to overcome such frauds board should always be transparent and the board should change its working pattern with changing times and according to the changing needs. Clause 49 is certainly one of the important guidelines of the stock exchanges in defining the role of board extensively and exactly as past CII recommendations, Voluntary guidelines and various other committees report were not mandatory in nature but clause 49 was made as compulsory guidelines need to be adopted by the company.

The Companies Act, 2013⁴⁴ has also come up in accordance with the new requirements pertaining to the directors, including public limited companies now must have one woman director on board and the director must have domiciled in India for a minimum of 182 days of previous year, apart from that

⁴² *Corporate Governance Voluntary Guidelines 2009* Available at http://www.mca.gov.in/Ministry/latestnews/CG_Voluntary_Guidelines_2009_24dec2009.pdf, last visited on March 05, 2018. The guidelines were issued in 2009; however, it can be pointed out that as the name suggests these guidelines were voluntary which mean as non-mandatory.

⁴³ Clause 49 of Listing Agreement, Available at <http://www.sebi.gov.in/commreport/clause49.html> and http://www.sebi.gov.in/cms/sebi_data/attachdocs/1410777212906.pdf, last visited on January 25, 2018 It is to be duly noted here that Cl.49 of the agreement were given out by one of the regulators i.e., 'SEBI', and not by the Government, however now this Cl.49 is said to be comprehensive and followed by most of the companies.

⁴⁴ EY, *Companies Act 2013, Changes and New Requirements Impacting Directors*, February 14, 2014, Available at <http://ficci.in/events/21798/ISP/Changes-and-new-requirements-impacting-Directors.pdf>, last visited on February 25, 2018

an Independent director should be a director for not more than 20 companies and out of total numbers of directors a minimum of 1/3rd to be of the Independent directors such that these directors must be minimum able to read the financial reports of the company and Schedule IV of the companies act deals with the roles and responsibilities of the Independent Directors but the act is too silent on the stock options which can be made available to the directors, the act was described as old wine in the new bottle.

Comparison of Role of Directors in India and the United Kingdom

- 1) Looking on to the reports and codes of both India and the United Kingdom it can be easily said that United Kingdom norms of Corporate Governance are principle-based whereas in India it is Rule-based. The main reason for such distinction might be the existence and emergence of the norms in the United Kingdom, which is present from a long time whereas in India the emergence is seen only after the 1990s when India opened its market for the investments.
- 2) Another key area which can be pointed here is about the audit committee, all other prospectus relating to the principles are one and the same in United Kingdom⁴⁵ but the difference that can be found is of the composition of the board whereas in the United Kingdom it is necessary that the audit committee must be wholly comprised of the Independent Directors whereas in India it is only that the committee has a minimum of 2/3rd of the Independent Directors
- 3) Another key aspect is pertaining to the remuneration committee. In the United Kingdom, it discourages all forms of performance-related remuneration including the stock options; whereas Indian legislations are silent about it, which means they allow it.
- 4) The United Kingdom has strong laws in force for the whistleblowers and it actually protects the whistleblowers through the legislation and Government has enforced various guidelines pertaining to the protection of the whistleblowers from time to time.⁴⁶ In India, it is completely a different picture where there is mention about the whistleblower under Clause.49 of the Listing Agreement but that is not adequate in nature but it just makes a small note and it has been mentioned under the mandatory requirements

⁴⁵ Various reports in India and the United Kingdom lays the same principles for the audit committee i.e., the matter pertaining to the conduct and working structure of the audit committee.

⁴⁶ Blowing the whistle on workplace wrongdoing, Available at <http://www.nidirect.gov.uk/protection-of-whistleblowers>, last visited on January 15, 2018

for all of the public company and certain private companies where the company exceeds stipulated threshold.⁴⁷

- 5) A substantial shareholder in the United Kingdom can be an Independent Director⁴⁸ whereas in India it is not.

Recommendations

- 1) Existing rules should be defined in a better way

The chairman of the board must be an Independent Director and he should derive out his role from that of the CEO. The Higgs Report pointed out that one amongst the non-executive directors should be appointed as Senior Independent Director and the same was included under the United Kingdom Corporate Governance Code. It is necessary that India too should have such Independent Director who can actually be directly connected with the shareholders of the company apart from the CEO.

- 2) Making Liable the Independent Directors

As far as Independent Directors are working with the due care the directors are exempted from all sorts of liabilities, but under both the legislation of India and United Kingdom, there are no provisions pertaining to the legal liability of the Independent Directors in case they misuse their position.

It is said that it is hard to make out the Independent Directors liable for the acts, after the Satyam scam more than 500 Independent Directors gave up their directorships from the companies which were listed with the Bombay Stock Exchange⁴⁹. However, an alternative should be culled out. There are instances as Independent Directors misused their position as it happened in Nagarjuna Finance Case⁵⁰, however, the Hon'ble Court denied anticipatory bail to Mr. Kampani.⁵¹

⁴⁷ Mentioned under Annexure ID, 7th point of Clause 49 under non-mandatory requirements.

⁴⁸ In the United Kingdom combined defence code mentions about it.

⁴⁹ Abha Bakaya, *Independent Directors on Quitting Spree*, ECONOMIC TIMES, Apr. 20, 2009; Available at http://articles.economictimes.indiatimes.com/2009-04-20/news/27643308_1_independent-directors-acc-board-multiple-boards last visited on November 25, 2017

⁵⁰ Umakanth Varottil, *Evolution and Effectiveness of Independent Directors in Indian Corporate Governance*, Hastings Business Law Journal, Vol.6, No.2, 2010 at page 64

⁵¹ *The Common-Sense View; The Supreme Court's Decision Not to Grant Anticipatory Bail*, Business Standard, May 11, 2009. Available at http://www.business-standard.com/article/opinion/the-common-sense-view-109051100048_1.html, last visited on January 22, 2018

3) Transparency

Though both the legislation in India and United Kingdom points that there should be too much of transparency pertaining to every matter of the company whereas in deciding the remuneration of the CEO it is necessary that the regulators such as the London Stock Exchange and Securities Exchange Board of India, should have to decide it.

4) For Better Effectiveness:

5) Training Program for the new Directors

Though various legislations provide for the training of the directors, it doesn't specify as to when they actually need to be trained whereas hardly companies follow or provide training to the directors, and also directors are associated with so many numbers of the companies which find it difficult to train them.

Conclusion

After analyzing and going through various reports and legislation of both India and the United Kingdom, it can be said that both the countries have very distinct features amongst their corporate governance norms. Depending upon the market and culture of the market, it can be said that the United Kingdom norms pertaining to Corporate Governance are better as compared to India's. The reason for their better corporate governance is that they have culled out necessary legislation as and when required by their work environments and also in effect of problems faced by them. Certain recommendations are duly made which needs to be adopted by India and certain criticisms are derived in both the legislation by the authors.

However at the end it is necessary that the board must undertake a formal and rigorous annual evaluation of its own performance and that of its committees and individual directors with supporting principles i.e., that an individual evaluation must show the commitment of the director towards the company⁵² and the company in order to be successful in the market, it is necessary that the management and board must go hand in hand keeping in mind the interest of all the stakeholders⁵³.

⁵² Alex Knell, *Corporate Governance: How to add value to your company-A practical Implementation Guide*, 1st ed, (Burlington:CIMA Publishing, 2006) ISBN: 0-7506-6924-1

⁵³ H.R. Machiraju, *Corporate Governance*, 1st ed, (Mumbai: Himalaya Publishing House, 2004) ISBN:81-7866-883-1

The important point is that the failure to comply with the norms does not attract any penalty in India⁵⁴ and the same is with the United Kingdom. It is necessary that the guidelines be changed to the mandatory ones to achieve the objectives.

However, it can be easily seen that the United Kingdom legislation are very finer than that of the Indian legislation, this may be because the United Kingdom is into the Corporate Governance prospect from times immemorial whereas in India the prospect of the Corporate Governance got into action prominently only after the 1990s. However, the concepts like Corporate Social Responsibility has made Indian legislation eye-catching, though the concepts under the existing laws pertaining to Directors should be made clearer and effective.

⁵⁴ Umakanth Varrotil, *India's Corporate Governance Guidelines 2009: Rhetoric or Reality?* Vol:1, NLSI Law Review, 2010 Westlaw Citation: 22(2) NLSI. Rev. 1 (2010)

Sabarimala v. Triple Talaq: **A Milestone to Women's Integrity**

Rishika Mitra & Prachi Jain***

Women in India

The women in this world have been described by propounding different perceptions. In a vast country like India, the history speaks that the women are considered a device force but the multi cultured Indian society placed the women at different positions. This is the reason women have no uniform status in Indian society.

Within the Indian sub-continent, there have been infinite variations on the status of women diverging according to the cultural malice, family structure, class, caste property rights and morals.

Position of women has changed during different periods of time.

Pre-Independence Time

1. *Vedic Period:* Position of women was glorious in all the spheres of life. Including freedom, equality and education. They can acquire efficiency in art, music and warfare. There was no prohibition in widow remarriage and no discrimination.
2. *Post Vedic Period:* During the post Vedic period, the women had suffered drastic hardships and restrictions. A male dominated society was set up. Pre puberty marriage system was originated. Daughters were brought up under surveillance. A right to property was recognised under the concept 'stridhan' given by father, mother, brother and husband as a token of love.
3. *Medieval Period:* The position of women was further degraded during invasions of India. Women were deprived of education and participation in society and community affairs. Social evils mushroomed during this period. Dowry became inevitable and the system of devdasi

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and polygamy had spread widely. Thus, during the medieval period, the women were oppressed in every walk of life.

Women's Position During The British Period

During the British period, the position of women had changed drastically due to the western impact on the Indian socio-cultural pattern. The concept of equality, liberty and individual secularism, although came to rise we are limited to the ruling class.

There were two major movements that took place during the British regime.

1. *The Social Reforms Movement*: This particular movement came to rise during the 19th century and was related to the status of women. The concern was shown regarding the problem of sati, prohibition on re marriage denial of the right to property, child marriage and education to women. Swami Vivekananda, Dayanand Saraswati and Annie Besant were of opinion that the old Vedic period should be revived which was ideal for women's status. MK Gandhi strongly criticised the system of child marriage, sati, prohibition of widow's remarriage and devadasi system.
2. *The Nationalist Movement*: The Nationalist Movement drew the attention of a large number of people. In 1927, All India Women's Conference was formed and it proved to be a crucial move towards the right to equality of women.

In order to do this, legislation was enacted like Widow's Remarriage Act, Child Marriage Act, and Hindu Women's Right to Property Act to eradicate some social evils. The establishment of crèches, reduction of working hours, prohibition on night working hours and restriction to work in mines were introduced under the banner of Nationalist Movement.

Women's Movement

To end the subordination of women and different perceptions, three major ideological movements of women emerged during this period.

1. *Liberal Movement*: The movement emerged in the 18th century and many of the thinkers debated the nature, status and role of women. The reason was to give women freedom. A landmark work on the subject namely, a vindication of the rights of women was published by Mary Wollstonecraft in 1792 throwing light on equal human rights and women's rights.

From the liberal movement, it was approved that the husband earns for the family's expenses and the wife takes care of the household affairs and the family's expenditure. Even in the sexual encounter, both husband and wife have equal roles to play. For building an idealistic

society woman should be given equal civil rights and also right to education.

2. *Radical Movement*: This movement came to rise during 1970 and it was related to the root of subordination. It was realised that the root of subordination lies within the family. The radical movement aimed for removal of all gender distinction and man was considered as a foe and subordination of women was taken as biopsychological supremacy of man over women. The movement was based on the opinion that rape, pornography and sexual violence are the results of masculine hostility against women.
3. *Socialist Movement*: Indian social reformers of the 19th century did approach on the line of the liberal movement, campaigning right of education to women so that women become better mothers and wives and they also campaigned for the removal of social evils like Sati, child marriage, prohibition on widow's remarriage etc.

Among Muslims, the scenario was worse. Muslim women were considered to be secondary. They faced discrimination in all spheres of life. Men were allowed to divorce or 'talaq' their wives at free will, have multiple wives and mete out cruel treatment to them. Women were treated as objects and unmarried girls were not allowed or encouraged to talk with men at their free will. Majority of women did not receive education and were not permitted to work or step outside the boundaries of their home. Women were considered to be burdens in society and were only put to the use of procreation of children.

*A Woman is a Human
She is not better, wiser, stronger, more intelligent, more creative, or more responsible than a
man. Likewise, she is never less. Equality is a given.
A woman is human.*

– Vera Nazarian

Hinduism, in the early nineteenth century, witnessed some major alteration when Lord William Bentinck took charge as the Governor General, many prominent Indian leaders among which Raja Ram Mohan Roy, an eminent religious leader urged and aided Bentinck to abolish the inhuman practice of Sati, a societal evil. With the introduction of the Regulation of 1829, the customary practice was made illegal and considerably disappeared from Hindu society.

In a patriarchal society like India, measures were taken consistently to ensure equal rights to women. The Dowry Prohibition Act was passed in 1961 and was also later made punishable under Section 304B of the Indian Penal Code (herein referred to as "IPC") to protect the interests of married women in the society. In

the landmark case of *Pawan Kumar v. State of Haryana*¹ the Hon'ble Supreme Court laid down the essentials pertaining to Section 304B of the IPC. These necessary ingredients to enforce 304B include death of a woman either by burns or bodily injury or otherwise than under any normal circumstances within seven years of marriage. It is also necessary that it be shown that she was subjected to cruelty or harassment by her husband or any other relative of husband pertaining to demand for dowry. Women had no right to property. They could not acquire any land or property of their ancestors. In the landmark judgement of *Mary Roy v. State of Kerala*² in 1986, Christian women were given the rights of inheritance against the law that had been earlier laid down by the Travancore Succession Act of 1916 applicable upon Travancore Cochin Christians in Travancore Area of Kerala. The Hon'ble Supreme Court in this judgement held that no personal law can be held above the Constitution of India and that the provisions in the Act related to succession were a violation of Article 14 and 15.

Muslim women, towards the end of the twentieth century, witnessed a radical advancement when divorced Muslim women were allowed to claim maintenance under Section 125 of the Code of Criminal Procedure, 1973. The Hon'ble Supreme Court in the landmark case of *Mohd. Ahmed Khan v. Shah Bano Begum and Ors*³ reiterated that Muslim women divorce would be entitled to maintenance under Section 125 of the Code of Criminal Procedure, 1973.

Later, The Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed in the same interest. Women as a class were consistently looked down upon and considered a weaker section of the society. In spite of a number of legislations, women did not see the daylight of equality whether it be social or individual.

*There is no tool more effective than the empowerment of women
for development of a country*

-- Kofi Anan

Analysis of the Triple Talaq Case

Shayara Bano, a Muslim woman after being married for 15 years was divorced by her husband through 'triple talaq' in October 2015. The woman approached the Hon'ble Supreme Court in 2016 challenging the validity of discriminatory practices against Muslim women. She filed a petition in the Hon'ble Supreme Court to declare the inequitable and unjust practices of Talaq-e-bidat, Polygamy and Nikah Halala illegal and unconstitutional as it violated the rights guaranteed by the Constitution of India under Article 14, 15, 21 and 25. The plea

¹ 1998 (3) SCC 309.

² 1986 AIR 1011.

³ 1985 (2) SCC 556.

was opposed by the husband of the petitioner, Shayara Bano on the ground that they were governed under Muslim Personal Law. Under the Indian Constitution, religious freedom is subject to all Fundamental Rights.

Article 25 of the Constitution guarantees freedom of practice and propagation of religion but it does not protect religious practices since they have the potential to negatively affect the welfare of the citizens. Article 14 of the Constitution guarantees the right to equality and it overrides Article 25 as instant triple talaq denies women their rights to equality before the law. Article 25 is also subject to Article 15(1) which says that the State 'shall not discriminate against any citizen on the basis of race, caste, sex.' Triple Talaq does not work in favour of women and hence it is violative of Article 15(1) of the Constitution of India.

The Triple Talaq Bill was passed by the Lok Sabha on 27th December 2017 and The Muslim Women (Protection of Rights on Marriage) Bill, 2018 superseded the earlier bill which was still pending in the Rajya Sabha. Triple Talaq is a customary practice among the Muslims by which a husband can divorce his wife instantly by the repetition of 'Talaq' three times in a row in any form- oral, written or any electronic form. It is an instant and irrevocable form of talaq. The practise of instant triple talaq is neither an essential feature of Islam nor is it accredited by the Quran, the ultimate source of law among the Muslims. Muslim countries like Pakistan, Cyprus, Iran, Qatar, UAE, Sudan, Turkey and many others have also banned and declared instant triple talaq to be Un-Islamic and against moral and civil rights of women.

In the case of *Shayara Bano v. Union of India*⁴ the Supreme Court judgement held the practice of instant triple talaq to be 'void and illegal'. Justice Nariman and Justice Lalit declared 'instant triple talaq' to be violative of Article 14 of the Indian Constitution" and Justice Joseph said, "*What is held bad in the Quran cannot be good in Shariat*". The judgement was acknowledged, welcomed and appreciated by Ulemas, lawyers, politicians and most importantly Muslim women who were deprived of their rights and meted out injustice over centuries. This anticipated a brighter and invulnerable future for them as men after this judgement cannot escape their duties as husbands in marriage and leave their wives deprived of their constitutional and marital rights. This judgement also serves as a check on the practice of polygamy and subsequent exploitation of women.

Hinduism is regarded as a traditional and orthodox religion. The basic principles of Hinduism are that God is the creator of everything, the aim of life is to know

⁴ 2017 (9) SCC 1.

God his creations and his path of life⁵. There is no supreme head, there are various religious practices and each person may follow a particular spiritual discipline, which is best suited to their knowledge. The ancient and comprehensive term employed by the Hindus for faith is Dharma. The word Dharma springs from 'dhr' which implies "to support, sustain, hold together". Dharma binds a society together. It binds all beings, and in fact the entire universe. It comprehends an entire vary of non-public and social responsibilities and lays down the way of life that aims at securing the fabric and religious sustenance and growth the individual and society. Dharma is the central ideal in Hinduism.

India is a country which maintains absolute neutrality and impartiality towards all religions, thereby implying the secular nature of India. It neither favours any religion nor does it discriminate any religion. It is a secular State, the introduction of which was made in the Preamble of India by the 42nd Amendment of the Constitution of India. Article 25 to Article 28 of the Indian Constitution guarantees each and every citizen of India the right to freedom of religion. Article 25 '*guarantees freedom of conscience and free profession, practice and propagation of religion*'. Article 26 '*guarantees the freedom to manage religious affairs*'. Article 27 '*guarantees freedom as to payment of taxes for promotion of any particular religion*'. Article 28 '*guarantees freedom as to attendance at religious instruction or religious worship in certain educational institutions*'.

As we deal with religious issues in the Southern part of India, controversies of orthodox and discriminating religious practices and women's rights catch our attention. '*Sabarimala Sree Dharma Sastha Temple*' is one of the most famous Hindu temples in India, located in the Pathanamthitta district of Kerala. The temple is handled by the '*Travancore Devaswom Board*'. The shrine at Sabarimala is an ancient temple of Ayyappan also known as '*Sasta and Dharmasasta*'. Lord Ayyappan is worshipped as a '*Naishtika Bramhachari*' or a celibate. Therefore, as per a notification by the 'Devaswom Board' that manages the temple, women belonging to the menstruating age (10-50) are not permitted to enter the temple⁶. The ban on restriction of women to enter the temple was implemented under Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry Rules), 1965 which states that 'Women who are not by custom and usage allowed to enter a place of public worship shall not be entitled to enter or offer

⁵ *All you need to know about Hinduism*, available at <https://history-of-hinduism.blogspot.com/2010/06/water-and-hinduism.html>

⁶ Sabarimala judgement in Supreme Court: From Kerala government's stand on women's entry to issues before court, key facts about the case, available at <https://www.financialexpress.com/india-news/sabarimala-judgement-in-supreme-court-from-kerala-governments-stand-on-womens-entry-to-issues-before-court-key-facts-about-the-case/1329747/>

worship in any place of public worship.' In 1991, the Kerala High Court upheld the ban in the case of *S. Mahendran v. The Secretary, Travancore*⁷ and instructed the Devaswom Board to implement the ban. The devotees are required to follow a 41 day austerity period called 'Vratham'. There are about 2 crore devotees that make a visit to the temple every year.

Sabarimala Case and Judgement Analysis

The Hon'ble Supreme Court, on 28th September 2018 paved the way for the entry of all women inside the temple (*Indian Young Lawyers Association and Ors v. The State Of Kerala and Ors*)⁸. The 4:1 judgement was passed by Justice Dipak Mishra, Justice R.F. Nariman, Justice Chandrachud, Justice A.M. Khanwilkar and Justice Indu Malhotra, who was the only dissenting judge being the sole woman on the bench. The Hon'bl Supreme Court observed that only biological reasons cannot be the only reason to restrict women to enter a religious institution. Justice Chandrachud in a harmonious judgement assessed that the ostracizing of women between ages 10-50 by Sabarimala temple was contradictory to the morality and toppled down the ideas of autonomy dignity and liberty. Justice Chandrachud harmonised with the opinions by CJI Mishra and Justice Nariman and held that the Ayyappana did not satisfy the judicially pronounced requirements to be considered a separate religious identity. He assessed that the bar of women from entering the temple was not an essential religious practice. Justice Chandrachud also emphasized that menstrual of women have no significance on the entitlement guaranteed to them under the constitution. He also dealt with the argument that the exclusion of women was a form of untouchability under article 17 of the constitution. He espied that the scrutiny of constituent assembly debates would show that the makers of Constitution had deliberately chosen to not give the term untouchability a specific meaning. He concluded that Article 17 is a peaceful guarantee against exclusion.

However, Justice Indu Malhotra observed that matters which concern deep religious sentiments must not interfere with the courts. 'Faith and rationality' must not be considered to be the same. It is essential that the history of the Lord residing in this particular temple of Sabarimala is mentioned here. Lord Ayappa is a Hindu deity worshipped in South India. The deity has many forms and in Sabarimala, it is in the form of a Brahmachari or of celibate nature. It is felt in the deep sense that if women enter the premises of the temple, it is disrespect to the

⁷ AIR 1993 Ker42.

⁸ *Indian Young Lawyer's Association & Ors. v. The State of Kerala & Ors.* (Page 358 Para: 6.1.) (https://www.supremecourtindia.nic.in/supremecourt/2006/18956/18956_2006_Judgement_28-Sep-2018.pdf).

nature of the deity and distracts the spiritual nature of the '*Naishtik Brahmachari*'. The judgement was opposed by many as it hurt the religious sentiments of the Sabarimala devotees and that an archaic practise was challenged upon. The restriction of entry into the temple had little to do with women's rights. The restriction is only of a particular age group which concerned maintaining the *Brahmachari* nature of the God residing in the temple and not of 'women' as a class.

Throughout the nation, including in Kerala itself, there are other temples of Lord Ayappa where the deity is not in the form of a celibate and there is no restriction of entry of women in those temples. Kerala is a matriarchal society, where women are highly educated and respected in society as good as the men if not more. Menstruation is neither considered to be a taboo nor is it impure. There is no religion which has considered menstruation to be impure. In any Hindu temple, women are generally not expected or themselves do not enter temples during their menstruation period. But there is no such restriction which exists in any temple except a few throughout the country which excludes the entry of any woman. These biases are created by the human mind. In no other temple in Kerala, women are restricted due to such biological processes. Moreover, it is to be taken into account that women are free to enter all other Ayyappa temples in the country. In *Attukal Temple* in Kerala women are worshipped, there are millions of women who participate in Pongal festival of that temple and no men are allowed. In *Kamrup Kamakhya Temple*, Assam only women are only allowed inside the temple during their menstrual cycle. Also, in this temple, the menstrual cloth of the Goddess who is worshipped is considered to be highly auspicious and it is often distributed among the devotees.

Another temple in Kerala, the *Bhagwati Temple, Chengannur* is women centric and bans the entry of men. In India, there are 13 such temples where men are not allowed to enter. However, the restrictions put down for men in these cases have never been questioned or interfered by the Courts which also demand a certain amount of respect towards the practices and the religious beliefs that only men must carry out.

Issues in the State of Kerala

Kerala today is facing multiple challenges which are not receiving the necessary and adequate attention. The issues that deal primarily with health, unemployment or even the drastic damage the Kerala floods in 2018 have caused are in dire need of urgent supervision and discussion. Kerala has a population of about 4crore among which people of between the ages 15 to 29, 21.7 per cent in rural areas and 18 per cent in urban areas are still unemployed. The women of Kerala seem to have no end to their plight with the

unemployment rate at 47.4 per cent as compared to 9.7 per cent in men. This is due to the scarcity of jobs in the organised sector in Kerala.⁹

According to the *State Economic Review 2018*, an alarming rise in non-communicable diseases like diabetes, cancer, hypertension and so on has been reported in the State of Kerala. The rates of cancer mortality in the men of Kerala are higher when compared to the national average. What is to be blamed is the large-scale modernisation and urbanisation, lifestyle changes, less importance to physical fitness, high stress levels etc. If that was not enough, the damage that has been caused by the recent floods is beyond the imagination. The devastation of public property, private and public infrastructure, business organisations can deplete the entire state. The government estimated the damage worth 20,000 crores while it does not have sufficient funds for the reconstruction of the losses suffered.¹⁰ The rehabilitation and reestablishment of the State are needed to be looked into with utmost scrutiny and immediate effect. These are the few crucial and significant issues in Kerala that need to be highlighted, examined and addressed as the instances related to unemployed women hint at unequal social, economic and civil rights of women. The exceptional assiduity that has taken place regarding a temple in a state where there are more important issues that indeed steer to the presence of gender inequality in the State.

Women and Inequality: Landmark Judgements that Changed Women's Position

Women in India have always been a victim of inequality with respect to health, education, economic and every other aspect of life. The patriarchal nature of the society has put women at a disadvantage and subjected them to discrimination based on gender for generations.

According to the Global Gender Gap Report by the World Economic Forum in 2011, India ranked 113 out of 135 countries. The Indian Constitution has conferred equal status to men and women but gender disparities still continue to exist among women of all ages. In the landmark case of *Vishaka v. the State of Rajasthan And Ors*¹¹ in 1992, Bhanwari Devi, a lower caste social worker, Bhanwari Devi was gang raped by five men in her village for trying to stop child marriage. She filed a complaint in the local police station but no further investigation was carried out. The issue in this case that was raised was whether

⁹ *Kerala Tops In Unemployment Rates*, available at <https://www.thehindu.com/news/national/kerala/kerala-tops-in-unemployment-rates/article8226139.ece>

¹⁰ *Kerala can convert the damage caused by floods into an opportunity*, available at <https://indianexpress.com/article/opinion/kerala-can-convert-the-damage-caused-by-floods-into-an-opportunity/>

¹¹ (1997)6 SCC 241.

the employer has any responsibility towards his/her employees against sexual harassment at workplace. The Hon'bl Supreme Court held that sexual harassment of a woman at workplace could be held violative of Article 14, 15, 19 and 21 of the Indian Constitution following which the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) was enacted in 2013 which further antiquated the Vishaka Guidelines introduced by the Hon'bl Supreme Court of India.

In the historical judgement of *Mukesh & Anr v. State for NCT of Delhi & Ors*¹² a 23 year old woman was brutally gang raped on a moving bus in the capital city of Delhi. After this incident, criminal laws were set to be analysed and amended to enhance the punishment of acts of barbaric and brutal nature against women. The Criminal Law (Amendment) Act, 2013 was passed which provides for the amendment of Indian Penal Code, 1860; Code of Criminal Procedure, 1973, Indian Evidence Act, 1872 and Protection of Children from Sexual Offences Act, 2012 in the relation of sexual offences related laws. The definition of rape widened after the passing of this Act and makes other laws more rigorous for victims subjected to such physical torture which ultimately proves to be fatal.

With the growth in technology in medical research in the late 20th century, growth in the abortion of female foetuses was observed with the advent of pre natal diagnostic techniques. The Government of India decreed the PNDT Act in 1996. The provisions of the act were however not being implemented effectively which resulted in the filing of a petition by the *Centre for Enquiry into Health and Allied Themes*¹³ which indicated the government to implement the provisions related to the Act with immediate effect and instructed to ban all the advertisements with regard to such techniques which increased the number of female foeticides.

Precedents on Gender Justice and Religion

In the case of *Saleem Basha v. Mumtaz Begum*¹⁴ that took place in 1998, it was held that a man cannot divorce his wife according to his own desires and wishes. The divorce between the parties must take place after attempts of reconciliation. The divorce should also take place for a reasonable cause arrived with the help of two mediators, one elected by the husband and the other by the wife. In 2002, the Bombay High Court in the case of *Dadgu Pathan v. Rahimbi*¹⁵ held that all reasons for divorce, conciliation, the appointment of arbitrators and the failure of

¹² 2017 SCC OnLine SC 213.

¹³ (2003) 8 SCC 412.

¹⁴ 1998 SCC OnLine Mad 927.

¹⁵ 003 (1) BomCR 740.

the same are to be justified when the wife contends the fact of talaq in the Court. Statements made in writing or oral are not admissible before a Court of law.

In the case of *St. Stephens College v. University of Delhi*¹⁶ it was upheld and sanctioned that a minority aided institution have a right to have their own rational procedure for admission. The facts of this case were that Christian students were given preference by the college which was affiliated to the University of Delhi were against the circulars of admission into B.A. and B.Com. courses by the Delhi University. The Court maintained that minority aided educational institutions have the right to reserve 50 per cent of their seats for their own community for the necessity to sustain the character of the minority institution.

In the much controversial case of *State of Bombay v. Narasu Appa Mali*¹⁷ which concerned a Hindu man who was held convicted under the anti-bigamy law. It was argued by Narasu Appa Mali that the prohibition of bigamy was also applicable to the Hindu but not to the Muslims. He petitioned the Court to strike down the law as it was violative of right to equality before the law under Article 14. Article 13 (3) mentions "*Laws inconsistent with or in derogation of the fundamental rights*" Clause 3 of the Article says "*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.*" It was held by the Bombay High Court that personal laws are not derived from the validation of any law passed by the Legislature or other any competent authority. The establishment of personal laws is from their respective religious scripts i.e. the Hindu as well as Mohamedan texts. The Court reiterated that the personal laws could not be ignored even if they violated the Fundamental Rights.

In *Madhu Kishwar v. State of Bihar*¹⁸ the Chota Nagpur Tenancy Act 1908 under Article 32 of the Indian Constitution was challenged which was women-discriminatory as it only provides succession to men. Justice M.M. Punchhi observed that according to the Hindu Succession Act, 1956 the State Government can exempt any race, tribe or sect from the operation of this Act also under which the State of Bihar has exempted the tribes that comprised the petition.

¹⁶ AIR 1992 SC 1630.

¹⁷ AIR 1952 Bom 84.

¹⁸ AIR 1996 5 SCC 125.

Conclusion

A distinction must be maintained between religion and laws until the practices of the religion are such that it aggrieves the opposite gender, opposes public policy or the practices of the religion are such that it diminishes the dignity of a woman, for instance, the inhuman practice of Sati had to be abolished as it was immoral. Religious beliefs of an individual or a particular group must be out of the question of Courts. The practice of restriction of entry of women into Sabarimala is an archaic one where the beliefs of crores of devotees are in question. It is also a tradition and it must be protected as it is neither immoral nor against public policy.

The uniqueness in the practices of people belonging to different sects of Hinduism must be protected. That comprises and maintains the true essence of any religion. However, the practice of Triple Talaq no matter it is an archaic one lowers the dignity of women in the society as it is no less than a sin. Such a form of Talaq has not been encouraged or appreciated in the Quran, the holy book of the Muslims and also violates the verses in the Sahih Hadiths. This form of talaq brings agony to the women as they are thrown out of their matrimonial houses with no secure means of living promised to them. Such a judgement is constitutional as it safeguards the interest of women at large.

Tracing the Principle of Non-Refoulement in Indian Municipal Law

*Aditya Gupta**

Introduction

The Principle of Non-Refoulement is the central premise of refugee protection programmes and international obligations. While the principle has been argued to have assumed the status of a Peremptory norm¹ in International Law, by virtue of its incorporation in various bilateral and multilateral treaties², its assimilation in the Indian Legal Framework is limited. India has not ratified the 1951 Convention for the Protection of Refugees and the 1967 Protocol for the Protection of Refugees and has also not enacted any legislation which discusses or enacts the principle as a domestic enactment. In 2015, two Bills were presented before the Lok Sabha namely the Protection of Refugees and Asylum Seekers Bill³ and the Asylum Bill⁴ both of which incorporated the principle⁵, but neither of the two Bills were enacted as domestic legislation.

Also, the affidavit filed by the Government of India before the Supreme Court on 18th September 2017 pertaining to the immigration of Rohingya Muslims, unequivocally announced that the Central Government shall not provide refuge to the immigrants because of security concerns and that the principle of Non-Refoulement does not constitute to be a binding principle on the Indian executive.⁶

The fact that the executive has not ratified two of the most important treaties pertaining to the refugee management systems in the modern international law

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¹ A. Farmer, *Non-Refoulement And Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection*, 23 GEORGETOWN IMMIGRATION LAW JOURNAL 2, (2008).

² E. Lauterpacht & D. Bethlehem, *The Scope and Content of The Principle of Non-Refoulement: Opinion*, CAMBRIDGE UNIVERSITY PRESS 89, (2009).

³ Bill No. 290 of 2015.

⁴ Bill No. 334 of 2015.

⁵ Section 3 of the Protection of Refugees and Asylum Seekers Bill, 2015 and Section 8 of the Asylum Bill, 2015.

⁶ D. Mitra, *Modi Government Affidavit on Rohingya Refugees Reverses India's Long-Held Stand on Non-Refoulement*, THE WIRE (Jul. 15, 2018, 6:45 PM), [https://thewire.in/diplomacy/indias-statement-rohingya-refugees-reversal-long-held-stance-non-refoulement.](https://thewire.in/diplomacy/indias-statement-rohingya-refugees-reversal-long-held-stance-non-refoulement.;); 38 PUCL BULLETIN 1 (2018).

scenario and that the legislature despite multiple attempts has failed to enact a municipal legislation, coupled with the fact that the executive is of the opinion that it can circumvent its obligation to foster the refugee population, point towards the fact that possibly the principle of non-refoulement does not form to be a part of the Indian Legal Framework.

The present research does not contradict the fact that India's practice in accommodating refugee populations at various instances has not been in consonance with the International norms and standards. The question that the present research indulges in is whether the Indian Legal Framework accommodates the principle of Non-Refoulement as a binding obligation. In absence of clearly defined statutory standards, the refugee populations shall be subjected to inconsistent and arbitrary government policies.

The present research identifies three sources of the principle in Indian jurisdiction. First, the institutional structures which work towards the betterment of refugee populations. Secondly, Article 21 (Art. 21) of the Constitution of India and lastly, Article 51 of the Indian Constitution.

Institutional Aid and Protection

The current institutional structures have nevertheless prevented the refoulement of some refugees over the years, but such institutions are incapable of providing any guarantee. Also, institutional structures cannot provide the protection which can be afforded by virtue of legislation or a binding set of obligations. The two major institutions which deal with refugee issues in the country are United Nations High Command for Refugees (UNHRC) and the National Human Rights Commission (NHRC).

The UNHRC published the statistics pertaining to refugee populations in India. As of 2016, India hosted 1,97,821 refugees and an additional 9,219 asylum seekers rendering the cumulative figure to 2,07,040. Of these, only 24,594 refugees were assisted by the UNHCR⁷, which amounts for less than 12 per cent of the total refugee population. It has been argued that since in various cases the High Courts have stayed the deportation of refugees and allowed them to seek protection under UNHCR⁸, such practice should be taken as a directive of the principle. Although, the fact remains that the courts have not granted to the concerned citizenry benefits under the Principle of Non-Refoulement, but rather a right to apply to UNHCR and that right is again conditional upon the discretion of the

⁷ Global Trends: Forced Displacement in 2016. (2017). UN High Commissioner for Refugees (UNHCR).

⁸ *Bogyi v. Union of India*, Civil Rule No. 981 of 1989; *ND Pancholi v. the State of Punjab*, W.P. No. 243/88.

government. In the case of *Ktaer Abbas Habib Al Qutaifi v. Union of India*⁹, N.N. Mathur J. highly deplored the actions of the UNHCR which instead of facilitating an agreement between the concerned state pertaining to the refugee, only provided said refugee with a certificate of according upon him the status of refugee.

Hence, owing to the fact that UNHCR has been able to provide aid to a very limited number of refugees and the fact that the presence of UNHCR in India is not guaranteed by any municipal legislation it cannot be considered to be the repository of the Principle of Non-Refoulement in Indian Legal Framework.

The NHRC has been involved in some very important litigations pertaining to the rights of the refugees in the Indian Context but the existence of the commission simply cannot guarantee substantive rights, it provides recommendations and spearheads litigation, but in no way provides new rights to citizens.¹⁰ Also, the recommendations of the NHRC are not binding on the government,¹¹ and also the commission cannot personally award compensation to the victims.¹² Hence, the NHRC cannot very well be the genesis of the principle in Indian Legal Framework.

Constitutional Symbolism

Over the years, many authors have espoused the view that the stateless citizenry is protected by the constitutional mechanisms embodied in the various fundamental rights and obligations to honour international obligations.¹³ Whereas some other authors have appraised the judicial position in the country and argue that the judicial pronouncements ensure and foster refugee rights.¹⁴

Article 21 and Non Refoulement

Art. 21 has time and again been argued to be the repository of the principle of non-refoulement in the Indian Legal Framework. Such claims are patently false, no

⁹ 1998 Cri LJ 919.

¹⁰ V. Shripati, *India's Human Rights Commission: A Shackled Commission?* 18 BOSTON UNIVERSITY INTERNATIONAL JOURNAL, 2 (2000).

¹¹ *D.K. Basu v. State of West Bengal*, (2015) 8 SCC 744.

¹² R. Singh, *Law, Policy and Practice of Refugee Protection in India: The Benefits And Roadblocks*, 2(1) KIIT STUDENT LAW REVIEW, (2015).

¹³ M. Purohit & M. Purohit, *An analysis of Non Refoulement in India*, 2(1) JAMIA LAW JOURNAL 173 (2017).

¹⁴ S. Bhattacharjee, *India needs a Refugee Law*, 43(9) ECONOMIC AND POLITICAL WEEKLY, 73 (2009).

such right has ever been read into the constitutional jurisprudence, nor can such a right be extrapolated.¹⁵

Initially the understanding of Art. 21 was limited to three simple steps. First, there had to be a law justifying interference with a person's life or personal liberty. Second, the law had to be a valid law. A law following the typical process of parliamentary legislation would suffice. Third, the procedure laid down by the law should have been strictly followed. Under this straightforward test, which operated as a check on the improper procedure, the state could justify serious infringements on life or personal liberty so long as the three procedural steps were followed in its creation and enforcement.¹⁶ Thus, Art. 21 was construed as providing for a mere procedural check on the government.

Although, later with the judgement of *Maneka Gandhi v. UOI*¹⁷, the principles of A 21 were commingled with the principles of A 14 and A 19. Thus, Art. 21 moved from mere 'procedure established by law' towards 'due process', as incorporated within the US Jurisprudence.

Art. 14, within the ambit, includes the proposition of 'equality amongst equals', thus digressing from the principle of absolute equality. If the executive can reasonably distinguish between classes of refugees, Art. 14 cannot be extracted by the disclaimed population to their benefit. The only substantial colour is made available to Art. 14 when it is conjointly read with Art. 19. The conundrum that the Refugee population suffers from is that the protection afforded under Art. 19 is exclusive to the citizens of the country. Thus, no substantive rights can be read into Art. 14 and Art. 21.

Therefore, an extension to the same, the 'due process' clause shall not be applicable to the Principle of Non-Refoulement, any 'procedure established by law', can abrogate the Right to Life and Liberty of a non-citizen.

Often heavy reliance has been placed on the case of *NHRC v. State of Arunachal Pradesh*¹⁸ to hypothesise that Art. 21 encompasses the principle of Non Refoulement.¹⁹ The dispute between the Chakma population and a group of hostile locals formed the subject matter of the present case. The Chakma population had been displaced in 1964 from erstwhile East Pakistan (now Bangladesh) and moved to Assam to the current state of Arunachal Pradesh.

¹⁵ B. Acharya, *The Future of Asylum in India: Four Principles to Appraise Recent Legislative Proposals*, 9 NUJS LAW REVIEW, 187 (2016).

¹⁶ MAHENDRA PAL SINGH, VN SHUKLA'S CONSTITUTION OF INDIA (13ed. Eastern Book Company 2018).

¹⁷ 1978 AIR 597.

¹⁸ *NHRC v. State of Arunachal Pradesh*, (1996) 1 SCC 742.

¹⁹ S. Agarwal, *Refugee Blues- Victims of Regional Geopolitics*, 8(1) GLC LAW REVIEW 136, (2014).

Although many applied for citizenship, local officials prevented their applications from reaching the federal government; despite living in India for over 30 years. As the relationship between the Chakmas and the local inhabitants of Arunachal Pradesh worsened, 'quit orders' were issued by the Arunachal Pradesh Students Union demanding that the Chakma leave or suffer severe harm.

Meanwhile, the Union Home Ministry attempted to confer blanket citizenship on the Chakma population. Finally, the NHRC filed a petition in court demanding that Arunachal Pradesh halt the Chakmas' forced migration and protect them from harm. The Supreme Court held that they cannot be migrated forcefully until the Central Government decides on their citizenship and that, the state government had an obligation to provide security at their present location.

This case does not point to the conclusion that Art. 21 is a repository of the principle first because the instructions provided by the Supreme Court do not prohibit the eviction or removal of the Chakma population, it only subjects such action to the Federal Government adjudicating their claim of citizenship. Hence, the mandate so rendered is not against the eviction of such population but the state's procedural violation of immigration law which would have rendered such eviction a 'deprivation of life and personal liberty'. Secondly, the Court acknowledged the fact that the Chakma population has been living in the country for more than two and a half decades, hence, the court has protected a citizenry which might probably be its citizens by actualisation but because of some procedural irregularity could not be registered as such.

A more recent verdict by the Supreme Court can be extracted for further elucidating the moot point. The Supreme Court in the case of *Dongh Liam Khan v. Union of India*²⁰, observed that the protection of Non-Refoulement to refugee populations can be accorded by virtue of Art. 21 of the Constitution. The stand was directly in contradiction with an earlier stand taken by the Supreme Court itself. In the case of *Mohd. Sediq v. Union of India*,²¹ the Court allowed the foreigner to be deported, emphasizing that the policies of the decision, policies and guidelines of the Central Government were paramount in the respect.²² The 2015 case of *Dongh Liam* failed to discuss the prior ruling of law on the subject, therefore the law prescribed in the judgement can always be critiqued as being *misinformed* and *Per Incuriam*. Furthermore, the divergent opinions are taken by the Apex Court point towards the ambiguity concerning the law related to refugees.

²⁰ (2016) 226 DLT 208.

²¹ (1998) 47 DR J 74.

²² D.S. Pattnaik & N.S. Siddiqui, *Problems of Refugee Protection in International Law: An assessment through the Rohingya Refugee Crisis in India*, 14(1) SOCIO-LEGAL REVIEW (2018).

Another case which has time and again been extracted to overestimate the protection conferred by Art. 21 is the case of *Ktaer Abbas Habib Al Qutaifi v. Union of India*²³ adjudicated upon by a single judge bench of the Gujarat High Court. The two petitioners were duly granted the status of a refugee by the UNHCR, who filed a petition to be released from the Joint Interrogation Centre and instead of deporting them to Iraq they be handed over to the UNHCR. The court eventually directed the concerned authorities to consider the petitioner's case from a humanitarian perspective and that the petitioner shall not be deported from Indian unless such consideration has been made. The judgement does not provide any recluse to the said refugee but simply implores the authorities to take a humanitarian stance and if they opine that the petitioner is to be deported, the 'due process of law' be adhered to. Also, the judgement is powerless against the Supreme Court's confirmation of the Centre's "unrestricted right to expel."²⁴

Although, in some cases, very few and far between, regarding specific facts some court have required the government to meet procedural due standards before restrictively regulating refugees. Those cases must be confined to their facts because they are very clearly exceptions; indeed, none of them was even declared reportable and they are no longer than a few unreasoned paragraphs.²⁵ Therefore, it can very well be argued that Art. 21 merely provides for a procedural impediment for the executive to comply to, before deporting the concerned population. It is no way encompasses the Right of Non Refoulement.²⁶

Article 51

The practice of assimilation of treaty obligations in domestic jurisprudence as incorporated by India is very much similar to the approach which has been adopted by the United Kingdom. India follows the dualist approach of International Law²⁷, which mandates that treaties are subject to municipal law. Enforcement of any treaty obligations must conform to the domestic law of the country. Whenever a conflict arises between a treaty and a municipal law, the latter prevails unless it can be harmoniously interpreted.²⁸

Neither does India have municipal legislation specifically pertaining to refugees or asylum seekers nor has the principle of Non-Refoulement been espoused by

²³ *Ktaer Abbas Habib Al Qutaifi v. Union of India*, 1998 Cri LJ 919.

²⁴ *Hans Muller v. Supt., Presidency Jail*, AIR 1955 SC 367. Hans Muller was handed down by a five-judge Constitution bench of the Supreme Court.

²⁵ B. Acharya, (2016). *The Future of Asylum in India: Four Principles to Appraise Recent Legislative Proposals*. NUJS LAW REVIEW, 9, pp.173-228.

²⁶ O. Chaudhary, *Turning Back: An Assessment of Non-Refoulement Under Indian Law*, 39(29) ECONOMIC AND POLITICAL WEEKLY, 3262 (2018).

²⁷ *State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201.

²⁸ *Bhavesh Jayant Lakhani v. State of Maharashtra and Ors.*, (2009) 9 SCC 551.

any domestic legislation. The Foreigners Act, 1946 is the current piece of domestic legislation which governs the state practice pertaining to refugees. S. 2(a) defines a 'foreigner' as 'a person who is not a citizen of India. Hence, this definition very well covers any kind of immigrants, refugees and tourists. S. 3(2) of the act provides the executive wide powers to control the entry of foreigners within the country. Under this act, the Central Government has been endowed with the power to prohibit, regulate and restrict the entry of foreigners in India. The Act also provides that the Central Government can very well restrict the movement of foreigners in India and confine them to refugee camps.

India has not ratified the Refugee convention of 1951. Hence, it can very well be argued that Art. 51 has not been inserted with the intention of abiding by the said obligations incorporated under the convention.

Hence, subject to the dualist approach followed by the Indian Legal Framework, it can very well be argued that since the provisions of Foreigners Act are in direct contravention to the principle of Non-Refoulement, any treaty which imposes the obligation not to refole refugees, whether in verbatim or in meaning cannot be imposed as a domestic obligation on India.

Non-Refoulement as Customary International Law

The right of Non-Refoulement has been appraised by many authors to have procured the status of Customary International Law.²⁹ The European Court of Human Rights has held that non-refoulement protects "the fundamental values of democratic societies."³⁰ Although, the assimilation of Customary International Principles in Indian Legal Framework is not unconditioned.

Different Indian Courts at various instances have opined that a Customary International Law shall be deemed to be incorporated in Municipal Law only if they are not contrary to the Municipal Law.³¹ In the present context, the principle of Non-Refoulement is in direct contravention to the provisions of the Foreigners Act. Hence, the domestic legislation in India very well 'occupies the field' of refoulement principles.

The Supreme Court in the case of *Vishakha v. State of Rajasthan*³², opined that "In the absence of domestic law occupying the field...the contents of the International

²⁹ M. Sternberg, *The Evolving Law of Non-Refoulement and Its Influence on The Convention Refugee Definition*, 24 IN DEFENSE OF THE ALIEN 215, (2001).

³⁰ *Saadi v. Italy*, (2009) 49 EHRR 30, para. 127; *Chahal v. the United Kingdom*, (1997), 23 EHRR 413, para. 79.

³¹ *T.N. Tamil and English Schools Association v. the State of T.N.*, (2000) 2 CTC 344; *PUCI v. Union of India*, AIR 1997 SC 568.

³² *Vishakha v. The State of Rajasthan*, AIR (1997) SC 3011.

Conventions and norms are significant for the purpose of interpretation of Art. 21." Although, the discussion in question dealt with treaty obligations of the state and not the assimilation of custom in International Law. It is a settled principle of law that a court can pass orders on issues before it.³³ Hence, not only does the Foreigners Act 'occupy the field' but also the Supreme Court's judgements often relied upon do not, in fact, discuss the obligations imposed by virtue of a Customary International Law.

Also, India has many times considered and rejected being a party to the refugee convention. Hence, the country would be hesitant in applying a principle whose responsibility it has been evading from 1951.

Summary of Arguments and Conclusion

- The UNHCR and NHRC cannot be considered as repositories of International Law, subject to the enormous refugee population in the country and the limited operations of UNHCR. The NHRC, on the other hand, does not enjoy any substantive powers and can merely help the concerned population in litigation for their rights. The Committee is also marred by legislative concerns which have rendered the commission 'toothless'.
- Article 21 of the constitution provides for a mere procedural impediment upon the executive and does not accord any substantive rights on the persons so claiming under it. Although, the commingling of the principles enshrined in Art. 21 with those of Art. 14 and Art. 19, provide for some substantive rights being available to the claimants. The benefits of Art. 19 are not available to non-citizens. Whether or not any substantial rights are available to the refugees is debatable.
- The case laws which have often been relied upon to direct that non-refoulement, in principle is enshrined within Art. 21 of the Constitution do not postulate any such conclusion.
- Any treaty or obligation pertaining to the acceptance of Non-Refoulement entered into by the Indian state shall not be binding by virtue of the provisions of the Foreigners Act.
- Even if the principle of Non-Refoulement achieves the status of Customary International Law, the same shall not be binding on the Indian jurisprudence since the domestic legislation already 'occupies the field'.

Rights of the refugee population in the world is a matter of grave concern and India has time and again been a benevolent host to these populations. Although, the fact of the matter is that the central premise of refugee law, the Principle of

³³ H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA (4 ed. Universal Law Publishing Company 2011).

Non-Refoulement is not a part of the Indian Legal Framework. This renders the refugee population dependent on the benevolence of the state and opens room for arbitrary executive action.

Pressing need for Domestic Legislation

Acceding to the Refugee Convention and the Refugee Protocol and other allied treaties is not a solution to the said problem. The legislature should enact domestic legislation which deals with the rights of the refugee and other such populations. In the meantime, the Foreigners Act should necessarily be amended to comply with the International norms of the jurisprudence of Refugee Law. With such amendment coming into force the Court can take recourse of International Treaties and Customary International Law to ensure that the refugees are accorded a fair and just treatment in consonance with the International obligations. Thus, ensuring that the Indian state complies with the necessary international commiserating jurisprudence which avers the refugee population being reduced to modern day scavengers.

Religion and the Law: Sabarimala Issue

A Legal and Moral Quagmire between Religious Liberty and Right to Equality

*Nikhil Erinjingat**

The Constitution of India on Religious Liberty and Equality

The Constitution of India begins with a Preamble which explicitly protects an individual's liberty of thought, expression, belief, faith, and worship. It, at the same time, protects an individual's equality to status and opportunity. Judiciary has had a plethora of opportunity to interpret the meaning and scope of religious liberty and equality under the Constitution.

Indian Constitution under Article 14¹ uses both the terms '*equality before the law*' and '*equal protection of the law*'. Further, classification by the State must be un-arbitrary, justified and reasonable.² Therefore, equals must be treated equally and un-equals differently. This is the principle of intelligible differentia.

Hence, before the law, both men and women are equal and discriminating women solely on the basis of sex strikes straight at the heart of the doctrine of equality.³ However, abuse, discrimination, violation, and maltreatment of women has been an unfortunate practice in the past and is in the present. Thus, even though the law does not discriminate women on the basis of their sex, the society does; and religion is an institution which does so with impunity. It is often difficult for individuals to challenge the authority of religious institutions in the Court of law and very few cases of such discrimination come before the court.

Despite the open and blatant discrimination by religion, it was held by the Bombay High Court that personal laws are immune from being challenged for violation of fundamental rights as they are not laws under Article 13.⁴ Thus, any personal law which abridges any fundamental right cannot be challenged, in the

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¹ Indian Constitution, 1950.

² *Nagpur Improvement Trust v. Vithal Rao*, AIR 1973 SC 689

³ *Abdul Aziz v. State of Bombay & Anr.*, AIR 1954 SC 321.

⁴ *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84.

first place. However, this Judgement of the Bombay High Court has been overruled by the *Sabarimala Judgement*. 'Indian secularism' is a unique kind of secularism. In India, secularism is a dicey topic. Narasu judgement is justified as religion is something which is based on faith and less on rationality. *Also, religion is an institution to itself which is not government established, and it is voluntary. Every religion has its own rules and regulations which ought to be followed by all the followers. Further, when a follower does not comply with the laws of a religion it amounts not only to disrespect to the religion but also harms the faith of other followers.*

The conflict between Articles 26 and 25(2)

The way Art. 26 is worded prevents the legislature from framing any law which takes away the rights of a religious denomination from managing matter of its religion, however, matter such as to acquire, sell and manage property may be controlled by the State.⁵ The exercise of freedom of religion is subject to the restriction on the basis of public order, morality and health. The Supreme Court has also held that law cannot be interpreted on the basis of moral principles.⁶ The morality which the Court is concerned with is Constitutional morality.⁷

Freedom under Art. 25 also includes protection from any act which attempts to insult the religion or religious feeling of that class.⁸ It was held in *Public Prosecutor v. Ramaswamy*⁹ that Sec. 295 of Indian Penal Code, 1860 (IPC) protected insult of not only idols in temples but also sacred books and other objects which were regarded as sacred by any class of persons, whether such objects were actually worshipped or not. It is interesting to note that the Court has not mixed rationality and logic to religious practices. The Court has recognized the significance of any object which is sacred by 'any' class of persons, whatsoever.

According to Art. 25(2)(b) of the Constitution, the State shall throw open Hindu religious institutions for social welfare and reform. This proviso clause was included in order to achieve social justice and equality. Harijans and other forms of untouchability were prevalent in Hindu religion. Therefore, the framers intended to include this clause as a proviso.¹⁰ On the other hand, Article 26 provides religious denominations with the right to manage their religious

⁵ *Narayanan Nambudripad v. Madras*, (1955) Mad. 356 Mad., at 377.

⁶ *Krishena Kumar v. Union of India*, AIR 1990 SC 1782.

⁷ *Nautej Singh Johar & Ors. v. Union of India & Ors.*, Writ Petition (Criminal) No. 76 Of 2016

⁸ *Ramji Lal Modi v. State of Uttar Pradesh*, (1957) SCR 860, 867.

⁹ (1964) A.M. 258.

¹⁰ Jeffrey Goldsworthy, *Interpreting Constitutions: A Comparative Study*, Oxford University Press; 1 edition (July 26, 2007), ISBN-10: 0199226474, at p.234-235.

matters. Caste systems and religion-based hierarchy are extremely common and prevalent in Hindu religion.

Considering that the caste system is a man-made hierarchy, the prohibition of entry into temples of several lower caste also becomes man-made. Further, since, Brahmins were the educated, the interpreters and 'authors' of religious texts, this prohibition continued in the pre-Constitutional period. However, since this differentiation is not based on intelligible differentia or does not have any rationale, it is discriminative. In *Sri Venkataramana Devaru v. the State of Mysore*¹¹ it was held that temples of public character not only included temples for the benefit for the public as a whole but also the denominational temples. Therefore, Art. 26(b) was subject to Art. 25(2)(b).

If we start questioning the rationale behind an individual from a lower caste prohibited from doing yagna and other religious rites, then almost all the religious principles will break down. Consequently, in order to achieve absolute equality, we may completely destroy all religious practices.

Legal Battle: Religious Liberty v. Gender Equality

The *Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors.*¹², a landmark judgment pronounced on 28th September 2018 by a five-judge bench of the Supreme Court, literally opened the path to Sabarimala temple to women of all ages. The battle for entry for women to the temple lasted over a decade. This judgment exorcized the 67-year-old *State of Bombay v. Narasu*¹³ the judgment of the Bombay High Court which protected personal laws from being challenged for violation of Part III of the Indian Constitution. Further, prior to the 2018 judgment on the entry of women into Sabarimala, in 1993 this matter was considered by the Kerala High Court in *S Mahendran v. The Secy, Travancore Devaswom Board, Thiruvananthapuram*¹⁴. The High Court held that the restriction imposed on women between the ages of 10-50 from entering the Sabarimala temple is not a violation of Art.14 as it is in accordance with the usage prevalent from time immemorial.¹⁵

In 1965 the *Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965* (hereinafter referred to as 'the 1965 Act') was enacted. Later, the Rules of 1965 was enacted. It is the Rules that legally prohibited women from entering the temple. Thus, prohibition is not because of the physiological reason but

¹¹ *Sri Venkataramana Devaru v. The State of Mysore*, 1958 AIR 255.

¹² *Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors.*, Writ Petition (Civil) No. 373 Of 2006. (Supreme Court of India)

¹³ *State of Bombay v. Narasu*, AIR 1952 Bom 84.

¹⁴ *S. Mahendran v. The Secy, Travancore Devaswom Board, Thiruvananthapuram*, AIR 1993 Ker 42.

¹⁵ *S. Mahendran v. Secy., Travancore Dewaswom Board*, AIR 1993 Ker 42.

because of the celibate nature of the deity. However, I do reject the age classification and according to me, women irrespective of their age must not enter the temple.

The instant matter¹⁶ was heard by Deepak Misra, CJI., A. M. Khanwilkar, J., Nariman J., Dr. D. Y. Chandrachud, J., and Indu Malhotra, J.. All the four judges except for Justice Malhotra declared prohibition violative of fundamental rights and therefore declared the law prohibiting this unconstitutional and void. Justice Indu Malhotra being the sole woman on the bench dissented with the popular view.

The fundamental contentions of the petitioners were that prohibition of women into the temple is unconstitutional as this practice violates Art. 21, 14, 15 and 17 of the Constitution and Rule 3(b) of the 1965 Rules is ultra vires the 1965 Act as the Act provides for entry of all sections and classes of Hindus.

Essential Religious Practice?

The Supreme Court in several cases (discussed below) has held that *only essential religious practices* are protected by the Constitution and the same has been adopted even in the Sabarimala verdict. The Court looked into the nature of the prohibition to determine whether this prohibition is an essential religious practice. This concept of '*essential religious practice*' was first put forth in the landmark judgment *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt*¹⁷ ("*Shirur Mutt*"), wherein it was held the Constitution under Art. 25 protects not only freedom of religious opinion but also the acts done in pursuance of a religion. The Court further held that the acts will be protected only if they are an essential part of the religion and stated, "*what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself*". This view was reiterated in *Ratilal Panachand Gandhi v. The State of Bombay*¹⁸ that religious denomination has the complete autonomy to decide which practices were essential for them. Para 23 of *Ratilal*¹⁹ states, "*No outside authority has any right to say that these are essential parts of religion...*" However, later the Supreme Court held in *Sri Venkataramana Devaru v. State of Mysore*²⁰ ("*Devaru*") that the State can throw open all Hindu religious temples to all classes and sections of

¹⁶ *Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors*, Writ Petition (Civil) No. 373 Of 2006. (Supreme Court of India).

¹⁷ *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt* (1954) SCR 1005.

¹⁸ *Ratilal Panachand Gandhi v. The State of Bombay*, (1954) SCR 1055.

¹⁹ *Ibid.*

²⁰ *Sri Venkataramana Devaru v. the State of Mysore*, (1958) SCR 895.

Hindus as per Art. 25(2)(b) and Art. 25(2)(b) will prevail over Art.26, in case of a conflict. The Supreme Court also held that religious institutions did not merely include the temples of 'public character' but also religious institutions of religious denomination. Therefore, the Supreme Court which is supposed to be an institution with no religious interest or faith in any religion will decide what constitutes the essential religious practice and whether a religious group is protected by Art. 25. *This essentially means that the Supreme Court has the power to make, un-make, or amend a religion.*

Further Justice Chandrachud in the instant judgment referred to *Mohd. Hanif Quareshi v. State of Bihar*²¹ in which the Supreme Court decided that sacrificing cow is not an essential practice in Islam, therefore, the prohibition on that is valid. *This case raises a question in my mind that, freedom or liberty has been defined as the absence of restraint²² or freedom to express oneself without external hinderance or constraints²³. J.S. Mill has further added that the expression of liberty must not cause harm to others.²⁴*

Justice Gajendragadkar in *Durgah Committee, Ajmer v. Syed Hussain Ali*²⁵ issued a cautionary note which said "even practices though religious may have sprung from merely superstitious beliefs and may in that sense be an extraneous and unessential accretion to religion itself."²⁶ The Court hence distinguished between superstitious beliefs and religious practices.

It is indeed fascinating how the Hon'ble Judges of the Supreme Court of India called some practice of religion to be 'superstitious' because if we go on to look at the dictionary meaning of superstition²⁷ then most of the fundamental elements to the existence of god to the stories of Mahabharata and Ramayana can be challenged. Chief Justice Latham (Australia) in *Adelaide Company of Jehovah's witnesses Incorporated v. The Commonwealth*²⁸ observed, 'what is religion in superstition to another'.

This rule of determining whether a practice is an 'essential religious practice' has been applied in the famous *Shayara Bano v. Union of India*²⁹ as well. Further,

²¹ *Mohd. Hanif Quareshi v. the State of Bihar*, (1959) SCR 629.

²² J.R. Seeley, 'Introduction to Political Science Two Series of Lectures', at p.119 (Cosimo, Inc, 2005).

²³ L.P. Carpenter, 'G. D. H. Cole: An Intellectual Biography', (Cambridge University Press; Reissue edition, October 14, 2008).

²⁴ <https://plato.stanford.edu/entries/mill/>

²⁵ *Durgah Committee, Ajmer v. Syed Hussain Ali*, (1962) 1 SCR 383.

²⁶ *Ibid.*, at para 33.

²⁷ "Excessively credulous belief in and reverence for the supernatural"- Oxford Dictionary (Accessed from: <https://en.oxforddictionaries.com/definition/superstition>).

²⁸ *Adelaide Company of Jehovah's witnesses Incorporated v. The Commonwealth*, 67 CLR 116, 123.

²⁹ *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

Justice D.Y. Chandrachud held in the instant judgment that if a religious practice is to determine whether a religious practice is optional. If yes, then it is not an essential part of the religion. The essential part must be such that it will alter the nature of religion. Statements made in the Supreme Courts are of substantial significance and thus must be made with the utmost wisdom and care. In India, especially, in Hinduism, there is no one text that a Hindu follows. Every Hindu do not have a duty to attend religious classes like that of Madrasa or Sunday Church classes. In the absence of a specific text or set of rules across the nation, the practices differ from region to region. Further, Hinduism being a very adaptive religion undergoes significant changes from time to time and thus comparing the Hinduism of 100 years back and of now is impractical and the absence of or inconsistency of practice does not make it non-essential, as it may also mean that people are failing to abide by the rules. Therefore, rather than doing away with religious practices and limiting the religious liberties of dutiful and ardent followers of the religion, measures should be taken to ensure strict adherence to the rules. Justice Chandrachud held in his judgment that the exclusion of women on the basis of their physiology is discriminative and thus unconstitutional and *to suggest that women cannot hold vratham is to stigmatize and stereotype them*. Justice Chandrachud did not consider the fact that the vratham is followed by men, not because Lord Ayyappa will be attracted by them but as held by Justice Chandrachud himself that the penance is carried out in order to maintain oneself as 'pure' and 'unpolluted' and thus will lead to a path towards attaining Godhead or to be one with the Lord Ayyappa.³⁰ Therefore, this vratham is kept in order to please Lord Ayyappa. Further, staying as away as possible from the opposite gender is one of the most fathomable understandings of 'Bramhacharya'. Therefore, the exclusion into the temple is not because of physiological reason but due to the celibacy of the deity.

On the other hand, the dissenting judgment of Justice Indu Malhotra holds that the doctrine of equality does not override the individual's liberty to religion.³¹ Justice Malhotra in her judgment states that the application of Article 14 in religious beliefs will delineate the rationality of these beliefs and it is outside the ken of the Court. She held that it is upon the individuals of the faith to decide what is an essential religious practice and not for the Courts to decide, provided the belief is oppressive like Sati.³² She also uses the Constituent Assembly

³⁰ *Indian Young Lawyers Association v. The State of Kerala*, W.P.(C) No. 373 of 2006, at 30 (per Justice Chandrachud) (Supreme Court of India).

³¹ Para 16(ii), p.74

³² Para 8.2 p.28-29.

debates³³ to justify the fact that temples and places of worship are excluded from Art. 15(2). In *Shayara Bano v. Union of India & Ors.*³⁴ Chief Justice of India Khehar held that religion and the personal law must be decided by the people of that faith and not by Courts even if the practice is regressive or progressive. On the issue of *essential religious practice* in *Shirur Mutt*,³⁵ the Court held that what is essential religious practice must be determined with reference to the doctrines of that religion itself.

According to Chief Justice Misra, those practices which will not un-make or alter the religion are essential religious practices. Justice Chandrachud commented that superstitious practices are not essential religious practices. This opinion of both the judges is evident when they relied on the *Durgah Committee, Ajmer & Ors. v. Syed Hussain Ali & Ors.* on page 74-75 by CJI, para 21.6 by Justice Nariman and Justice Chandrachud in para 35 of his judgment. Chief Justice Latham of Australia High Court in *Adelaide Company of Jehovah's Witnesses Incorporated v. The Commonwealth*³⁶ observed, "what is a religion to one is superstition to another". Therefore, when religious practices undergo the test of Art. 14, the Supreme Court tends to rationalize religion. Art. 14 permits classification based on intelligible differential along with proving a nexus between the classification and object to be sought.³⁷

Even in the landmark judgment of *Shayara Bano v. Union of India & Ors.*³⁸, CJI Khehar in his dissenting judgment held in Para 389 that it is not the duty of the Court to decide what is essential to religion and what practices must be held unconstitutional. He also held that matters of religion and the personal law must be perceived as accepted by the followers of the faith. Therefore, there are copious cases which say that it is beyond the powers of the Court to interpret and rationalize religion and religious beliefs.

The judgment on Sabarimala by the Supreme Court caused a ruckus in Kerala. Not just religious leaders but even women were protesting the judgment. Several women tried to enter the temple but had to return halfway due to safety issues. Devotees of Lord Ayyappa tried to attack these women and threatened to

³³ Amendment No. 293 proposed by Prof. K.T. Shah, Amendment No. 206 and Amendment No. 301 was relied upon by Justice Indu Malhotra to come to the conclusion that temples are not excluded from Art. 15(2).

³⁴ *Shayara Bano v. Union of India & Ors.*, (2017) 9 SCC 1.

³⁵ 67 CLR 116.

³⁶ *Adelaide Company of Jehovah's Witnesses Incorporated v. The Commonwealth*, 67 CLR 116, 123.

³⁷ *National Council for Teacher Education v. Shri Shyam Shiksha Prashikshan Sansthan*, (2011) 3 SCC 238.

³⁸ *Shayara Bano v. Union of India & Ors.*, (2017) 9 SCC 1.

harm their family members.³⁹ The Police tried its best to control the situation but in vain. Now, since the women, whose equality was apparently upheld, are themselves protesting it puts the legitimacy of the judgment in question. With the mass rejection of the Supreme Court verdict one cannot fail to ask, considering even the concept of utilitarianism, which dictates '*greatest good of the greatest number*', *should the apex court have decided otherwise?*

³⁹ <https://indianexpress.com/article/india/young-woman-tries-to-enter-ayyappa-temple-sent-back/>

Reflections on Judicial Inroads in India in Guarding Women's Integrity and its Social Relevance

*Kaumudi Umrao**

Introduction

*"A Right is not what someone gives you, it's what no one can take from you."
-- Ramsey Clark (6th US Deputy Attorney General)*

Around the world, women have confronted widespread brutality, segregation, infringement of their essential human rights and fixing of 'roofs' on their very presence. Such remedies are unavoidably set somewhere near male individuals from the general public as their 'caretakers'. They have looked as far as possible, choose what is beneficial for them, what they can long for, just as even how, when and what women can do with their very own bodies. Thus, such mentalities of regarding women as 'property' – setting down of edges, practices and mores for them are looked to be purified through societal traditions, religious remedies and once in a while even as enactments. This is particularly so in India.¹

In the post-freedom India, a large number of the practices, customs, taboos and sexual orientation based disparities have been differently brought somewhere around dynamic social change movements, legislative advancements just as through numerous striking and creative legal interventions. India has been seeing one such period of wonderful perplexity for sex affectability just as a mission for women rights, correspondence and what has now come to be set under the rubric of women "substantial uprightness."²The Supreme Court (SC), and by and large even a portion of the state high courts have had the daringness

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¹ A push for women's right to bodily integrity, available at <https://www.tribuneindia.com/news/comment/a-push-for-women-s-right-to-bodily-integrity/697880.html> (lath visited on March 5, 2019).

² Bharat H. Desai, Kumari Nitu, Kheinkor Lamarr, Moumita Mandal, Nagma Parween And Varsha Singh, "Quest for Women's Right to Bodily Integrity: Reflections on Recent Judicial inroads in India", 53 EPW 51, 2018.

to change business as usual. Their legal hammerings have looked to lead the route for making unequivocal advances for fundamental human privileges of Indian women in a general public basically determined by man-centric society. Thus, the job of the courts, particularly the higher legal executive, ends up basic since they are the guard dog for implementation of major rights cherished under the Constitution.

In this article, some of the very important recent cases of the Supreme Court will be examined and analysed to give a look into the impacts of more extensive legal skylines of the judges of the SC and how it is assuming the undertaking of "sociolegal building" for maintaining the crucial human rights of women to real trustworthiness. Every one of these cases has importance as far as how the issue in question encroaches upon the persona (psyche and body) of a Woman.

Path Breaking Judicial Decisions

As it is a general standard that the lawmaking body makes law, officials executes law and judiciary translates law yet in ongoing trends judiciary has taken up some new roles and responsibilities now law isn't a mere mediator or an inactive watcher however law is currently a dynamic player, because of the adjustments in law it has emerged numerous discussions yet its new job has progressed towards becoming preferred standpoint for women, the new law has numerous choices and tenets or rules for women which is an extraordinary commitment to women strengthening. At present, when the two wings of government i.e, the legislature and executive have neglected to practice their part in making and actualizing law, the judiciary is acting itself as the manager of the established assertion, other than that judiciary is working in agreement or consonance with the worldwide traditions or universal arrangements_in order to give meaning to women empowerment by recognizing their rights at large in society.³

The legitimate consequences of the zenith court's decisions contain maintaining the intrinsic right of women to have last say in each viewpoint that influences them going from divorce to decisions in sexual issues to discrediting practice that stifles their sexuality to asserting their right to worship by the specific natural and biological procedure of the body.

Triple Talaq

The broadly advertised Supreme Court judgment is an appreciated advancement, hailed eagerly by numerous individuals in India and abroad who have since quite a while ago condemned the industriousness among Indian Muslims of the act of talaq-e-biddat, in which a man singularly breaks up his

³ Mohd Abdul Yousuf, "Role Of Judiciary In Protecting Women Rights", 3 JCIL 12.

marriage, with prompt impact, by articulating "talaq" three times one after another. It is also a tribute to the prolonged and fearless struggle of groups like the Bharatiya Muslim Mahila Andolan in the face of much pressure from within and outside the Muslim community.⁴

Divorce: Bone of Contention Under Muslim Law

In Islamic law, the term talaq connotes the "discharge from the marriage tie". A Muslim spouse can disavow marriage through various methods of talaq. Triple talaq is one of the methods of separation drilled by an Indian Muslim spouse, which has turned into a bone of dispute. Triple talaq is as of now prohibited in numerous nations, including Islamic nations.

The capacity of a man to end a marriage through the belittling and flippant course of triple talaq added further affront to this damage of a sex unequal post-separate from the real world, explicitly for Muslim women. This implies the finish of marriage can—and normally does—leave women in desperate material straits, taking care of children and themselves with no evident methods for help.⁵

Victory for Muslim Women and of Women Community

The legality of the act of moment triple talaq emerged before a Constitutional Bench of the SC in *Shayara Bano v. Union of India (2016)*⁶. It was fought as violative of principal rights ensured to the residents of India. The SC confronted the question: Can moment triple talaq be ensured under religious rights (Article 25) ensured under the Constitution?

The SC at long last has pronounced "Triple Talaq illegal and furthermore violative of Article 14 of the Indian Constitution." Instant triple talaq isn't a fundamental piece of Islam and has no assurance under Article 25 of the Constitution. Under Article 25 of the Constitution, the state cannot take away the essential religious practice of a person. Therefore, if a practice which is arbitrary and not an essential religious practice it will be hit by the exception laid down u/a 25. Therefore, the whole issue was whether or not the practice is an essential religious practice of Islam. The Court, along these lines, struck down the Muslim Personal Law (Shariat) Application Act, 1937 seeing that it looked to perceive and implement triple talaq. The noteworthy judgment of the SC in triple talaq

⁴ Sylvia Vatak, "Why the Triple Talaq verdict will not trigger an instant revolution", *Economic Times*, 27 August 2017.

⁵ Triple Talaq Verdict: A Battle Won, But The War Remains, available at: <https://www.thehindubusinessline.com/opinion/columns/c-p-chandrasekhar/triple-talaq-verdict-a-battle-won-but-the-war-remains/article9833744.ece>, (Last visited on March 3, 2019).

⁶ (2017) 9 SCC 1.

not just underscores the privileges of women under Articles 14, 15 and 21 of the Constitution but on the other hand is in similarity with the Holy Quran.⁷

The dominant part seat depended on its before choice Shamim Ara⁸ which held that this routine with regards to Triple Talaq is against both religious philosophy and law and in light of the fact that it is trailed by an extensive number of individuals it can't be approved. Along these lines, such practice is proclaimed illegal and put aside.

The striking down of this arbitrary practice is welcome which nonetheless empowers women and raise them one step up in the society where they are still treated as second class citizens.

Way Forward

Muslim women searching an exit from a despondent or damaging marriage are not totally powerless and drained of cures as Muslim law itself provides the option of divorce even at the instance of women (khula etc). Yet, it stays genuine that separate is a lot less demanding for a man than for a lady and most Muslim separations are cultivated by the man articulating talaq. Indeed, even after this landmark court judgment, it is absurd to expect to talk about gender equality seeing that Muslim divorce is concerned.

At long last, there is the subject of this Supreme Court judgment's reasonable significance. Will it really affect the everyday lives of Muslim spouses in India and, provided that this is true, how and how soon? Although judiciary has fulfilled it's a role in protecting the integrity of Muslim women but for in order to bring out the true meaning of this role, the legislature needs to intervene with some strong legislation which can regulate this mentally traumatizing practice upon women. Although the government has come up with a Muslim Women (Protection of Rights On Marriage) Bill, 2018 which is still struggling between the houses of parliament in order to make its place. So, at last, we can be optimistic to get a good law that too soon enough which will look into the plight of Muslim women.

Adultery

"Adultery" gets its source from the French word "avoutre", which has developed from the Latin action word "adulterium" which signifies "to degenerate". The word reference significance of infidelity is that a hitched man submits infidelity

⁷ *Shayara Bano v. Union of India* -- Triple Talaq-Case Summary, available at <https://lawtimesjournal.in/triple-talaq> (Last visited on February 28, 2019).

⁸ (2002) 7 SCC 518.

on the off chance that he has intercourse with a lady with whom he has not gone into wedlock.

Section 497 of the IPC — some portion of the British-ordered reformatory code of 1860 — condemned infidelity, yet did as such "unevenly": that is, just the man — and not the lady — who occupied with infidelity could be rebuffed. Additionally, just the spouse could bring an arraignment for infidelity; however, he would have no case on the off chance that he had "agreed" or "schemed" in the two-timing act.

This arrangement of strange conditions together comprised a close ideal tempest of male-centric society. The spouse being approved to bring an indictment against the "other man" (yet not in the event that he "agreed" to the relationship) likened to the conviction that, on marriage, responsibility for woman's body goes from her father to her better half.⁹

History of Section 497 and its Relevance in Present Times

Section 497 is a pre-constitutional law which was ordered in 1860. By then of time, women had no rights autonomous of their spouses and were treated as an asset or "property" of their husbands. Thus, the offence of infidelity was treated as damage to the spouse, since it was viewed as a "theft" of his property, for which he could continue to indict the wrongdoer. Generally, since infidelity meddled with the "spouse's selective privileges", it was viewed as the "most astounding conceivable intrusion of property", like theft.

On a perusing of Section 497, it is certifiable that women are treated as subordinate to men in light of the fact that it sets out that when there is "consent" or "connivance" of the man, there is no offence. This treats women as an asset. It regards her as the property of man and absolutely subservient to the desire of the ace. It is an impression of the social strength that was pervasive when the correctional arrangement was drafted¹⁰. In today's era when equality has spread its wings in almost every sphere of human rights, such a law absolutely stands null and void which violates the right to choice over one's body and sexual autonomy. Such a law although is against social morality but in a democracy like our's constitutional morality will prevail and there is no place for such a law which is totally premised upon sexual stereotypes.

⁹ Gautam Bhatia, "Decriminalisation of adultery is the first of many steps", *Hindustan Times*, September 28, 2019.

¹⁰ Adultery (sec 497 and sec 198), available at <https://blog.sconline.com/post/2019/02/21/adultery-s-497-ipc-and-s-1982-crpc/>, (last visited on March 2, 2019).

Joseph Shine v. Union of India¹¹

In this remarkable judicial decision, a five judges constitutional bench held section 497 of IPC as unconstitutional. The solicitor in the Joseph Shine case additionally tested the legitimacy of Section 497 on the grounds that it disregarded Article 14 of the Constitution. The SC seat was, in any case, of the assessment that Section 497 saw women just as unfortunate casualties having no office or appropriate to grumble. This IPC arrangement considered a wedded lady as only a product of her significant other, did not "secure and protect" the sacredness of marriage. It was rather gone for ensuring the "restrictive right of a spouse." The arrangement symbolized the outrageous type of criticism of a women's substantial trustworthiness as it tried to defend "sexual selectiveness of wedded women to serve her better half." The SC seat henceforth opined that Section 497 debased women and damaged their intrinsically ensured poise, security and sexual self-rule.¹² Accordingly, the SC held that Section 497 was unlawful as it was violative of Articles 14, 15 and 21. As a consistent result, it additionally held the procedural arrangement Section 198 of the Code of Criminal Procedure to be illegal.

Way Forward

The judgment of the Supreme Court is likewise imperative, notwithstanding, for the further ramifications that it might have. Every one of the judges was certain that a woman has the option to real trustworthiness, singular decision, and individual self-rule against the State, yet additionally inside the setting of the home and the family. This quickly raises doubt about some of our laws that effectively deny these rights. Two of the most unmistakable ones incorporate the compensation of conjugal rights (which enables a court to "direct" one life partner who has left the organization of the other companion to return, even without wanting to), and the marital rape exemption (which expresses that assault inside a marriage does not consider assault for the motivations behind criminal law). Along these lines, the decriminalization of infidelity may have a gradually expanding influence that goes past its prompt setting and fills in as a launchpad for a more noteworthy opportunity, equity, and freedom inside what is normally comprehended to be the private circle.

¹¹ 2018 SCC OnLine SC 1676.

¹² Section 497: 3 past Supreme Court judgments on adultery law, available at <https://www.indiatoday.in/india/story/adultery-law-section-497-3-past-supreme-court-judgments>, (Last visited on March 8, 2019).

Entry into Sabarimala Temple

"The social exclusion of women, based on menstrual status, is but a form of untouchability which is an anathema to constitutional values"

-- Justice Y.V. Chandrachud

The Ayyappa temple in Sabarimala locale in Kerala has been in the news for its dubious arrangement of precluding section to women from securing menstruating age (ten to fifty years). This sanctuary is situated in the Periyar Tiger Reserve in the Western Ghats mountain scopes of Pathanamthitta area of Kerala, which happens to be a standout amongst the most celebrated journey locales for Hindus. The preclusion to sanctuary section for women can be followed in the legend that the divinity of the sanctuary Lord Ayyappa was a 'Naishtika Brahmachari' (who pursued chastity), and according to the supporters of the sanctuary boycott, women of bleeding age are viewed as "not unadulterated" to enter the sanctuary as that would exasperate the abstinence of the god. In the previous three decades, this issue has drawn obstruction and dissents from various segments of society and has offered to ascend to a lawful debate.¹³

Issue/Contentions

The Ayyappa temple in Sabarimala, Kerala, denies women of discharging age (somewhere in the range of ten and 50 years old) from entering it – a restriction authorized under Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965: "Women who are not by custom and utilization permitted to enter a position of open love will not be qualified for entry or offer love in wherever of open love." The Young Lawyers' Association documented a request in the Supreme Court testing this standard in 2006.

Five lawful inquiries were presented under the steady gaze of the pinnacle court. It managed issues of rejection as an unfair practice. Regardless of whether such prohibition comes extremely close to basic religious practice under Article 25 of the Constitution? Can a religious group affirm this privilege under the umbrella of appropriate to deal with its own issues in the issues of religion? The issue of the denominational character of Lord Ayyappa was additionally set before the SC particularly if Rule 3 licenses religious sections to boycott passage of discharging women. It was addressed whether the standard is ultra vires the parent demonstration. Both the gatherings gave contrasting understandings of basic rights under Articles 14, 15, 16, 17, 21, 25, 26.

¹³ Sabarimala Entry Case: When Entry To A Temple Is Denied In God's Own Country, available at <https://www.youthkiawaaz.com/2018/09/when-gods-denied-in-gods-own-country-sabrimala-temple-entry-case/>, (Last visited on February 22, 2019).

The Judgment which Maintained Legacy of Human Dignity¹⁴

The petitioners asserted that the temple can't guarantee the character of an autonomous religious category as it is overseen by the Travancore Devaswom Board. The board gets public funds and any limitation on women because of their period cycles was a type of unapproachability and "its training in any structure is illegal" under Article 17. The respondents, be that as it may, asserted this confinement as a well-established practice and that the devotees of Ayyappa were a different section.

They looked for concession, being a different section, that Ayyappa has the privilege to practice and save its Dharma, including its pledge of Naishtika Brahmachari under Article 25(1) and the privilege to security under Article 21. Despite these disputes, the SC held that any confinement on the passage of women to the temple is an unfair practice. It was a sign of male centric principles of limiting just menstruating women and subsequently needed to fall. Any such treatment of discharging women as tainted and dirtied was interpreted as an image of prohibition, and equivalent to only illegal routine with regards to untouchability (Article 17)¹⁵. It has been battled by some that "subjective obsession of the period of 10– 50 years as the time of forbidden is likewise established on a male centric legend that sexuality of women and menopause are the equivalent"

When we discuss changes, the law is a definitive expert which gets its legitimacy from the constitution of India; subsequently, protected changes are fundamental in societal changes. In this specific circumstance, the judgment is radical in its way to deal with justify religious works on winning in Indian culture. It additionally guarantees singular freedom and ensures women rights in open spots.

Way Forward

We live in a nation that calls itself free; we yearn for expanding the GDP. Be that as it may, where despite everything we bomb as a general public, as a country, is in killing the profound established male centric society in the psyches of its natives. The consequence of such a belief system keeps on existing in all circles of our life influencing women explicitly. Indeed, even today women are separated on grounds of sex, sex and in the ongoing case they have been segregated on grounds of virtue and contamination. In such a scenario judicial pronouncements like this one stand as a victory for safeguarding women and

¹⁴ *India Young Lawyers Assn. v. State of Kerala* (2017) 10 SCC 689.

¹⁵ Bharat H Desai, Kumari Nitu, Kheinkor Lamarr, Moumita Mandal, Nagma Parween And Varsha Singh, "Quest for Women's Right to Bodily Integrity: Reflections on Recent Judicial inroads in India", 53 EPW 51, 2018.

their bodily integrity but then too there is no acceptance in society at large, even after the judgment there were many review petitions filed and there were incidents covered in news of threatening women and barring them from entering the temple. All these situations require the attention of the state in coming up with more cogent laws to handle the issue well and revamp the constitution with a close look at articles which protect liberty and dignity of an individual. There is also need of serious attention from the citizens as well of the nation to support the cause and help in promoting such basic rights of women instead of being a hurdle in their fulfilment also the concerned authorities need to come up and make sure that when something like these judgments mark a beginning in social development, they are continued in a meaningful way and not just left as mere theoretical readings.

Sex with Minor Wife is Rape

In a leading case of *Independent Thought v. Union Of India*¹⁶ the petitioner "Independent Thought" is an enrolled society working in the region of child rights which recorded an appeal under Article 32 of the Constitution so as to draw consideration towards the infringement of young girls wedded between the ages of 15 to 18 years. Section 375 of IPC endorses a period of assent for sex as 18 years significance in this way that any individual having sex with a young girl underneath 18 years old will be statutorily blameworthy of assault regardless of whether the sexual movement was with her assent. Notwithstanding, by the excellence of Exception 2 to Section 375 of IPC, if a young girl between 15 to 18 years old is married, her better half can have non consensual sex with her without being punished under the IPC, simply because she is married to him. Such an exception isn't just subjective yet in addition in opposition to the fundamental structure of the Constitution.¹⁷

Unjust Nature of Exception 2 of Section 375 IPC

The court held that Exception 2 of IPC makes a fake qualification between a married young girl and an unmarried young girl with no sensible nexus. The counterfeit refinement is in opposition to both Article 15(3) and Article 21 of the Constitution. No other arrangement in reformatory laws gives any invulnerability to the spouse. It likewise disregards the substantial respectability and regenerative decision of the young girl. In this way, it is being self-assertive and prejudicial obstructing the best enthusiasm of the young girl. Exemption 2 made an unlawful order between wives younger than 15, and those somewhere

¹⁶ 2017 10 SCC 800.

¹⁷ Arima Pankaj, "Independent Thought vs. Union of India: An evaluation of the judgement and its repercussion in the field of marital laws", 22 JHSS 11,(2017).

in the range of 15 and 18 years old ('the grouping'). In any case, but for this grouping, all wives would be secured by the statutory rape arrangement.¹⁸

Exception 2 of Section 375 IPC Violative of Articles 14, 15 & 21

The Court found that the arrangement was in a struggle with the rationality hidden different resolutions overseeing adolescence, marriage and sexual relations. For example, the Protection of Children from Sexual Offenses Act, 2012 (POCSO).

Under Article 21 of the Constitution, a girl child has an option to live with the respect which is damaged by Exception 2 by obliterating her substantial honesty and conceptive decision.

A child is a child whether hitched or unmarried or separated or isolated or bereaved. The method of reasoning of characterization between a wedded and unmarried girl in Exception 2 has progressed toward becoming non-existent, subsequently, making special case subjective, nonsensical and violative of the principle of equality under Article 14.

Under Article 15(3), Parliament has forced to make enactment for the welfare of girls and women. POCSO was such a right of Article 15(3) by the governing body. POCSO arrangements have a superseding impact over some other law. There is a fake refinement between assault of a wedded young girl and irritated penetrative Sexual Assault which is totally discretionary and biased.

Way Forward

This case has made a noteworthy move to ensure the protection of young girls by condemning the sex with a spouse underneath 18 years. Be that as it may, the Supreme Court had not set out any extraordinary arrangement for managing such situations where the enthusiasm of other counterpart youngster is additionally in question. It didn't consider those situations where the boy is additionally a minor and would be as guiltless as the young girl if have consensual sex with her. In India, instances of eloping and marriage are common, the Apex Court's obliviousness towards such cases since they can be summed up under the child marriage bodies of evidence is against the enthusiasm of the young boy as well.

Indeed, even today, the possibility of spousal assault in marriage is an irregularity. It is trusted that in the event that the young girl has agreed for

¹⁸ SC Case Analysis on Marital Rape: *Independent Thought v. Union of India and Another*, available at <https://www.latestlaws.com/case-analysis/sc-case-analysis-on-marital-rape-independent-thought-v-union-of-india-and-another-by-akanksha-yadav/>, (Last visited on March 1, 2019).

marriage, at that point she has consequently assented for having sex with her husband at his will. A large portion of the assault cases goes unreported in India because of an assortment of reasons. As appeared by the most recent National Family Health Survey, spouses submit most of the demonstrations of sexual brutality in India. Out of the absolute number of assaults answered to NFHS, 97.7% were submitted by mates of the person in question.¹⁹ Sexual assent is the privilege of each girl whether wedded or not as that of men. On the off chance that the sex is without assent, the equivalent ought to be punished paying little heed to the relationship of the culprit to the person in question. This judgment is a milestone judgment in the field of checking child marriage and consequently conjugal assault and we can hope for the judiciary to also throw some light on the delicate issue of marital rape as well.

Woman has a Right to Love and Reject

"She has an individual choice which has been legally recognized. It has to be socially respected. No one can compel a woman to love. She has the absolute right to reject."

-- Justice Deepak Mishra

Eve Teasing: Hampering Social Growth of Women

Eve teasing is a silly type of delight for men and a physical just as mental torment for women. This is one of the days by day issues women in Indian culture face. Of the considerable number of structures that brutality against women can accept, even prodding is the most universal and slippery in light of the fact that it is viewed as ordinary conduct and not an attack to females.

The term Eve teasing is utilized to allude to inappropriate behaviour of women in open places, for example, the avenues, open transportation, parks, shorelines, and film lobbies. This kind of an open provocation by a solitary man or groups of women incorporates, for example, verbal attacks, for example, making passes or unwelcome sexual jokes : nonverbal strikes, for example, demonstrating vulgar motions, winking, whistling, and gazing ; and physical ambushes, for example, squeezing, petting and scouring against women in open spots .moreover, a few occasions of eve prodding have been trailed by increasingly fierce ambushes, for example, assault and murder²⁰. Hence, it ends up troublesome for women to do exceed expectations in all circles of life when such acts happen which thus influences social development of women and furthermore denies them of monetary upliftment also.

¹⁹ Arima Pankaj," Independent Thought vs. Union of India: An evaluation of the judgement and its repercussion in the field of marital laws", 22 JHSS 11,(2017).

²⁰ Eve Teasing as a form of violence against women, available at https://www.researchgate.net/publication/271186262_Eve_teasing_as_a_form_of_violence_against_women_A_case_study_of_District_Srinagar_Kashmir, (Last visited on March 5, 2019).

Pawan Kumar v. State of Himachal Pradesh²¹

This judgment given by the Supreme Court of India clears a path in making the privileges of women in the nation more grounded and increasingly defensive. Male controlled society and different elements prompt the figment of women being unequal to men and the practices used to authorize these thoughts are still broadly existent all over India. This prompts the idea of male bullheadedness or the evident predominance of men over women. The primary feature spoken about is that of provocation by method for eve prodding and undermining. These eventually contribute as components prompting pitilessness against women which can in different examples add up to abetment of suicide. Court also observed that in a civilized society male chauvinism has no place and egoism must succumb to the law as clearly stated by justice Deepak Mishra. The court specifically held that-

“It has to be kept in mind that she has a right to life and entitled to love according to her choice, it has to be socially respected. No one can compel a woman to love. She has the absolute right to reject.”

Way Forward

The Supreme Court for this situation has taken a firm to represent women' rights. The judgment is additionally towards securing women' pride. The court made a notice of 'male bullheadedness', 'selfishness' and 'manliness' which are all a danger to women. This case additionally centres around the way that eve teasing which is frequently overlooked can likewise prompt some increasingly genuine episodes like that of the suicide of the unfortunate casualty as occurred in this case. By bringing the demonstration of eve teasing under the ambit of suicide, the Supreme court has perceived the seriousness of these wrongs and the discipline which these demonstrations may welcome. The court has held them to be violative of women' entitlement to correspondence and their entitlement to pride.

Despite the fact that the blamed in the present case has been rebuffed, in any case, nonetheless, there are a lot more unfortunate casualties who are experiencing a comparative stage. There's a need to control the developing number of eve-teasing episodes before any other person turns into its casualty. The preminent court has neglected to give any guidelines in this regard. A stringent law on the issue is the need of the hour and moreover the major stakeholders of the society who are the citizens of the nation need to stand firmly against such menaces and hence safeguard some basic rights of women so that no more women take their life, lock themselves in their homes, stop attending to

²¹ 20177 SCC 780.

schools and colleges or get married at an early age due to such inappropriate acts by some uncivilized beings of the society which deprives women of their overall social growth.

Relevance of these Judgments in Reference to Social Upliftment of Women

“There is no tool more effective than the empowerment of women for the development of a country.”

– Kofi Anan

India being a creating nation so as to grow needs the instrument of women strengthening more than anything. As per World Bank, around 48.3% of our nation comprises of females and there is no denying to the way that since old occasions when women have been contrasted with goddesses in our nation, unexpectedly, they have been dealt with like objects. In spite of the fact that there is an enormous distinction in the manner in which women were taken a gander at 50 years prior and today. Yet, the violations against women are as yet rising wildly despite everything they are denied of specific rights which they merit as men.²² Be that as it may, the judiciary has constantly attempted its best to engage the females of the nation, by giving milestone decisions like of Shah Bano Begum²³ or Daniel Latifi²⁴, Vishakha v. State of Rajasthan²⁵ and the recent ones discussed above in this paper.

India is home to the world's third-biggest Muslim populace which is administered by the Sharia or Islamic statute and this has been the situation since British frontier rule. However, until today, India's 90 million Muslim women face the danger of an abrupt, oral, and out-of-court divorce. An overview by Bharatiya Muslim Mahila Andolan uncovered that 95 per cent of divorced women got no support from their spouses. Much of the time, women are not in a situation to quickly turn into breadwinner and oversee kids.²⁶ However, in such pathetic scenarios, judicial interventions like that of Triple Talaq verdict stands as a supporter both socially and economically uplifting the women for their dignified survival in the society. Moreover, this is just a start in

²² Latest judgments by Supreme Court of India on rights of women, available at <https://blog.ipleaders.in/supreme-courts-on-womens-rights/#comments>, (Last visited on March 3, 2019).

²³ 1985 2 SCC 556.

²⁴ 2001 7 SCC 740.

²⁵ 1997 6 SCC 241.

²⁶ Triple talaq: How it affects the lives of India's 90 million Muslim women, available on <https://www.indiatoday.in/fyi/story/triple-talaq-muslim-women-supreme-court-sharia-law-islam>, (Last modified on August 22, 2017).

the fight for gender justice for women which can go a long way if supported by proper legislative approach.

At long last, the Victorian period is by all accounts arriving at an end – the judgment on Section 497 is dynamic from various perspectives. With regards to changing social substances of our occasions, particularly the changing sex conditions. This judgment turns out to be considerably more logically significant since it shows that woman is no more a property of husband and has full right over her sexual autonomy and reaffirms the standards of equity and justice. There is additionally a need to take a gander at the organization of marriage, particularly from the point of view of women, who are not simply searching for monetary and government managed savings or acknowledgement, yet associations. There is a little level of instructed, monetarily free women who are likewise looking for fairness inside marriage. The accuracy of this judgment will have positive implications and make ready for a sexual orientation equivalent and just society.²⁷

Religion can't come over the Constitution in a law based nation. What's more, when we secure the privileges of a divinity made in stone, while disregarding the privileges of genuine individuals, we are recommending that religion is exempt from the laws that apply to everyone else, the Constitution, and even the genuine soul of a majority rules system, where everybody is said to be equivalent. In a popular government of the people, by the people, for the people, an equity framework made for them, can't in any way, shape or form significantly consider maintaining the privileges of a god rather than those of women. This judgement thus makes women socially stand up in claiming their rights and fight against the discrimination meted out to them based on some biological process and moreover degrading their bodily integrity.

Child marriage and marital rape are the two sides of the same coin, Young women in the age aggregate underneath 18 are as yet growing physically and rationally, what's more, may not be in a situation to settle on educated choices and decisions with respect to their wellbeing and prosperity²⁸. Exception 2 of section 375 of IPC was clearly unjust and unfair on the face of equality of married and unmarried women below the age of 18 years, hence making young married girls under 18 vulnerable in the society. The apex court has finally through the Independent Thought judgement socially uplifted those vulnerable

²⁷ Jyoti Seth, " Adultery verdict: A progressive judgment on Section 497", Indian Express, 28th September 2018.

²⁸ Executive director of the Population Foundation of India, available at: <https://thewire.in/gender/minor-wife-sex-rape-supreme-court>, (Last visited on March 6, 2019).

class of young girls and brought them at par with the society and moved a step further toward non-discrimination against a woman as a whole.

The Supreme Court has comprehended the very certainty that women strengthening is the most irreplaceable course to Country's advancement and can't be disregarded with the exception of at the stake of the nation's crumbling. In this way, the court is attempting its best to split and get rid of all such customary standards that look down on women, has offered decisions to forestall viciousness against women and to put them similarly as men in the general public. In the nation of Gods and Goddesses, it is a significant renowned shloka of Sanskrit that must be clung to: '*yatra naryastu pujoyante, tatra devta ramante*' which means where women are loved, there God dwells.²⁹

To Sum Up

"The best thermometer to the progress of the nation is its treatment to women."

– Swami Vivekanand

These path-breaking decisions make it plentifully certain that the Courts have assumed the job of an impetus in guaranteeing that the women are secured in a powerful way in each circle in view of their powerlessness. However, these wonderful legal advances require an unequivocal activity and development, particularly with respect to the Union Ministry of Women and Child Development and other responsible authorities to push for convenient and concrete lawful changes. Since the centre issue of women entitlement to substantial honesty fundamentally relies on the change in societal demeanours, hence we as citizens of this powerful nation should stand together as a whole in empowering our women. Thus, there is far to go before we will see the full acknowledgement of women correspondence and exercise of their rights as individuals because it is not only the role and responsibility of judiciary alone to stand up for the rights of women but it also demands the support and cooperation of the society as a whole.

²⁹ Latest judgments by Supreme Court of India on rights of women, available at <https://blog.ipleaders.in/supreme-courts-on-womens-rights/#comments>, (Last visited on March 3, 2019).

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