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Property in Indian Water
A Future Transformed by Climate

Paul T Babie*

Unless we use our water more sustainably and manage it more inclusively, we may indeed see more water-related conflict within countries than between them.

– Scott Moore, Senior Fellow,
Water Centre, University of Pennsylvania,
Letters to the Editor, March 23rd, 2019, The Economist.

Abstract

This article, which contains four parts, explores the ways in which climate change challenges the nature of property in Indian water. The first briefly recounts the ways in which control over surface freshwater is currently achieved in India. It focuses on the use of property as a concept for use in determining allocation, identifying a continuum of approaches to allocating property in water. Yet, because such allocation is nothing more than a fragmentation of the water resource in increasingly smaller bundles, the second part explains why doing so will result, ultimately, in the inability of any user to make effective use of the resource, for any purpose. The third part considers two alternatives to property as a means of allocating the use of freshwater found in Indian rivers, one secular, the other sacred. Finally, the article concludes with some brief reflections on the nature of transformative change necessary to achieve a sustainable and inclusive approach to water allocation.

Keywords; Indian water, population, warming, scarce resource, property.

I. The Crucible of Climate Change

Asia holds more than half of the world's population but contains little of its freshwater supply—China only seven percent, India only four; everywhere, quantity and quality are constrained. That limited supply, in the form of rains, rivers, coasts, and seas, shaped and shapes Asia's history. That history pivots around the control of the freshwater resource, which in turn underpinned an explosion and longevity of population.[1] Yet, while this might seem like a story with a happy ending—endless economic growth for a populace that is becoming better off over time—it is not. Instead, climate change is exacerbating a water supply already stretched beyond its natural limits. Rather than a happy ending, Asia reveals why climate change is, indeed, the global emergency that the United

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1 Sunil Amrith, *Unruly Waters: How Rains, Rivers, Coasts, and Seas Have Shaped Asia's History* (Basic Books, 2018) 3.

Kingdom recently declared.[2] Asia's water story is really the story of a continent already succumbing to the ravages of climate change.[3] Sunil Amrith writes: 'in a warming world, Asia is distinctive for its sheer scale, and distinctive for the scale of inequality among its peoples. Both are rooted in the quest for water, which is a vital feature of modern Asian history….'[4] Thus, for Asia,

> [w]ater is…a "sampling device" for other sorts of change, even as changes in water ecology have had a direct effect on millions of people's lives. We can trace many of Asia's political transitions through the effects they had on water: from the global reach of the British empire in the nineteenth century, to the projects of national reconstruction that the Indian and Chinese states carried out in the twentieth. But the history of water is more than a mirror to the human intentions. The history of water shows that nature has never truly been conquered. Water has served as a material constraint on every Promethean plan of growth and plenty. The sheer ferocity of a wet climate—a climate of monsoons and cyclones—remains a source of fear, and no fear is as great as the fear of water's absence, in drought. The cultural history of water is one of reverence as much as hubris. And water has its own chronology—the chronology of the seasons; the episodic chronology of sudden, intense disasters; the imperceptible chronology of cumulative damage, as manifested in the effects of human activity on the oceans.[5]

Asia is vulnerable to climate change because it has developed, as a continent and as individual national governments, in the human activities that both produce the emissions which drive climate change and in the activities which in turn stretch and warp water supply beyond what nature provides. In the ultimate Catch-22, supply continues to dwindle as a result of the very human activities which it initially made possible.

Nowhere is this dual vulnerability—to climate and diminishing water supply—more pronounced than in India. The story of India's freshwater supply—both surface and groundwater—is also the story of Asia, for three reasons outlined by Amrith. First, India stands at the heart of the story of British Empire, which stands in turn at the heart of climate change. Second, while the story of India is one of democracy, the Indian state has behaved in an authoritarian manner, almost as if it were the extension of the British Raj. And, finally, climatically, India is the crucible of the monsoon, the thread which runs through the whole story of water in Asia. My concern is with one small corner of this story: the allocation of control over water—in a fragmented way—and how, in the face of climate change, that allocation no longer meets the needs of Asia, as represented by India.[6]

2 United Kingdom, *Parliamentary Debates (Hansard)*, House of Commons, 1 May 2019, 659 (Jeremy Corbyn, Leader of the Opposition).

3 Amrith (n 1) 5.

4 Ibid.

5 Ibid 9-10 (footnotes omitted).

6 Ibid 10-13.

This is not a lesson merely for India, or even for Asia—it is a lesson for all of us, the world over. Fragmenting the control of water among many users can no longer work when the available supply continues to dwindle due to the effects of climate change, themselves the consequences of our own activities, with the control over what little water is left concentrated in fewer and fewer people.[7] As time unfolds and the impacts of climate change begin to be felt much more acutely, this truth about water will only produce greater intra-national water conflicts; people within states will begin to fight more and more over the control of water. Given this impending reality, we must consider alternative means—both sustainable and inclusive—of allocating this scarce resource. The challenges to water demand transformative change, and this article briefly suggests a possible climate driven future for the way in which water is allocated.

The article contains four parts. Part II briefly recounts the ways in which control over surface freshwater is currently achieved; this focusses on the use of property as a concept for use in determining allocation. I identify a continuum of approaches to allocating property in water. Yet this is nothing more than a fragmentation of the water resource into increasingly smaller bundles. Part III explains why the fragmenting of control through the use of the concept of property will result, ultimately, in the inability of any user to make effective use of the resource, for any purpose. Part IV considers two alternatives to property as a means of allocating the use of freshwater found in rivers, one secular, the other sacred. Part V concludes with some brief reflections on the nature of transformative change necessary to achieve a sustainable and inclusive approach to water allocation.

II. Striking a Balance?

Legal systems throughout history have faced the difficulty of how to allocate the use and control of natural resources so as simultaneously to allow some people to make use of them and to prevent others from doing so.[8] Frequently, states turn to the concept of property to achieve this dual objective.[9] While it has evolved over time, only taking its modern liberal form in the last 100 years,[10] property throughout history has always been about ensuring to its holder the ability to make use of a good, resource, or thing, and to exclude others from doing so, and seemingly carries with it the benefit of ensuring the security and stability of that

7 See Simon Long, 'Climate change and population growth are making the world's water woes more urgent', *The Economist* (February 28, 2019) <https://www.economist.com/special-report/2019/02/28/climate-change-and-population-growth-are-making-the-worlds-water-woes-more-urgent>. And see 'Special Report: Water', *The Economist* (March 2nd, 2019).

8 See generally JW Dellapenna and J Gupta (eds), *The Evolution of the Law and Politics of Water* (Springer, 2009).

9 On the nature of property as an allocation of sovereignty, see Morris R Cohen, 'Property and Sovereignty' (1927) XIII *Cornell Law Quarterly* 8.

10 On the modern liberal concept of property, see Paul Babie, 'Choices that Matter: Three Propositions on the Individual, Private Property, and Anthropogenic Climate Change' (2011) 22 *Colorado Journal of International Environmental Law and Policy* 323; Paul Babie, 'The Spatial: A Forgotten Dimension of Property' (2013) 50 *San Diego Law Review* 323.

control.[11] Today, that power is captured in the 'bundle of rights metaphor'[12] or the 'liberal triad'[13] of property: the rights of use, exclusivity, and alienability. Thus, the state has always sought, using the concept of property, to play a role, one way or another, in allocating control over water, either from the base-line position of taking all or most of the water as its own property, and then parcelling it out to private users, or in standing behind the power of the private owner of land to control water on or below it.

Yet, while natural resources law typically seeks simultaneously to provide for flexibility and certainty in allocation,[14] it is by no means obvious how to invoke the concept of property in aid of those twin objectives. Water perhaps proves least amenable to such standardising efforts.[15] Nonetheless, most legal systems known to human history have attempted not only to provide for a legal regime accommodating flexibility and certainty, but also to use the concept of property, at least as a touchstone, in doing so. Today, in establishing a system of water law, every legal system traces its origins to one of the two dominant legal traditions that today cover the globe[16]—civilian and common law—both of which took different approaches to the use of the property concept as the touchstone for determining allocation of control over and use of water.[17]

The Roman civilian tradition treated natural resources, including water, as part of the land, thus 'water on the surface, underground, or collected in cisterns belonged to the landowner if the land was subject to *ius civile* ownership (*dominium*).'[18] For many sources of water, however, the Roman law began with a conception of shared use, *usus publicus*,[19] or *res communes*, a form of common public property which included rivers, beaches, and the air. Under this division of common and private property, first occupation, which was a method of acquiring private property in land, chattels, or animals, did not apply to 'rivers, lakes, seas and beaches [which] have their greatest value as open-access resources

11 See Richard Schlatter, *Private Property: The History of an Idea* (Rutgers University Press, 1951); Richard Pipes, *Property and Freedom* (Vintage, 2000).

12 JE Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Review* 711.

13 Margaret Jane Radin, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 *Columbia Law Review* 1667.

14 Scott S Slater, *California Water Law and Policy*, Volume I, §1.01–1.02 (LexisNexis, 2017) (internal citations omitted).

15 See Cynthia Bannon, 'Fresh Water in Roman Law: Rights and Policy' (2017) 107 *The Journal of Roman Studies* 60; Cynthia Bannon, *Gardens and Neighbors: Private Water Rights in Roman Italy* (University of Michigan Press, 2009); Joshua Getzler, *A History of Water Rights at Common Law* (Oxford University Press, 2006). And see also Edwyna Harris, 'Scarcity and the Evolution of Water Rights in the Nineteenth Century: The Role of Climate and Asset Type', Monash University Business and Economics, Discussion Paper 45/10.

16 See Aldo Schiavone, *The Invention of Law in the West* (Harvard University Press, 2012).

17 S Hodgson, *Land and water - the rights interface* (Food and Agriculture Organization of the United Nations, Rome, 2004) Pt 4.

18 Bannon, 'Fresh Water' (n 15) 65.

19 Ibid 62.

that no one may reduce to private possession.'[20] Still, riparian owners (those whose land abutted a river or lake) 'might take limited quantities of water for domestic purposes, or build huts on the beach in storms.'[21]

While water therefore formed a public resource or good which was not immediately amenable to the application of the property concept, Roman law did recognise two limited private (possibly proprietary) uses of water. The first allowed for an 'apportioning [of] water from a public river, as long as no one could show that more had been apportioned to [a person] under his own right.'[22] Thus, the rights of each must remain equal, with no use of 'water compromising the interests of…neighbours downstream.'[23] And, the second exception allowed seemingly proprietary rights to draw water to be created by a servitude 'imposed on a "servient" property to benefit another "dominant" property. Servitudes were permanent rights, attached to the land rather than the persons who created them, and thus the holder of a servitude had an in rem claim to it.'[24]

The English common law tradition, 'maintain[ed] the principle of Roman law that flowing waters are *publici juris* and in maintaining that those who have access to such waters may reasonably use them,…privilege[ed] the owners of lands adjacent to watercourses.'[25] In doing so, the common law concluded that 'water is incapable of being owned';[26] rather, because '[f]lowing water cannot be possessed in a tangible fashion like land, [it could] only [be] quasi-possessed or appropriated by user.'[27] Rejecting the possibility of property in water, the common law instead posited that '[i]n the case of percolating water,…the landowner could draw any or all of it off without regard to claims of neighbouring owners…[]' and '[i]n the case of water flowing through a defined channel,…the riparian owner…could not always take all the water…', although it was possible to take some.[28]

At common law, the riparian owner enjoyed a right paramount to any other right, including prior user.[29] A system of such 'riparian rights' secures to the riparian owner two rights: flow and abstraction. The former ensures '…the flow

20 Richard A Epstein, 'The Economic Structure of Roman Property Law' in Paul J du Plessis, Clifford Ando, and Kaius Tuori (eds), *The Oxford Handbook of Roman Law and Society* (Oxford University Press, 2016) 513-523, 514. And see also Denis P Kehoe, 'Tenure of Land and Agricultural Regulation' in Paul J du Plessis, Clifford Ando, and Kaius Tuori (eds), *The Oxford Handbook of Roman Law and Society* (Oxford University Press, 2016) 646-659, 653.

21 Epstein (n 20) 514. And see also Kehoe (n 20) 653.

22 Kehoe (n 20) 654.

23 Ibid.

24 Ibid 648.

25 Hodgson (n 17) Pt 4.3 (footnote omitted).

26 Kevin Gray, *Elements of Land Law* (Butterworths, 2nd ed, 1993) 25.

27 Getzler (n 15) 2.

28 Sir Robert Megarry and HWR Wade, *The Law of Real Property* (Butterworths, 5th ed, 1984) 65 (internal citations omitted).

29 See David R Percy, 'Responding to Water Scarcity in Western Canada' (2005) 83 *Texas Law Review* 2091; David R Percy, *The Framework of Water Rights Legislation in Canada* (Canadian Institute for Resources Law, 1988).

of water…unaltered in volume or quality, subject to ordinary and reasonable use by the upper riparian owners, though [with] no right to object to the level of the water being lowered unless this causes damage or a nuisance[],[30] while the latter is '[t]he ordinary and reasonable use which at common law a riparian owner was entitled to make of the water flowing through his land' for both ordinary purposes, such as domestic uses, and extraordinary purposes, such as irrigation and manufacturing.[31]

Riparian rights proved incapable of sufficient flexibility to apply to unique climatic conditions, such as those found in the arid and semi-arid regions of the southwestern United States and most of Australia.[32] To meet such conditions, American law developed a system known as 'prior appropriation', giving to the first user to appropriate the use of water a paramount proprietary right;[33] most of Australia, along with some American states such as California,[34] established a system of 'state ownership' that largely replaced riparianism;[35] and some jurisdictions adopted hybrid riparian, prior appropriation, and state ownership systems.[36]

What we find, then, in the two legal traditions which inform all modern legal systems is a system of water law that seeks to balance the public interest (the *res communes*) with the private use (riparian rights) of water. Both the Roman and the English law traditions strike that balance largely on the side of public interest rather than private right; although both do recognise the potential of some limited private rights—which may or may not be proprietary—in strictly proscribed circumstances. In the case of the civilian tradition, these private rights involve that to draw water and acquire a servitude in relation to its use, while the common law recognised much the same in the riparian rights of flow and abstraction.

Other legal systems, drawing upon the civilian or common law patrimonies, strike

30 Megarry and Wade (n 28) 66 (internal citations omitted).

31 Ibid.

32 Alastair R Lucas, Security of *Title in Canadian Water Rights* (Canadian Institute for Resources Law, 1990) 1-15; SD Clark and IA Renard, *The Law of Allocation of Water for Private Use: Framework of Australian Water Legislation and Private Rights*, Volume 1 (Australian Water Resources Council, Melbourne, 1972) 51-112.

33 See David H Getches, *Water Law* (West, 3rd ed, 1997); The National Agricultural Law Centre, *Water Law: An Overview* <http://nationalaglawcenter.org/overview/water-law/>; A Dan Tarlock, 'Prior Appropriation: Rule, Principle, or Rhetoric?' (2000) 76 *North Dakota Law Review* 881.

34 See *California Water Code*, Statutes 1943, c 368, p 1606, § 102.

35 See Sandford Clark and Ian A Renard, 'The Riparian Doctrine and Australian Legislation' (1970) 7 *Melbourne University Law Review* 475; Sandford D Clark, 'The River Murray Question: Part I – Colonial Days' (1971) 8 *Melbourne University Law Review* 11; Sandford D Clark, 'The River Murray Question: Part II – Federation, Agreement and Future Alternatives' (1971) 8 *Melbourne University Law Review* 215; Ian A Renard, 'The River Murray Question: Part III – New Doctrines for Old Problems' (1972) 8 *Melbourne University Law Review* 625; D Patrick James and Hubert Chanson, 'One Hundred Years+ of Riparian Legislation in New South Wales' (2000) 3 *Australian Environmental Law News* 39. The same modifications were implemented in semi-arid parts of western Canada, such as Alberta and Saskatchewan: see Percy, *The Framework* (n 29).

36 Percy, 'Responding to Water Scarcity' (n 29).

their own balance of public and private. In considering those alternatives, it is possible to view the balance between public interest and private right in water as a continuum of allocative approaches. At one end—what we might call the public interest or *res communes* position—we find the Roman and English law approaches. We can refine that position, though, using the approaches found in Israel and China.

In Israel, a democratic capitalist system, the *Water Law of 1959* declares every drop of water, from the raincloud to the sea, to be the state's property and therefore subject to its allocative decisions. Pursuant to Article 2, all sources of water, existing or potential, are subject to state ownership, and those sources are defined as 'springs, streams, rivers, lakes and other currents and accumulations of water, whether above ground or underground, whether natural, controlled, or manmade, and whether water rises, flows or stands therein at all times or intermittently, and includes drainage water and sewage water'. Thus, all domestic water sources are to be managed by the State for the needs of the people and the development of the country. Unlike the Roman and English riparian owner, no rights to land in Israel's law create any right to water.[37]

Similarly, in China, a communist political and state-capitalist economic system, the *Water Law of the People's Republic of China 2002*, Article 3, declares that 'water resources are owned by the State. The State Council, on behalf of the State, exercises the right of ownership of water resources. The water of ponds belonging to rural economic collectives and the water of reservoirs built and managed by such collectives shall be used by the collectives respectively.' Article 7 establishes that any use of water requires a state-granted water-taking licence. Therefore, as in Israel, no land right carries with it a right to water, and Article 2 provides that '[t]he water resources referred to in this Law include surface water and groundwater.'

At the other end of the continuum of allocative approaches, what we might call the private right position, we find the Indian approach to water allocation. Indian law is an interesting hybrid of approaches found in both the civil and common law traditions, as modified by the Israeli and Chinese approaches. On the one hand, surface water is dealt with by comparatively recent post-colonial Indian legislation which provides for state ownership, although allowing for extensive use rights for the surface owner of land.[38] On the other hand, the control of groundwater, which in fact includes most water on the surface of land, is vested in the absolute control of the surface owner.[39] Thus, given the integrated nature of

37 R Laster and D Livney, 'Israel: The Evolution of Water Law and Policy' in Joseph W Dellapenna and Joyeeta Gupta (eds), *The Evolution of the Law and Politics of Water* (Springer, 2009) 125. See also Seth M Siegel, *Let There Be Water: Israel's Solution for a Water-Starved World* (Thomas Dunne Books, 2017).

38 By virtue of the *Indian Easements Act (1882)* (UK). And see Philippe Cullet & Joyeeta Gupta, 'Evolution of Water Law and Policy in India' in Joseph W Dellapenna & Joyeeta Gupta (eds), *The Evolution of the Law and Politics of Water* (Springer, 2009) 159, 164-7; Philippe Cullet and Sujith Koonan, *Water Law in India: An Introduction to Legal Instruments* (Oxford University Press, 2nd ed, 2017) 9-12.

39 By the operation of the *Indian Easements Act (1882)* (UK). And see Cullet & Gupta (n 38) 164; Cullet and Koonan (n 38) 2.

the water resource, this seeming division of control over use between surface and groundwater in fact makes it difficult for the state to control the use of the entire water resource.

In the middle of the continuum one finds two positions, one slightly to the Indian side, the other slightly to the Israeli. The former is that of the US prior appropriation doctrine, which places extensive power in the hands of a user of water who makes first use of the resource, whether that use is attached to riparian land or not.[40] The latter is the Australian/Canadian hybrid state ownership-riparian rights approach, which places all water in the ownership of the state, which holds the power to licence both surface and groundwater use, thus allowing for the continued existence of some limited riparian rights.[41]

The problem with using property as the touchstone for control of water—wherever it might be located along the continuum of allocative approaches posited here—is that it is only ever a balancing of the power of use and exclusion between the state and the individual. Climate change uncovers the difficulty with looking at water this way: there is simply not enough of the resource itself to meet even the needs of the few—the state included—among whom that control is allocated. Can any legal system really seek to allocate the water resource using an approach which sees the outcome as a zero-sum exercise placing power either in the hands of the state or in that of private interests? In short, no. As we will see in the next part, scarcity of water, exacerbated by the human activities which drive climate change, and by property's abstracting and fragmenting tendencies, leads to intractable problems.

III. A Recipe for Disaster

Property once meant tangible things—things we can see, touch, hold: land, timber, clothing, grain, wine, and so on. The Romans started with such things and worked out which could be the subject of property.[42] English law did much the same: property meant something solid, that had substance, and was not ephemeral. In fact, it applied to very little that was not tangible.[43] And, as things, especially as land, '[p]roperty intrinsically conferred a role in political life: it was akin to a ticket to participate in the life of political society.'[44] But not for long. As modernity and liberalism took root, and as Blackstone's aphorism—'there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and

40 See Getches (n 33); The National Agricultural Law Centre (n 33); Tarlock (n 33).

41 See Clark and Renard, 'The Riparian Doctrine' (n 35); Clark, 'The River Murray Question: Part I' (n 35); Clark, 'The River Murray Question: Part II' (n 35); Renard (n 35); James and Chanson (n 35).

42 Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1962) 105-7.

43 See Andro Linklater, *Owning the Earth: The Transforming History of Land Ownership* (Bloomsbury, 2014) 1-90.

44 Brendan Edgeworth, 'Murphy on Property' in Jocelynne A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 170-186, 174.

exercises over the external things of the world, in total exclusion of the right of any other individual in the universe'[45]—took hold, abstraction followed.[46]

Today, then, the liberal conception of property which governments the world over use to allocate control over goods and resources refers not to things, but to the bundle of rights—the liberal triad—of use, exclusivity, alienability. It has little if anything to do with the things to which those rights attach. And this has been the objective of liberal law—moving the meaning of property away from things and towards an abstraction.[47] This allows property to apply to more and more things which seemingly have no existence at all; indeed, they are illusions. Kevin Gray puts it this way:

> Proudhon got it all wrong. Property is not theft—it is fraud. Few other legal notions operate such gross or systematic deception. Before long I will have sold you a piece of thin air and you will have called it property. But the ultimate fact about property is that it does not really exist: it is mere illusion. It is a vacant concept—oddly enough rather like thin air.[48]

And Thomas C Grey:

> …the conception of property held by the specialist (the lawyer or economist) is quite different from that held by the ordinary person. Most people, including most specialists in their unprofessional moments, conceive of property as things that are owned by persons. … By contrast, the theory of property rights held by the modern specialist tends both to dissolve the notion of ownership and to eliminate any necessary connection between property rights and things.[49]

Why has liberal law abstracted in this way? To allow the unbridled pursuit of constant economic growth. The turn to rights converted the thing into an economic value.[50] Property, once tangible things, goods and resources, is now an abstract set of rights in respect of items of social wealth, intangible things such as intellectual property, shares in a corporation or, above all, money. It still brings with it power, but no longer the ticket to access political life it once did. Instead, it is simply raw, unbridled power, dependent on nothing, including politics, for its force.

Once property abstracts from the tangible to an intangible item of social wealth—a bundle of rights—something else becomes possible: the bundle itself can be

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45 Sir William Blackstone, *Commentaries on the Laws of England, Book II, Of the Rights of Things* (University of Chicago Press, 1979 [1765]) 2.

46 Robert W Gordon, 'Paradoxical Property' in John Brewer & Susan Staves (eds), *Early Modern Conceptions of Property* (Routledge, 1995) 95-110, 95.

47 See Denise R Johnson, 'Reflections on the Bundle of Rights' (2007) *32 Vermont Law Review* 247; Peter Burdon, 'What is Good Land Use - From Right to Relationship' (2010) 34 *Melbourne University Law Review* 708.

48 Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, 252.

49 Thomas C Grey, 'The Disintegration of Property', in J Roland Pennock & John W Chapman (eds), *Property: Nomos XXII: Yearbook of the American Society for Political and Legal Philosophy* (NYU Press, 1980) 69.

50 Ibid.

chopped up among different holders into smaller and smaller bundles, or worse still, into sole rights on their own. Thus,

> one owner may be endowed initially with the right to sell, another to receive sale revenue, and still others to lease, receive lease revenue, occupy, and determine use. Each owner can block the others from using the [whole thing]. No one can [do anything] without collecting the consent of all of the other owners.[51]

In short, a concept of property which views the things of the world as abstract rights allows for

> …initial endowments…as disaggregated rights rather than as coherent bundles of rights in scarce resources. … [M]ultiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use.[52]

Property inexorably drives toward 'a property regime in which multiple owners hold effective rights of exclusion in a scarce resource,'[53] thus making it impossible for any single owner, or even groups of them, to make any use of the whole. Property, in other words, first abstracts, and then fragments, both the thing itself (which, of course, it calls an 'item of social wealth'), and the rights available in that thing, among a vast number of holders.

Add to the abstracting and fragmenting drive of property the exacerbating effects of climate change, and one has a recipe for disaster. Every position on the continuum of water allocative approaches posited in Part II, whatever the balance it strikes, becomes problematic—it abstracts, it fragments, and it allows for the activities which not only produce climate change, but which are themselves further inhibited by it. In the case of water, climate change lays bare the problems created through the concentration of power and wealth in the hands of a few; as water becomes scarce—and climate change makes it more so, a 'perfect storm' or 'Catch-22'—an already overallocated resource can barely sustain those select few with the most secure water entitlements, let alone those with less or no security of supply at all.[54] Simon Long writes that

> The scientific consensus [in relation to the impact of climate change on water] is that, in the words of Henk Ovink, the Dutch government's special envoy on water matters, the process will be "like a giant magnifying glass, making all our challenges more extreme". Wet places will become wetter and dry places drier. The world's water endowment is already highly unequal—just nine countries account for 60% of all available fresh supplies. China and India have about 36% of the world's people, but only about 11% of its freshwater. Climate change will

51 Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 *Harvard Law Review* 621, 623.

52 Ibid 623-4.

53 Ibid 667 (emphasis in original removed).

54 Amrith (n 1) 303-4.

> exacerbate this inequity. And rainfall, such as the South Asian monsoons, on which much of subcontinental economic life hinges, will become more erratic.
>
> …
>
> As a report by the World Bank puts it: "The impacts of water scarcity and drought may be even greater, causing long-term harm in ways that are poorly understood and inadequately documented." Of course, a lot depends on how much the climate changes and how fast.[55]

We are caught in a seemingly never-ending cycle of over-use and diminishing supply, driving a catastrophic outcome for the earth and all of its inhabitants, human and non-human. It is nothing short of an emergency for nature.[56]

In its *7th Global Assessment Report on Biodiversity and Ecosystem Services Report*, the summary of which was released on 6 May 2019,[57] the UN Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), found that '[n]ature is declining globally at rates unprecedented in human history – and the rate of species extinctions is accelerating, with grave impacts on people around the world now likely'; around one million animal and plant species are now threatened with extinction, many within decades, more than ever before in human history.[58] IPBES Chair Sir Robert Watson warns that:

> The overwhelming evidence…from a wide range of different fields of knowledge, presents an ominous picture[.] The health of ecosystems on which we and all other species depend is deteriorating more rapidly than ever. We are eroding the very foundations of our economies, livelihoods, food security, health and quality of life worldwide.[59]

Why and how is this happening? Human activities, made possible by property, are the culprits. The five most significant of our activities, in descending order, are: '(1) changes in land and sea use; (2) direct exploitation of organisms; (3) climate change; (4) pollution and (5) invasive alien species.'[60] And all of this is driven by a 'limited paradigm of economic growth.'[61] The economic growth imperative, as should now be obvious, depends upon an abstracting and

55 Long (n 7).

56 Helen Briggs, Becky Dale, and Nassos Stylianou, 'Nature's emergency: Where we are in five graphics', *BBC News* (5 May 2019) <https://www.bbc.com/news/science-environment-48104037>.

57 UN Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), *7th Global Assessment Report on Biodiversity and Ecosystem Services Report: Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (UNIPBES, 6 May 2019) <https://www.ipbes.net/sites/default/files/downloads/spm_unedited_advance_for_posting_htn.pdf>.

58 'UN Report: Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating'', Sustainable Development Goals (6 May 2019) <https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/>.

59 Ibid.

60 Ibid.

61 Ibid.

fragmenting conception of property which ignores the reality—the things—of the world in which we live, placing the emphasis solely on the economic value of the abstracted and fragmented right.

This is particularly troubling in the case of water, for in using property as a concept to determine the allocation of a scarce resource, the focus becomes the economic value of the right to that resource rather than the resource itself. Water, once simply water, is now a bundle of rights in an item of social wealth. Water's tangible existence has been converted, by the liberal conception of property, into an intangible abstract item of economic value, which can be fragmented among various users. And it is used as such, to fuel economic growth. This is made clear in the IPBES Report, which finds that more than a third of the world's land surface and nearly 75% of freshwater resources are now devoted to crop or livestock production—all part of 'a pattern…of global interconnectivity and 'telecoupling' – with resource extraction and production often occurring in one part of the world to satisfy the needs of distant consumers in other regions.'[62]

What can we do? IPBES Chair Sir Robert Watson summarises the path ahead if we are to avoid the dire consequences with which we are already beginning to live:

> …it is not too late to make a difference, but only if we start now at every level from local to global…. Through 'transformative change', nature can still be conserved, restored and used sustainably – this is also key to meeting most other global goals. By transformative change, we mean a fundamental, system-wide reorganization across technological, economic and social factors, including paradigms, goals and values. The member States of IPBES Plenary have now acknowledged that, by its very nature, transformative change can expect opposition from those with interests vested in the status quo, but also that such opposition can be overcome for the broader public good….[63]

In the case of the allocation of control over water, what would 'transformative change' of a 'fundamental, system-wide reorganization across technological, economic and social factors, including paradigms, goals and values' look like?

Well, we could start with a new approach to property, one that rejects the abstracting and fragmenting tendencies of the bundle of rights metaphor or the liberal triad. Such alternative models are available. But is another form of property really 'transformative change'? The short answer: no. In relation to freshwater systems, the IPBES Report recommends:

> …policy options and actions [that] include, among others: more inclusive water governance for collaborative water management and greater equity; better integration of water resource management and landscape planning across scales; promoting practices to reduce soil erosion, sedimentation and pollution run-off; increasing water storage; promoting investment in

62 Ibid, citing Eduardo S Brondízio.

63 'UN Report' (n 58).

> water projects with clear sustainability criteria; as well as addressing the fragmentation of many freshwater policies.[64]

If we seek transformative change through collaborative water management and better equity, we could, instead, look at water and its allocation in an entirely new way—a way which leaves behind the property paradigm, with its values of abstract and fragmentary rights making the impossible goal of limitless economic growth seem possible. The next part considers two such ways in which we could look at the allocation of water with a view to achieving truly transformative change.

IV. Water as a Person

Truly transformative change rejects the status quo; in the case of water, property, its abstracting and fragmenting imperatives, represents the status quo. This Part explores two options which provide another way of viewing water and its allocation, both of which are already found in India. The first, a secular legal approach, would declare watercourses to be legal persons holding unique rights; this would provide a new means of allocation. The second option takes an ancient view of watercourses, treating them as sacred or divine, again offering a new means of allocation. I briefly examine each option. Both focus on a conception of legal personhood 'that re-orients the law away from anthropocentrism to something else.'[65]

A. Legal

All legal systems, both common and civil, recognise two types of person: 'natural'—you and me—and 'fictional', those entities created by law known as 'legal' persons. Legal persons have been around for a very long time— examples include the 'Crown'[66] and the corporation.[67] Perhaps someday 'artificial intelligence' will join this list.[68] But more recently, a new fictional person—what we might call the 'environmental person'[69] —has emerged in a number of jurisdictions, initially in Ecuador and Bolivia, and more recently in

64 Ibid.

65 Cristy Clark, Nia Emmanouil, John Page, & Alessandro Pelizzon, 'Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance' (2018) 45 *Ecology Law Quarterly* 787, 792.

66 Ernst H Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton University Press, 1957); George Garnett, 'The Origins of the Crown' in John Hudson (ed), *The History of English Law: Centenary Essays on 'Pollock and Maitland'* (The British Academy and Oxford University Press, 1996) 171-214.

67 Frederick Pollock and Frederic W Maitland, *The History of English Law before the Time of Edward I, Vol I* (Cambridge University Press, 2nd ed, 1899) 486-526; *Salomon v A Salomon & Co Ltd* [1897] AC 22, 33 (Lord Halsbury); *Bank of the United States v. Deveaux*, 9 US 61 (1809); The Rt Hon Lord Cooke of Thorndon, KBE, *Turning Points of the Common Law* (Sweet & Maxwell, 1997) 1-27.

68 Caroline Cauffman, 'Should robots be given legal personhood?', *Maastrict European Private Law Institute* (March 11, 2019) <www.mepli.eu/2019/03/should-robots-be-given-legal-personhood/>.

69 See Gwendolyn J. Gordon, 'Environmental Personhood' (2018) 43 *Columbia Journal of Environmental Law* 49.

New Zealand and India.[70] Proposals for legal personhood have also been made in relation to the Colorado River in the United States[71] and the Murray-Darling system in Australia.[72] This section considers the application of the concept of an environmental person to major rivers in New Zealand and in India.[73]

In 2017, New Zealand enacted the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ), conferring legal personhood—environmental personhood—on the Whanganui River.[74] Only days later, the Indian High Court of Uttarakhand declared the Ganges and Yamuna Rivers, and 'all their tributaries, streams, [and] every natural water flowing with flow continuously or intermittently [in] these rivers' to be legal persons.[75] Both took largely the same conceptual approach, although the former used legislative, while the latter judicial means to achieve the outcome of environmental personhood.

The High Court of Uttarakhand sought to achieve both environmental and religious ends in making its declaration, so as to protect the sacred and ecologically valuable objects of the rivers from environmental degradation. To do so, the Court declared the rivers to be legal minors, with all corresponding rights, duties, and liabilities of a living person. A Court-appointed guardian would exercise and defend these rights, including the right to enter contracts and to own property.[76]

While parts of the decisions of the High Court conferring environmental personhood were subsequently overturned by the Supreme Court of India, with other parts still under review,[77] these decisions, as well as developments in other

70 *Mohd Salim v State of Uttarakhand & others*, WPPIL 126/2014 (High Court of Uttarakhand) 2017 [19]; *Lalit Miglani v State of Uttarakhand & others*, WPPIL 140/2015 (High Court of Uttarakhand) 2017 64. And see also Clark, et al (n 65); Lidia Cano Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' (2018) 7 *Resources* <https://www.mdpi.com/2079-9276/7/1/13>.

71 See Laura Spitz and Eduardo Moises Peñalver, 'Nature's Personhood and Property's Virtues' (February 14, 2020), UNM School of Law Research Paper No 2020-1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3538522>".

72 See Michelle Etheridge, 'Murray River nature rights proposed as legal protection for watercourse', *The Advertiser* (21 December 2019)

73 In 2019, the Bangladesh Supreme Court declared all of that nations rivers to be legal persons: Rina Chandran, 'Fears of evictions as Bangladesh gives rivers legal rights', *Reuters* (July 5, 2019) <https://www.reuters.com/article/us-bangladesh-landrights-rivers/fears-of-evictions-as-bangladesh-gives-rivers-legal-rights-idUSKCN1TZ1ZR>; Ashley Westerman, 'Should Rivers Have Same Legal Rights as Humans? A Growing Number of Voices Say Yes' *NPR* (August 3, 2019) <https://www.npr.org/2019/08/03/740604142/should-rivers-have-same-legal-rights-as-humans-a-growing-number-of-voices-say-ye>.

74 See Abigail Hutchison, 'The Whanganui River as a Legal Person' (2014) 39 *Alternative Law Journal* 179; Erin L. O'Donnell and Julia Talbot-Jones, 'Creating legal rights for rivers: lessons from Australia, New Zealand, and India' (2018) 23 *Ecology and Society* 7.

75 *Mohd Salim* (n 70); *Lalit Miglani* (n 70).

76 O'Donnell and Talbot-Jones (n 74) Table 1.

parts of the world, demonstrate that the conferral of legal and human rights upon elements of nature is no longer a fringe component of environmental law.[78] Instead, and significantly for present purposes, '[a]s pressures on freshwater systems continue to increase, understanding the opportunities and limitations provided by this new legal approach will allow decision makers to make more informed choices when considering ways of addressing their context-specific socio-environmental and economic pressures.'[79]

As a means of transforming the standard property-informed approach to water allocation, the legal rights which come with environmental personhood can be invoked to address the complex socio-environmental and economic problems associated with the allocation of the water resource. Indeed, 'it can be used to complement legislative frameworks ranging from state ownership models through to water markets'.[80]

B. Divine

The three major Himalayan Rivers of India—the Indus, Ganges, and the Brahmaputra—are all recognised as divine or sacred.[81] Each has its own story.[82] My focus here is limited—touching only on the Indus and Ganges; similar stories could be told of the divinity or sacredness of each of the three, with equal value for use as a model of transformative change in the allocation of scarce water resources.

Some of the world's first cities are found along the banks of the Indus; Sanskrit literature was written about the river; holy preachers from Islam wandered its shores; Buddhism's earliest followers walked its upper reaches. The Sanskrit priests called the Indus 'Unconquered Sindhu'—the river of rivers.[83] Alice Albinia writes of the Indus that

> [i]ts merchants traded with Mesopotamia five thousand years ago. A Persian emperor mapped it in the sixth century BCE. The Buddha lived beside it during previous incarnations. Greek kings and Afghan sultans waded across it with their armies. The founder of Sikhism was enlightened while bathing in a tributary.[84]

77 Erin L O'Donnell, 'At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India' (2018) 30 *Journal of Environmental Law* 135.

78 See Gabriel Eckstein, Ariella D'Andrea, Virginia Marshall, Erin O'Donnell, Julia Talbot-Jones, Deborah Curran & Katie O'Bryan, 'Conferring Legal Personality on the World's Rivers: A Brief Intellectual Assessment' (2019) *Water International* 1.

79 O'Donnell and Talbot-Jones (n 74) Conclusion.

80 Ibid.

81 O'Donnell and Talbot-Jones (n 74); O'Donnell (n 77).

82 For the story of the Indus, see Alice Albinia's evocative *Empires of the Indus: The Story of a River* (John Murray, 2008); the Ganges, Sudipta Sen's wonderful *Ganges: The Many Pasts of an Indian River* (Yale University Press, 2018); and the Brahmaputra, Mark Shand's beautiful *River Dog: A Journey Along the Brahmaputra* (Little Brown, 2002).

83 Albinia (n 82) xv.

84 Ibid xv-xvi.

In short, in the life of India and of its peoples, the Indus is one of the rivers understood to be sacred, to be a divinity for many faith traditions—'…it runs through the lives of its people like a charm. From the deserts of Sindh to the mountains of Tibet, the Indus is worshipped by peasants and honoured by poets; more than priests or politicians, it is the Indus they revere.'[85] The Indus 'encircled Paradise', bringing forth civilizations and species, languages and religions, as the Atharva Veda says of the Indus, it is saraansh, 'flowing forever'.[86]

Of the Ganges, these Sanskrit ślokas, taken from an eight-stanza ode, revere the river:

> O River, daughter of Sage Janhu, you redeem the virtuous
> But they are redeemed by their own good deeds—
> Where's your marvel there?
> If you can give me salvation—I, a hopeless sinner—then I would say
> That is your greatness, your true greatness
> Those who have been abandoned by their own mothers,
> Those that friends and relatives will not even touch
> Those whose very sight makes a passerby gasp and take the name of the Lord
> You take such living dead in your own arms
> O Bhagirathi, you are the most compassionate mother of all.[87]

These rivers are sacred, divine—they cannot be abstracted and they cannot be fragmented. Thinking of them as sacred, divine entities opens our mind to the transformative change we seek for the allocation of the freshwater resource. It would allow for fundamental reorganisation across technological, economic and social factors, including of paradigms, goals and values.

V. Conclusion: A Transformative Climate Future

Why would seeing the allocation of freshwater through the lens of personhood, either secular/legal or divine/sacred, or a combination of both, matter? Because it would represent transformative change, in two ways. First, as a start, we need to stop thinking of water as a fragmented resource—it cannot be seen as surface and groundwater. It is simply water. And we cannot abstract and fragment its control—we must look for integrated systems of allocation, control, and use. Seeing water as a person would allow us to move beyond the abstraction and fragmentation of the liberal concept of property and focus instead on the resource, on the water itself. We would treat its allocation not as something that would allow us to fragment but, instead, as the IPBES recommends, to be more inclusive, collaborative, integrative, and sustainable—taking account of all interests, economic, social, and environmental.

Second, building upon the movement away from fragmentation, seeing water as a person, indeed, even as a sacred entity, would mean not seeing it as an abstraction, a bundle of rights useful only in instrumentalist terms making

85 Ibid xvii.

86 Ibid 308-9.

87 As translated and quoted by Sen (n 82) 19.

possible economic exploitation and growth. How can one abstract and fragment a divinity! Instead, seeing the resource for what it is—water—rather than an economic value, would allow us to take seriously the need to develop practices that reduce the negative consequences of seeing a resource only as an item of social wealth: practices that reduce soil erosion, sedimentation and pollution run-off, that increase water storage capacity, that promote investment not for economic growth, but for sustainability over the long-term.

We cannot be sure that seeing water differently will lead with certainty to these positive outcomes. But what is certain is that the failure to think creatively, to think transformatively will surely exacerbate the negative consequences of climate change and overuse of water with which we are already living. And it may seem odd, indeed, strange to those steeped in the liberal political and legal traditions to think of a resource like water as a legal person, to think of it as a sacred or divine being. Yet the lessons of New Zealand and India tell us that such creative, novel thinking no longer places those who hold such thoughts on the fringe of legal and policy reform.[88] On the contrary, such thoughts are transformative, and they ought to be treated as such, placing them at the very heart of options for changing the way we allocate water.

88 O'Donnell and Talbot-Jones (n 74) Conclusion.

To Appeal or Not to Appeal Interrogating the Finality of the Decisions of the NICN

Dr. Philip A. Folarin*

Abstract

The crux of this paper is to examine the power and jurisdiction of the National Industrial Court of Nigeria (NICN) with specific regards to the finality or otherwise of its decisions on labour related matters. It also evaluates the rationale behind the Supreme Court's decision in Iwu's case stripping the NICN of its power of finality which it hitherto had over certain civil matters as a specialized labour court. Comparatively, this paper considers the jurisdiction of the Labour Court in South Africa and India with a view to drawing some useful lessons for advancing labour jurisprudence in Nigeria. This paper finds that cancellation of finality of NICN's decision may not promote the course and interest of justice in light of the atypical nature of labour matters.

Key words: Appeal, Court of Appeal, Jurisdiction, National Industrial Court of Nigeria (NICN)

Introduction

It cannot be denied that the right of appeal of litigants constitutes a fundamental element of a fair judicial practice and plays a significant role in the Nigerian justice system.[1] However, prior to the watershed decision of the Supreme Court of Nigeria in *Skye Bank Plc v Victor Anaemem Iwu*[2] delivered on the 13th of November, 2017, there existed a controversy as to whether all the decisions of the National Industrial Court were appealable to the Court of Appeal. The belief was that the Court of Appeal has limited jurisdiction to inquire into the decisions of the National Industrial Court of Nigeria (NICN) except as provided by the Constitution of the Federal Republic of Nigeria. But in a majority decision of six against one, the Supreme Court held that the Court of Appeal has exclusive appellate jurisdiction over all the decisions of the NICN.

Generally, the right of appeal exists due to the sensitivity and controversial nature of disputes between litigants. Thus, it is modest and also culturally acceptable in all jurisdictions that litigants should have more than a chance to appeal against decisions that appear unfair to them as they would have an opportunity to present their grievances to a different set of panel.[3] In fact, it is implicit in every adjudicatory process that a court cannot mostly be a court of first instance as well as that of last resort.[4]

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1 Adetayo Oluwafemi, ''Judicial Absolutism: Propriety of the National Industrial Court as the first and final court in Labour and other related matters'' 42, *Journal of Law, Policy and Global.* 70 (2015).

2 2017 16 NWLR (Pt 1590).

3 Ibid.

4 Adetayo Oluwafemi, *supra note* 1

However, the lawmakers took a bold step by declaring that certain civil decisions of the NICN will be final and not subject to appeal. The provision has led to a lot of controversies among many stakeholders clamouring for an amendment of that provision while others have pressurized the Supreme Court to interpret the provisions in a more liberal way so as to subject all the decisions of the NICN to appeal.

It is interesting to note that the Constitution has given the NICN exclusive jurisdiction over labour matters which means it is the only court that can preside over such matters to the exclusion of other courts and the law makers deliberately conferred on it the right of finality of such decisions (with the exclusion of decisions bordering on fundamental rights and criminal matters) not with the intention of creating another supreme court but in the interest of justice.

The crux of this paper is to interrogate the finality of the NICN decisions and posit that the intention of the draftsmen conferring the right of finality on the NICN might be crucial in advancing the interest of justice and building labour jurisprudence in Nigeria.

Part one of this paper is the introduction. Part two focuses on the historical evolution of the NICN and its jurisdiction as conferred on it by the Constitution. Part three interrogates the finality of NICN decision while part four examines the system and jurisdiction of Labour Court in South Africa and India in the quest of engaging a comparative perspective. Part five concludes the paper.

Evolution of the NICN

Prior to the establishment of the NICN, industrial relations law and practice was modelled on the non-interventionist and voluntary model of the British system.[5] Attempt by the Nigerian government to provide an efficient legal framework for the settlement of trade disputes dates back to 1941 with the promulgation of the Trade Disputes (Arbitration and Inquiry) (Lagos) Ordinance of 1941.[6] That Act, which was first enacted in 1941, gave power to the Minister of Labour to intervene by means of conciliation, formal inquiry and arbitration where negotiation had broken down.[7] It had two notable features which, in fact, might be regarded as drawbacks.

First, it lied in the absolute discretion of the parties to decide whether or not they would avail themselves of the machinery provided.[8] The Minister could not compel them to accept his intervention.[9] Thus, he could only appoint a conciliator upon the application of one of the parties, while he needed the consent of both parties to set up an arbitration tribunal. Secondly, there were no

5 Chioma Agomo, "Law and Industrial Relations – Nigeria" *International Encyclopaedia of Law, Kluwer Law International*, 38 (2000).

6 See Section 4(2), Trade Disputes (Arbitration and Enquiry Act) 1958.

7 Philip Folarin, National Industrial Court and the third Alteration Act: Emerging Trends (2017) *available* at: SSRN: htpps://ssrn.com/abstract=2924609 (last visited on September 10, 2019).

8 Ibid.

9 Ibid.

permanent institutions laid down before which the disputing parties could go for the settlement of their labour disputes. Instead, an ad hoc body, an arbitration panel had to be set up for a particular dispute and once it gave its decisions, it became *functus officio*.[10] Under this ordinance only ad hoc bodies in the form of arbitration tribunals could be set up to handle trade disputes and it left the role of government to be merely discretionary at the instance or invitation of parties. This Ordinance was only applicable to Lagos until 1957 when the Trade Disputes (Arbitration and Inquiry) (Federal Application) Ordinance of 1957 was passed. This period gave way in 1968 with the promulgation of the Trade Disputes (Emergency Provision) Decree No.21 of 1968 and the Trade Disputes (Emergency Provision) (Amendment No.2) Decree No.53 of 1969.

These Decrees made it obligatory for the parties to deposit three copies of any existing collective agreement for the settlement of a trade dispute with the Federal Commissioner for Labour and also to report the existence of a trade dispute to the Commissioner. The Decree of 1969 in particular banned strikes and lock-outs under pain of imprisonment without option of fine and imposed stringent duties on the employer and employees to report strikes and lock-outs within 14 hours to the Inspector General of Police. It also established on a permanent basis, a tribunal to be known as the Industrial Arbitration Tribunal to address some of the problems engendered by the above Decrees, the Trade Disputes Act of 1976 was passed.[11] Consequently, the National Industrial Court was established in 1976 pursuant to the Trade Disputes Decree No. 7 of 1976, which later became the Trade Disputes Act (TDA) 1990.[12] Section 20 of the said Act provided that:

> *"There shall be a National Industrial Court for Nigeria (in this part of this Act referred to as "the Court") which shall have such jurisdiction and powers as are conferred on it by this or any other Act with respect to the settlement of trade disputes, the interpretation of collective agreements and matters connected therewith."*

Meanwhile in 1992, the 1976 Act was amended by the Trade Disputes (Amendment) Act 1992.[13] As a product of an interventionist in industrial and trade disputes arena, the NIC was structured in a regimented disputes resolution regime under the firm control of the Minister of Labour.[14] By virtue of Section 22 of Decree No. 7 of 1976, consequential amendments were made to the 1963 Constitution to include the National Industrial Court as one of the courts in the country. Section 21 of the said Decree specifically made certain provisions of the Supreme Court Act No.12 of 1960 applicable to the NIC. The intention that NIC be a court comparable to the High Court and Supreme Court was well made out. The Act introduced new dynamics to the legal framework for the settlement of disputes in Nigeria. Prior to the establishment of the Act in 1976, in particular, prior to 1968, industrial relations law and practice was modelled on the non-

10 Chioma Agomo, *supra note* 5.

11 Philip Folarin, *supra note* 7 at 7.

12 Cap T8 Laws of the Federation of Nigeria, 2004

13 Cap 432 LFN 1990.

14 Adetayo Oluwafemi supra note 1 at 71.

interventionist and voluntary model of the British approach. The Act (the 1976 Act) created a comprehensive procedure for the settlement of trade disputes combining voluntary and compulsory measures.[15]

Problems, however, started when the 1979 Constitution was promulgated and superior courts of record were specifically listed therein and the NIC was left out. It became doubtful, therefore, whether NIC was a court of superior record under that Constitution.[16] This dilemma was resolved in 1992 when Decree 47 of that year specifically made NIC a superior court of record. Given the then military dispensation, which made decrees superior to the Constitution, there was no doubt as to the efficacy of Decree 47 of 1992. The problem nonetheless resurfaced under the 1999 Constitution wherein the Constitution did not make any provision for the establishment of the NIC as a superior court of record in the country.

In 2006, when the National Industrial Court Act (NICA) of 2006 was passed[17], the question regarding the constitutional status of the court kept recurring. The issue as to whether or not the court was a superior court of record still elicited diverse commentaries and interpretation by the courts[18] notwithstanding the provision of Section 1(3) of the Act which provides that the NIC shall be a superior court of record and shall have all the powers of a High Court.[19] *Ipso facto, in National Union of Electricity Employee (NUEE) v. Bureau of Public Enterprise*,[20] the Supreme Court held that the NIC is a subordinate court and that it had no exclusive jurisdiction over matters assigned to it under Section 7 of the National Industrial Court Act.[21] The decision of the Supreme Court in NUEE's case dealt a heavy blow on the status and operation of the National Industrial Court. It, however, also elicited positive reactions from within the judicial and legislative circles as well as within the labour industry.[22]

Consequently, a Bill to alter the 1999 Constitution of the Federal Republic of Nigeria with regard to the inclusion of the National Industrial Court of Nigeria (NICN) as a superior court of record was laid before the National Assembly in March 2010 for consideration and was eventually passed into law.[23] The President gave his assent to the Bill on the 4th day of March 2011, thus heralding a new chapter in the history of the National Industrial Court of Nigeria.

15 Chioma Agomo, *supra note* 5.

16 Ibid.

17 National Industrial Court Act (NICA), 2006, Federal Republic of Nigeria, official gazette, No. 30, Lagos, 14 June 2006, Vol. 93, (*NICA 2006*).

18 Ibid.

19 Section 1(3) (a) and (b), NICA 2006.

20 [2010] 7 NWLR (pt 1194) 538.

21 Adetayo Oluwafemi, *supra note* 1.

22 *Ibid*. Note That the Constitution of the Federal Republic of Nigeria 1999, as amended by the Third Alteration Act, 2010, changed the name National Industrial Court (NIC) into National Industrial Court of Nigeria (NICN).

23 Akinseye-George SAN (ed.), *Contemporary Issues on Labour Law, Employment and National Industrial Court Practice and Procedures: Essays in Honour of Honourable Justice Babatunde Adeniran Adejumo OFR, President of the National Industrial Court,*(Law Lords Publications, Abuja, 2014).

The new law placed the NICN in the relevant sections of the Constitution.[24] Section 6 of the Constitution vests judicial powers of the Federation in the Supreme Court of Nigeria; the Court of Appeal; the Federal High Court; the National Industrial Court; the High Court of the Federal Capital Territory, Abuja; a High Court of a State; the Sharia Court of Appeal of the Federal Capital Territory, Abuja; a Sharia Court of Appeal of a State; the Customary Court of Appeal of the Federal Capital Territory, Abuja; a Customary Court of Appeal of a State; such other courts as may be authorized by law to exercise jurisdiction on matters with respect to which the National Assembly (in case of the Federation) or the Houses of Assembly of the states may make laws. Thus, the National Industrial Court of Nigeria became a superior court of record like other superior courts of record in Nigeria recognized under the constitution. Also, the combined effects of section 7 of the NICA, 2006 and section 254C (1) of the Constitution (Third Alteration) Amendment Act, 2010 are that the present jurisdiction of NICN is exclusive to it and cannot be shared with other courts.

Finality of NICN's Decisions

The two decisions of the Supreme Courts that bother on the right to appeal against decisions of the NICN are diametrically opposed to each other, and the same time triggered continual controversy among legal practitioners, academics, employees and employers. The controversy revolves around whether or not the NICN's jurisdiction is imbued with finality on labour-related matters. On the one hand, the first - *Coca-Cola v. Akinsanya*[25] *(Akinsanya's case)* was of the opinion that the NICN is the final arbiter for civil labour matters save criminal and fundamental right breaches while the later - *Skye Bank v. Victor Iwu*[26] *(Iwu's case)* held contrary and made all decisions of the NICN appealable at the Court of Appeal.

It should be noted that before these landmark decisions by the Supreme Court, Court of Appeal in their various decisions by different divisions was clearly divided as to whether or not NICN's decisions were appealable in all instances where appeals were brought by litigants. This division or scepticism by various divisions of the Court of Appeal is, at best, further deepened by the incongruent decisions of the Supreme Court in both *Akinsanya's and Iwu's cases*.

The Court of Appeal (Ado-Ekiti Division) in the cases of *Local Government Service Commission, Ekiti State and Anor v. Jegede*.[27] *Local Government Service Commission, Ekiti State and Anor v. Bamisaye,*[28] *Local Government Service Commission, Ekiti State and Anor v. Olamiju,*[29] *and Local Government Service Commission, Ekiti State and*

24 Sections 6, 84(4), 240, 243, 287(3), 289, 292, 294(4), 316, 318, the Third Schedule, the Seventh Schedule to the 1999 CFRN have all been altered to include the NICN.

25 *Coca-Cola v. Akinsanya* (2017) 17 NWLR (Pt.1593) p.122.

26 (2017) 16 NWLR (Pt. 1590).

27 (2013) LPELR 21131.

28 (2013) LPELR 20407.

29 2013) LPELR 20409.

Anor v. Asubiojo,[30] has been consistent in holding that litigants have the right of appeal as of right in matters relating to fundamental right as granted by s.243(2) of the 1999 Constitution as amended and that they can appeal subject to leave of Court Appeal on all other matters. Hence the NICN is not a court of final decision as appeal, either as of right or leave of court, can arise from its decision in appropriate instances. However, the Court of Appeal in the case of *Coca-Cola v. Akinsanya*[31] decided the same year as the earlier four cases, held that until the National Assembly passes a law granting the litigants right of appeal by leave of court, NICN's decisions are final save with respect to fundamental rights and criminal matters. Also, in *Ekanem & Ors vs Mobil Producing (Nig)*[32], the above decision was upheld to mean that only fundamental and criminal matters are to be appealed as of right.

The controversy generated by divided opinions of both the Court of Appeal and Supreme Court is rooted in the different interpretations that may be accorded s.9 of the National Industrial Court Act (NICA) and s.243 (2)(3)(4) of the 1999 Constitution, on the one hand, and s. 240 of the same Constitution, on the other hand. While the latter provision includes the NICN as one of the superior courts of record from whose decision appeal can generally arise to the Court of Appeal just as with other superior courts listed in the section, the former provisions are not without some equivocation. According to section 9 of NICA:

> *"9(1) Subject to the provisions of the Constitution of the Federal Republic of Nigeria, and sub section (2) of this section, no appeal shall lie from the decisions of the court to the Court of Appeal or any other court except as may be prescribed by the Act or any other Act of the National Assembly*
>
> *9(2) An appeal from the decision of the court shall lie only as of right to the Court of Appeal on questions of fundamental rights as contained in Chapter IV of the Constitution of the Federal Republic of Nigeria."*

Moreover, section 243(2)(3)(4) of the 1999 Constitution is to the effect that:

> *"(2) An appeal shall lie from the decision of the National Industrial Court as of right to the Court of Appeal on questions of fundamental rights as contained in Chapter IV of this Constitution as it relates to matters upon which the National Industrial Court has jurisdiction;*
>
> *(3) An appeal shall only lie from the decision of the National Industrial Court to the Court of Appeal as may be prescribed by an Act of the National Assembly. Provided that where an Act or Law prescribes that an appeal shall lie from the decisions of the National Industrial to the Court of Appeal, such appeal shall be with the leave of the Court of Appeal.*

30 (2013) LPELR 20403.

31 (2013) 18 NWLR (Pt.1386) p.225.

32 (2018) LPELR-45171 (CA).

(4) Without prejudice to the provisions of section 254C(5) of this Act, the decision of the Court of Appeal in respect of any appeal arising from any civil jurisdiction of the National Industrial Court shall be final."

Argument against finality of NICN's decisions rests on the fact that s.240 of the Constitution is unequivocal as it clearly limits or restrains jurisdiction of the all lower courts, inclusive of NICN to appellate jurisdiction of the Court of Appeal and there is nothing expressly stated in the said section limiting or ousting the appellate jurisdiction of the Court of Appeal in favour of the NICN.[33] This position formed the centre piece of the judgment of the Supreme Court Iwu's case. The apex court held that there is no clear expression in s.240 of the Constitution limiting or restricting the power of the Court of Appeal to generally entertain appeals from trial courts, NICN inclusive. However, the writer holding a contrary opinion attempts to debunk the apex court's rationale informing the decision in Iwu's case.

Clarity of the Constitution on Appealable Decision of the NICN

It is interesting to note that the Court was apt in stating that the Constitution in s.240 is clear as to not restraining the appellate jurisdiction of the Court of Appeal but omitting to state that the same Constitution is explicit in S.243 that only NICN's decisions bothering on human right and criminal matters are to be subject to appeal. The intention of the lawmakers is cogent and lucid by boldly stating that in criminal causes and matters, appeal shall lie from the decision of the National Industrial Court to the Court of Appeal as of right.[34] When interpreting constitutional provisions, the Court must consider the provisions holistically and not in isolation. In civil causes and matters, an aggrieved party can only appeal to the Court of Appeal from the decision of the National Industrial Court as of right on issues bothering on fundamental rights while the leave of the Court of Appeal must be obtained in other instances where the National Assembly has enacted an Act prescribing that an appeal should lie to the Court of Appeal. It is apparent from the wordings of Sections 254C (5), (6) and 243 (4) of the Constitution, that an appeal shall lie even up to the Supreme Court in respect of matters within the criminal jurisdiction of the National Industrial Court. Put simply, not only can an appeal lie against the decision of the National Industrial Court in respect of criminal matters, the Court of Appeal is not the final appellate court in respect of criminal appeals emanating from the decision of the National Industrial Court. Meanwhile, by virtue of subsection 4 of Section 243, the decision of the Court of Appeal in respect of any matter upon which the National Industrial Court has civil jurisdiction is final. The omission of other civil matters was deliberate. The Constitution is clear and unambiguous with regards to matters that are appealable; the distinction is explicit enough for a sincere seeker to understand the true and genuine intention of the lawmakers. In the case of *Bogoro Local Government Council v Kyauta & Ors*[35], The Appeal Court held below:

33 Eleifa Ekanem & Bassey Ekanem, "An Analysis of the Jurisdiction of the National Industrial Court of Nigeria as Court of First and Last Resort in Civil Matters" *IORS Journal of Humanities and Social Science* 58 (2017).

34 The Constitution of the Federal Republic of Nigeria 1999, as Amended, section 254.

35 2017 LPELR-43296 (CA).

> *"Section 5(b) of the Third Alteration Act which amended Section 243 of the Constitution allows an aggrieved party or person the right of appeal as of right from a decision of the National Industrial Court to the Court of Appeal on questions of fundamental rights as contained in Chapter IV of the Constitution as it relates to matters upon which the National Industrial Court has jurisdiction. However, the Constitution that made the National Industrial Court a superior Court of record broke from its tradition of conferring appellate jurisdiction on the Court of Appeal over the other decisions of the National Industrial Court as it has done in respect of other superior Courts created by it, by stating in Section 5(3) of the Third Alteration Act than appeal shall only lie from other decisions (except on questions of fundamental rights) of the National Industrial Court to the Court of Appeal as may be prescribed by an Act of the National Assembly. As the position stands now, there is no enactment of the National Assembly conferring a right of appeal from any decision of the National Industrial Court outside fundamental rights relating to matters within its civil jurisdiction to the Court of Appeal."*

Similar opinion was expressed when the question as to the right of appeal came before the Lagos division Court of Appeal in *Lagos Sheraton Hotel & Towers v Hotel and Personal Services Senior Staff Association*.[36] The Court of Appeal unanimously held that "the right of appeal against NICN decisions lies as of right only if it relates to fundamental rights and criminal matters and until a statute is enacted which provides otherwise, no appeal can lie against NICN decisions, except in the circumstances provided by the Constitution." In *Lawal v OAU. Ile -Ife*[37], Per Owoade J.C.A held that:

> *"There is presently no such Act of the National Assembly and until there is an enactment to that effect or a subsequent amendment of Section 243 of the Constitution, the National Industrial Court remains the final and ultimate Court in all causes or matters upon which it has jurisdiction except in decisions relating to questions of fundamental rights connected with chapter IV of the Constitution or in criminal causes."*

The Living Tree Doctrine of Interpretation

The Supreme Court in Iwu's case relied on the "living tree" doctrine of interpretation as a principle that guides in the interpretation of constitutional provisions. The doctrine postulates that the constitution must be capable of growth to meet the future. The living tree doctrine is a doctrine of constitutional interpretation that posits that a constitution is organic and must be read in a broad and progressive manner so as to adapt it to the changing times.[38] Living tree interpretation refers to the practice of interpreting bills of rights as organic documents, such that the meaning of the protected rights and freedom evolves.[39]

36 (2014) 14 NWLR (pt. 1426).

37 LPELR-40290 CA 2016.

38 Grant Huscroft, "Trouble with Living Tree Interpretation" 25(1) *The University of Queensland Law Journal*. 5 (2006).

39 Ibid.

The living tree metaphor was coined by Lord Sankey in *Edwards v Canada (Attorney General)*,[40] a decision of the Judicial Committee of the Privy Council interpreting the British North America Act 1867 ('BNA Act'), which served as Canada's Constitution.[41] The question in Edwards was whether s. 24 of the BNA Act, which provided that 'qualified persons' could be appointed to the Canadian Senate, allowed the appointment of women as well as men.[42] The government referred the question to the Supreme Court of Canada and that Court held that common law incapacity precluded women from being considered qualified persons for purposes of Senate appointments.[43] On appeal, however, the Privy Council (then Canada's highest court) advised that women were eligible for appointment to the Senate. In a famous passage, Lord Sankey remarked as follows: "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits …"

It should be noted however that applying the living tree doctrine must be done with great caution. To say that a bill of rights must be interpreted in light of new and unforeseeable circumstances is not to say that it can be interpreted to mean anything that its words may bear. The difficulty lies in determining the parameters of permissible interpretation. It is difficult to agree on what constitute change in any event, because change is in the eyes of the beholder. It is then no surprise that the decision reached by the Supreme Court was not unanimously reached as Per Aka'ahs, JSC thought otherwise. It should be noted that even proponents of living tree interpretation cautioned that living tree interpretation is subject to serious constraints.[44] Dworkin, defending what he calls the 'moral reading' of the US Bill of Rights, calls these constraints the requirements of 'integrity':

> *"Judges may not read their own convictions into the Constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges… Judges must defer to general, settled understandings about the character of the power the Constitution assigns them."*[45]

It must be noted that the living tree doctrine was used to interpret a bill of rights that bothered on sensitive issues like gender equality and not any general provisions of the constitution such as the determination of a court's jurisdiction as the case was in Iwu's case. In *R v Prosper*[46], L'Heureux-Dube J wrote in dissent:

40 (1930) AC 123.

41 Grant Huscroft, *supra note* 38.

42 Ibid.

43 Ibid.

44 Ibid.

45 Ronald Dworkin, *Freedom's Law, The Moral Reading of the American Constitution* (Harvard University Press, 1997).

46 [1994] 3 SCR 236, 287.

> *"I doubt [living tree interpretation] can be used to interpret a constitutional document, such as the Charter…Besides, the 'living tree' theory has its limits and has never been used to transform completely a document or add a provision which was specifically rejected at the outset. It would be strange, and even dangerous, if courts could so alter the constitution of a country."*[47]

Certain factors must be considered before applying the living tree doctrine as what determines progress is quite controversial. In a country of over 200 million people as Nigeria, the congestion we have in our courts and the weariness associated with agitating matters from trial courts to the Appeal Courts and then to the Supreme Court often spanning decades. Will it be a move in the right direction to make all decisions of the NICN subject to appeal especially when there is arguably no clear provision in the Constitution to that effect?

The Nigerian jurisdiction may not be quick to align itself with other jurisdictions like South Africa or Canada which operates a more decentralized system of court. The South Africa jurisdiction has a special Labour Court of Appeal that hears only appeals from the Labour Court. In such jurisdictions, it may be appropriate to apply the living tree doctrine without caution. Nigeria does not have a special Labour Court of Appeal that solely entertains appeals arising from the NICN's decisions; all appeals go to the general Court of Appeal. For the Constitution to evolve and grow to 'meet the future', the Court system must first be altered like we have in other jurisdictions.[48] Thus, the living tree doctrine is certainly not a suitable doctrine of constitutional interpretation to be applied to the Nigerian Constitution with respect to labour matters.

Labour Matters and Delayed Justice

Historical acknowledgements recognise the perspective of the accused or the disputant, and suggest that for a person seeking justice, the time taken for resolution of their issue is critical to the justice experience of this person and can render their treatment wholly 'unjust' in circumstances where finalisation of a dispute takes 'too long'.[49]

This is more so in labour matters. Time is of the essence in labour cases as irreparable damage may be suffered by a party (especially the employee who is usually the weaker party) where dispensation of justice is unduly delayed. For instance, the peculiar nature of labour matters is such that a timely court intervention and decision is paramount. An employee who has sustained life threatening injury at work suing for compensation for to cover medical bills; or an employee who has been suspended indefinitely without pay; or an employee, who

47 The irony of Justice L'Heureux-Dube emphasizing caution in regard to living tree interpretation is that she was one of the most activist judges in interpreting the *Charter*. Elsewhere, Justice L'Heureux-Dube has lauded living tree interpretation and its potential for advancing equality, and women's rights in particular. See 'The Legacy of the 'Persons Case': Cultivating the Living Tree's Equality Leaves' (2000) 63 *Saskatchewan Law Review* 389.

48 In the USA, every state has its own supreme court which act as the court of last resort.

49 Tania Sourdin and Naomi burstyner, "Justice delayed is justice denied" available at http://papers.ssrn.com/sol3/paperscfm?abstract_id=2721531 (last visited on September 10, 2019).

upon completing probation period, has neither been confirmed nor laid off, and so on; would all need timely intervention and final dispensation of justice in their respective matters.

It is clear that the draftsmen's intention with respect to sections 243 of the Constitution and 9 of the NICA was to give the NICN power of finality over certain labour matters to foster quick dispensation of justice. The intention of the Legislature is that matters under the jurisdiction of the National Industrial Court should as a matter of public policy, be expeditiously disposed of and therefore should not be matters for unduly long or protracted appeal.[50] The presumption is that the Legislature knew the state of affairs existing at the time of the legislation and that its policy or intention was directed towards that state of affairs.[51]

In 2018, the former Chief Justice of Nigeria disclosed that the diary of the Supreme Court is full till 2021.[52] The implication of this no new case can be attended to till 2022. Otteh[53], while also describing the revelation by the CJN as scary, said it was time to declare a state of emergency in the Nigerian justice sector.

Otteh lamented below:

> *"That is very scary; it means, you need about three or four years to get a possibility that your appeal will be heard. That is really very scary. It shows that we are still not making the kind of progress that we ought to be making with respect to getting justice in the country. If it takes four years to get a hearing date, which does not mean that that is when judgment will be delivered, it then means that it will take a minimum of 10 years for a case to travel through the gamut of the courts because all the matters that go to the Supreme Court have been through the Court of Appeal, perhaps the high court, perhaps even the magistrates' court. Are we making progress? This was what it used to be several years ago and this is one of the major obstacles to being able to access justice in Nigeria. I believe that we can do better; Nigerians expect the judiciary to do better. Nigerians cannot have confidence in a justice system where it takes them a minimum of 10 years to get a case heard and finally determined."*

The implication of this latest judgment by the Supreme Court in Iwu's case is that justice will not just be delayed but it will be defeated as litigants will exploit this development to frustrate the aggrieved party so as to unnecessarily delay justice by appealing to the court of Appeal.

The NICN as a Specialized Court

The NICN is a creation of the Constitution as a specialized court to have exclusive and limited jurisdiction over labour matters. Traditionally, specialisation refers

50 *Cocacola Nigeria Limited v. Akinsanya, supra note* 25.

51 Ibid.

52 Justice Walter Onnoghen disclosed this on the 8th of October, 2018.avalable at http://punchng.com/supreme-court-diary-full-till-2021-cjn-insists/ (last visited on September 10,2019).

53 Joseph Otteh disclosed this on the 11th of October, 2018. http://punchng.com/cjn-says-supreme-courts-diary-filled-till-2021-lawyers-worry/ (last visited on September 10, 2019).

to specialized subject matter combined with subject-matter expertise.[54] With reference to courts, specialised courts have limited and frequently exclusive jurisdiction in one or more specific fields of the law such as commercial courts, administrative courts, labour courts, and drug courts.[55] Specialized courts are defined as tribunals of narrowly focused jurisdiction to which all cases that fall within that jurisdiction are routed. Judges who serve on a specialized court are considered specialists, even experts, in the fields of the law that fall within the court's jurisdiction.[56] The Judges that preside over them are usually experts in the relevant field. The Constitution makes it mandatory that the Judges of the NICN must possess knowledge and experience in the law and practice of industrial relations and employment conditions.[57] Proponents of specialization argue that specialized courts are more likely to make correct decisions in complex areas[58] simply because such matters are presided over by experts and experts' opinions have a high level of accuracy.

In South Africa, the Labour Court of Appeal has the final say over labour matters, not the general Court of Appeal or Supreme Court and South Africa is known for its robust development in labour jurisprudence. Hence, the intendment of the Nigerian Constitution was to promote a progressive system that will enhance swift hearing of cases knowing well how sensitive labour matters could be to litigants and how speedy court's reactions should be in protecting their rights. The drafters at that time were fully aware of the backlog of cases in the general court and how slow matters can be treated and intelligently inserted those sections in the interest of justice.

Justice Bayang Akaahs (JSC) could not have captured it better in his dissenting judgment in Iwu's case when he held below:

> *'I am of the firm view that decisions of the National Industrial Court in relation to matters spelt out in section 254C (2),(3) and (4) of the Constitution should be final since it is a specialized court and is meant to cater for special interests and foster economic development'*[59]

Comparative Analysis of Labour Court in South Africa and India

Labour courts in South Africa are specialized courts established under the Labour Relations Act, No. 66 enacted by the South African Parliament in 1995.[60]

54 Markus B. Zimmer, "Overviewofspecializedcourts",2009, available at https://pdfs.semanticscholar.org/ ec36/1489cc7caa6815636bbdc4b3c369b0915619.pdf (last visited September 10, 2019).

55 Ibid.

56 Ibid.

57 The Constitution of Nigeria, section 254B (3 and 4).

58 Richard Revesz, "SpecializedCourtsandtheAdministrativeLawmakingSystem",1990<https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3806&context=penn_law (last visited September 10, 2019).

59 *Skye Bank Plc v Victor Iwu (2017) supra note* 2.

60 The Act has been amended severally by the *Labour Relations Act* as amended by *Labour Relations Amendment Act*, No 42 of 1996 Proclamation, No 66 of 1996 *Labour Relations Amendment Act*, No 127 of 1998 as well as the *Labour Relations Amendment Act*, No 12 of 2002.

The Act provides for the establishment of the Labour Court as an open court with jurisdiction in all provinces of South Africa. The Labour Court is a court of record and has the same powers and status as a provincial division of the Supreme Court.[61] The Court is presided over by a Judge President,[62] a Deputy Judge President and as many judges as the President may consider necessary.[63] In order to qualify for appointment as a judge on the Labour Court, a person must either be a Judge of the Supreme Court or a legal practitioner who has knowledge, experience and expertise in labour law.[64]

The Labour Court has exclusive jurisdiction with respect to all matters relating to labour[65] but does not have jurisdiction to adjudicate an unresolved dispute if the Act requires the dispute to be resolved through arbitration.[66]

The Labour Appeal Court (LAC) has jurisdiction to hear and determine all appeals against the final judgments and the final orders of the Labour Court.[67] In relation to the jurisdiction, the LAC has a status similar to the Appellate division of the Supreme Court.[68] The LAC may also sit as a court of first instance if the Judge President so directs in which case it is entitled to make any order that the Labour Court would have been entitled to make.[69]

The adjudication process in India is quite different from what is obtainable in Nigeria and South Africa. The Industrial Disputes Act of India, 1947, deals with industrial disputes. Section 10 of the Industrial Disputes Act, provides that when an industrial dispute occurs or is apprehended, the appropriate government may: (1) refer the industrial dispute to a conciliation officer or board of conciliation officers for promoting a settlement, or (2) to a court of inquiry, or (3) to a labour court of adjudication, or (4) to an industrial tribunal for adjudication.

The Act provides that a tribunal and a labour court shall consist of one person only to be appointed by the appropriate government.[70] A person is qualified to be appointed as the presiding officer of a tribunal if: (i) he (or she) is or has been a judge of a High Court; or (ii) he (or she) has for a period of not less than three years, been a district judge or additional district judge. A person is not qualified for appointment as the presiding officer of a labour court unless: (i) he (or she) is or has been a judge of a High Court; or (ii) he (or she) has, for a period of not less than three years been a district judge or an additional district judge; or (iii) he

61 Labour Relation Act, 1995, sec .151.

62 The Judge President is appointed by the President of South Africa, acting on the advice of National Economic Development and Labour Council (NEDLAC) and the Judicial Service Commission and after consultation with the Minister of Justice. See Section 153 of LRA.

63 Labour Relation Act section 152(1)(c).

64 Labour Relation Act section 153(6)(ii)(b).

65 Labour Relation Act section 157(1).

66 Labour Relation Act sec 157(5).

67 Labour Relation Act, 1995, sec. 173.

68 Labour Relation Act, 1995, sec .167(3).

69 Labour Relation Act, 1995, sec .175.

70 The Industrial Dispute Act, sec .7(2).

(or she) has held any judicial office in India for not less than seven years; or (iv) he (or she) has been the presiding officer of a labour court constituted under any provincial or state Act for not less than five years.[71]

Decisions of the labour court may be appealed by either party in the high court of each state.[72] Consequently, a labour court ruling often takes considerable long time to be implemented since the court's decision is not necessarily final.[73] Normally, the appeals process takes the following form. The decision of the labour court may be appealed before a high court (single bench).[74] If the single bench decision is not satisfactory to either party, an appeal may be taken before the full bench of the high court.[75] If that decision is similarly unsatisfactory, the appellate stage proceeds before a single bench of the Supreme Court.[76] Further stages include a three bench and, finally, the full bench of the Supreme Court.[77] A decision of the full bench of the Supreme Court is final and terminates the appeals process.[78]

It must be noted that in South Africa, the labour courts deal with labour disputes to the exclusion of all other courts and also has a stamp of finality through its appellate division, the LAC but the structure is totally different in India with appeals having to go through different appeal stages before the final determination. This structure has been criticized. One of the problems identified is that of delay. Matters referred to the labour court can take a long time for resolution. For instance, the labour court generally takes a minimum of three to four months to make a decision.[79] Some time back, the then Chief Justice of India, Shri E.S. Venkatramaiya wrote to the state governments to draw their attention to inordinate delays in industrial adjudication. He drew their attention to a case which involved more than 10,000 workers and was decided by the Supreme Court in sixteen years after it had been referred to an industrial tribunal.[80] This is one of the issues that has been identified above as a challenge of the Nigerian jurisdiction. Another major observation is that Judges that preside over the Labour Court in India are not necessarily experts in labour law. Both the Nigeria and the South Africa labour law prescribe expertise in industrial relations as a requirement for Judges of the Labour Courts since it is created to be a specialized Courts. Desai J. rightly remarks that a labour court judge "must be a social

71 The Industrial Dispute Act, sec. 7(3).

72 Paul Lansing and Sarosh Kuruvilla, "Industrial Dispute Resolution in India in Theory and Practice" *9 Loy. L.A. Int'l & Comp. L. Rev.* 345(1987) Also available at: http://digitalcommons.lmu.edu/ilr/vol9/iss2/3 (last visited September 10,2019).

73 Ibid.

74 Ibid.

75 Ibid.

76 Ibid.

77 Ibid.

78 Ibid.

79 A. AGGARWAL, Indian and American Labor Legislation and Practices (1966).

80 Debi S. Sanni, Labour Court Administration in India https://www.researchgate.net/publication/260277936 (last visited September 10,2019).

scientist". This would require adjudicators to indulge in sustained participation and questioning. It is a contradiction in that the law does not prescribe for the adjudicators any qualification of expertise in industrial relations.[81] From the foregoing, it is clear that the position in Nigeria and India are quite similar to a large extent in terms of labour appeals process.

In the absence of a National Industrial Court of Appeal, it may well be that the drafters of the 1999 Constitution, power of finality of decision was well envisaged for the NICN. Incidentally, at a meeting organized by ILO[82], the labour courts in Europe agreed on certain points. The summary of the meeting is as follows:

"It was recognised that the possibility of appeal might run counter to one of the basic reasons for the establishment of labour courts, namely the need to render decisions quickly. Nevertheless, the solution to this should not be found in abolishing appeals but rather in limiting or restricting the right of appeal. It was noted that in several countries the right of appeal was guaranteed by the constitution and that other ways and means could be found to deal with the case load of labour courts. As far as appeals outside the labour court system were concerned, many participants were of the opinion that such a possibility would undermine the basic reasons for the existence of labour courts and, in a certain sense, may be 'harmful' to the prestige of labour courts."[83]

Conclusion

The Third Alteration to the 1999 Constitution has exceptionally expanded the frontiers of labour law and practice in Nigeria. Apart from curing the defects of inferiority hitherto embedded in the status and jurisdiction of the NICN, the Act has also conferred the court with finality of decisions, albeit with some sort of unsettled controversy. However, it is very clear that the decision of the apex court in Iwu's case could be a clog in the wheel of the development of labour jurisprudence in Nigeria. The decision leaves a lot to be desired and has further deepened the hitherto existing controversy on the finality or otherwise of the NICN's decisions. It is almost certain that litigants and legal practitioners will exploit this decision to delay the course of justice and make judgments of the NICN nugatory with frivolous applications. The way forward lies in the creation of the National Industrial Court of Appeal and making relevant provisions of the Constitution undoubtedly lucid as to the finality of decisions of labour courts.

81 Ibid.

82 International Labour Organization. www.ilo.org.

83 ILO, 'Proceedings of a meeting organized by the International Institute for Labour Studies' available at https://www.ilo.org/wcmsp5/groups/public/ed_dialogue/dialogue/documents/meetingdocument/wcms_205856.pdf (last visited on September 10, 2019).

Clinical Legal Education Through Mediation Centres in Law Schools: An Analysis

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Abstract

The concept and philosophy of Clinical Legal Education in India initiated by Late Prof. Madhav Menon proved to be an effective model to engage law students in various legal activities and giving them an insight to various issues confronting the society and applicability of legal principles in such cases. In law schools training to various ADR methods given to student's mediation is most common. Mediation is playing, a significant role, in the culture of dispute resolution across the continent. Though, the state of mediation procedure and practice in most of the countries can be traced back to the establishment of grass root justice dispensation system since ancient time, the practice of outside Court settlement gained popularity due to its distinct advantages over adversarial system of dispute resolution, due to its cost effective, less technical, time saving etc. benefits. After UNCITRAL Model law passed by General Assembly in the year 1985 most of the countries started formalizing age old system of mediation/ conciliation process keeping in mind contemporary practices and needs of the society. The basic concern of this paper is to analyse the concept of mediation in various countries and how Law Schools can play a path breaking role in dispute resolution thus lessening the overburden judiciary. With the expertise of legal knowledge, the students can directly contribute in and minimize court's burden from trivial civil disputes. The paper will study the functioning of mediation center in various law schools and will present a blue print for establishing mediation centers in all law schools in India so that society can get benefit of legal education.

Keywords: Clinical Legal Education, Mediation, Negotiation, Informal Dispute Resolution, Community Justice

1.0 Introduction

Mediation as an Alternative Dispute Resolution method has been in existence since times immemorial. Disputes were resolved amicably by village elders by a process which employed the knowledge and experience of the mediators in persuading the parties to a realistic understanding of the merits and demerits of their cases and the possible solution to the same; thereby saving the parties from time-consuming and expensive adjudicatory process notoriously associated with Courts. It would be appropriate to say that it not only the human beings but even God have adopted mediation in various Hindu mythologies[1] in order to settle

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1 Lord Krishna opted for mediation in Mahabharata. "Mahabharata is an Indian epic and spiritual literature, it consists of 100,000 verses."

their disputes and there are ample references of the same. For instance, Lord Krishna acted as a mediator between the two contending sides in order to settle the dispute that has arisen in between the parties.[2] So also who can deny that anyone adopting an unreasonable attitude or averse to finding a solution by talks across the table, actually invites doom and destruction as it did in the great Hindu epic.

However, over the years mediation took a back seat and was to an extent ignored in the modern court related dispute resolution system. The consequence of such neglect can be simply ascertained from magnitude of pending cases in Indian judicial systems. As of August 2019, there are over 3.5 crore cases pending across the Supreme Court, the High Courts, and the subordinate courts. Of these, subordinate courts account for over 87.3% pendency of cases, followed by 12.5% pendency before the 24 High Courts. The remaining 0.2% of cases is pending with the Supreme Court."[3] It is only recently that the significance of alternative dispute resolution mechanism has been once again recognized and mediation emerges as a viable tool for settlement of disputes.

The mediator can properly help the parties not only to express themselves in front of them, they are encouraged to illustrate their own issues and facts related to the conflict, helps them to highlight their respective larger interest, make them aware about the realistic challenges as well as offers them to generate and have a discussion about their ideas in order to have better option for their settlement this results in proper settlement of the dispute through an agreement. The mediator encourages practice of settling the dispute on fulfilling common grounds of settlement rather than extreme ends.

1.1 Mechanism and Procedure:

While the process is flexible and can be designed to suit the demands of individual cases, it usually comprises of joint and separate meetings. Joint meetings enable parties to give their versions of the dispute, and the opportunity to listen to that of the other side. Separate meeting with the mediator enables parties to speak openly, examine their strengths and weaknesses, voice fears and concerns so as to enable forward movement in exploring options for settlement. Disputed facts can be ascertained with cooperation of the parties or with the help of experts. Indeed, experts function better as neutrals, free from the impositions of partisan evidence. Confidential information can be shared with the mediator with the express request to avoid disclosure. The options for settlement get discussed, modified and refined; they are matched with criteria that parties devise for a fair and workable settlement. As the process moves forward, a shift in attitude takes place there is less of blame and recrimination as the disputing parties direct their energies to jointly searching for a solution. The mediation process thus focuses on the parties, tries to uncover the reasons for their dispute, and makes them

2 Rajagopalachari, Mahabharata (International Gita Society), available at http://www.gita-society.com/section3/mahabharata.htm (last accessed on March 10th 2019).

3 National Judicial Data Grid Report available at https://njdg.ecourts.gov.in/njdgnew/index.php, (last accessed on 18th January, 2020).

participants in the search for equitable and sustainable solutions to the conflict. There is an empowering aspect here in showing people that they are not disabled in dealing with the conflict that occurs in their lives.

Keeping in mind, the advantages of the process of mediation over adversarial method of dispute resolution in India some of the educational institutions have taken an initiative in the line of concept of clinical legal education and started mediation center within the University. Though in India the concept is not new but most of the foreign Universities are having mediation centers for conflict resolution within the university and for the matters referred to university either by court, state government or by private party thus, directly contributing in the justice administration systems of their country and thus facilitating the State and welfare of the society at large. The present study assessed the role, functions and powers of mediation centers in educational institutions across the glove. It highlights the functioning of mediation centers, their achievements, problems, learning and identifies areas of improvement. In this endeavour functioning of following Mediation centers are examined.

1) Hertfordshire Mediation Centre

Hertfordshire Mediation Centre forms part of the school of Law, Criminology and Political Science in United Kingdom. The Centre comprises of highly skilled panel of mediators, the main dispute resolution room and there are five 'break out rooms', which provide a healthy environment, comfort and privacy for the parties in order to have a desired solution for their disputes. With the availability of mediator and high-class facilities the parties are encouraged to reach to a settlement within reasonable period of time and fixed price. The Centre deals with all civil disputes which include among others: consumer rights, business contracts, property rights, rights of way, and tenancy disputes, matters related to construction, building and others. Additionally, it also helps parties in a workplace dispute to reach a settlement.

The centre also has an educational dimension providing continuing professional development training to mediators and the ability for trainee mediators to observe live mediations. Students of the school can gain an insight into how mediation works and start to develop practical skills in this area of growing importance. The students have learned from their experience since they had worked with many companies belonging to different size and sectors. With the help of their past experience in business, mediator can apply mediation process for solving a dispute based on maintaining confidentiality as well as professionalism.

It is important to have a mediator who has proper understanding of mediation and impartial dealings with parties rather than a person who is comfortable with specific subject matter in a dispute.

The University of Hertfordshire emphasizes on making use of mediation for all sectors in order to solve a dispute through their Civil Mediation Council in the society. No support from State and they charge fees from the parties for mediation.

By necessary mediation service, it provides an exceptional service, which is meant for all dispute resolution requirements within a reasonable cost. This results in competitive fixed price as the parties are provided expert mediators and high-class facilities in order to reach to a conclusion. With the availability of fully qualified and well-trained mediators in the panel helps in providing better solution to the public. Further by workplace mediation service it is providing solution for the issues related to workplace disputes in hassle free environment.[4]

2) Centre for Mediation- University of Central Lancashire

The Mediation Clinic was established in order to provide services especially to students, staff, the local community, law firms and organizations, which need assistance to resolve their disputes. The Centre highlights on activities such as teaching and making students learn by giving them practical knowledge with the help of provisions relating the mediation services.

The Centre provides courses based on mediation such as LL.B. with Mediation, PSC as well as CPD course etc. It involves case studies in matters related to asylum, charity related work, civil litigation, community care, consumer services, contract related matter, data protection and domestic violence. Also, it incorporates matters of reality sectors, immigration, insurance sector, emerging intellectual property matters, cyber Issues, taxation and civil matters like torts.

The Centre for Mediation is part of the pro-bono division of the Lancashire Law School. The law students run the clinic who have experienced in civil and commercial mediation training course. The clinic offers services such as representation, initial advices etc,[5] and all mediators are co-mediated as well supervised under the direction of experienced mediator. The centre focuses on activities such as empowering the clients to take control of their conflicts. It includes facilities like mediation advocacy services as well as has international mediation advocates, which can attend the mediation process with the parties and also offers advice in relation to the process and encourage practice to negotiate on behalf of clients.[6]

3) Bangalore Mediation Centre

Bangalore Mediation Centre performs functions in relation to matters related to Section 89 of Code of Civil Procedure. It focuses on Mediation as an alternative mode for solving the conflicts. With the support High Court of Karnataka, Advocates Association, Bangalore it undertakes an activity related to court annexed mediation by the trained advocate-mediators.

It considers civil cases apart from serious allegation of frauds, rent cases, injunction, matrimonial matters, labour matters, declaration etc. and cheque

4 Hertfordshire Mediation Center, *available at*: www.herts.ac.in/law/hertfordshire-mediation-centre, last visited on 16th Jan 2019.

5 Ibid.

6 Centre for Mediation-University of Central Lancashire *available at*: http://www.uclan.av.uk/about_us/facilities/centre_for_mediation.php, last accessed on 15th Jan 2017.

bounced cases under Section 138 of Negotiation Instrument Act, 1881. When both the parties show their will for settlement, they can refer to Mediation by filing memo and Judge on its discretion can refer the matter to Mediation.

In the center mediators are experienced advocates with a minimum standing of 15 years at the Bar and who have been given special training in the art of mediation by the High Court with the technical cooperation of the experts belonging from the Institute for the Study and the Development of Legal Systems which is also known as 'I.S.D.L.S' set up in San Francisco.[7]

4) Riphah Mediation Center-Riphah International University

Riphah Mediation Centre (RMC) has been established under Riphah Institute of Public Policy. The prime objective is to provide alternative platform in order to solve the conflict, with the help of professional training. The matters related to social issues, foreign business and the government conflicts are taken up by the centre. The Riphah Mediation Centre is supported by the Riphah Institute of Public Policy, which works on national policy issues as well as regional conflicts related to public sector.[8] With academic vision of Riphah Institute of Public Policy emphasizes is made on proper working of the Centre. The RMC functions on followings basic principles:

(i) Making Connection: When the connection is made by contact with RMC service then they allocate a mediator to help the party. RMC mediator ensures that parties are voluntary acting and mediation is appropriate to be followed in this scenario. RMC mediator will help in explain the further steps of the mediation process and will provide the details related to venue where mediation will take place.

(ii) Settling the Meeting: It consists of two stages such as individual meetings as well as joint meetings. In individual meetings the focus is made on allowing both the parties to set the scene, helping the mediator to understand the circumstances, acknowledging individual beliefs and making an effort to build trust and reputation with the parties concerned.

(iii) Exploring the Issues: With joint meetings emphasis is made on exploring the issues of the dispute between the parties.

(iv) Building the Agreement: After the meeting the mediator will provide the possible options in order to solve the dispute between the parties and come to settlement through an agreement.

(v) Closure: RMC will focus on having an agreement between the parties and both the parties will show their will to solve their disputes through this agreement although this can be possible only if an agreement is reached.

7 Bangalore Mediation Centre, *available at*: http://www.onlinemediationcenter.ac.in, last accessed on 10th Feb. 2019.

8 Ibid.

The University may make use of appropriate notes, which are meant for academic purpose and maintain the confidentiality of the parties based on mutual agreement between them.

The Mediation coordinator or Secretary of RMC Mediation Service, they provide guidance on the mediation process to find a solution to a dispute, if possible, through mediation between the parties on mutual understanding. In addition to mediation the Riphah Mediation Centre also undertake public awareness and certificate to facilitate to become master trainer as well as mediation as their career.[9]

5) The Centre For Mediation in Africa- University of Pretoria

It was established in September 2011 with mission, to enhancing the effectiveness of mediation in major conflicts in Africa through teaching, research, training and the provision of support to the UN, the AU, the sub-regional organizations and African governments.

The stated objectives of the Centre are:

(i) To conducts, publishes and also disseminates research on matters related to mediation that contributes to best practice, by highlighting positive as well as negative lessons.

(ii) It designs and focuses on presenting teaching modules based on mediation at postgraduate level.

(iii) It facilitates mediation skills training meant for students and diplomats.

(iv) It forges and maintaining partnerships with another universities which focuses on matters related to research and teaching in the field of peace and conflict studies.

(v) It assists international organization such as United Nations and their organs, the sub regional organizations and also involves key African governments to have their own mediation capacity and engage in effective mediation.[10]

6) Bond University Dispute Resolution Centre, Australia

The Bond University Mediation center, 1989 works for a better understanding about the necessity to have consensus-oriented dispute resolution procedures. It develops modules concerning concepts related to negotiation, mediation, arbitration and other forms of alternative dispute resolution, which will be helpful for Law School programs. It also provides training to lawyers and other professionals into dispute resolution methods. The centers encourage as well as facilitate research work and publications with the help of courses, workshops and seminars, which are presented on campus and off-campus.

9 Riphah Mediation Center-Riphah International University, *available at*: www.riphah.edu.pk/public-policy/mediation/ripah-mediation-centre, last accessed on 21st Feb 2019

10 The Centre for Mediation in Africa- University of Pretoria, *available at*: http://www.up.ac.za/centre-for-mediation-in-africa, (last accessed on 10th March 2019).

It deals with cases of family dispute, consumer matters and other civil disputes. It has inter-disciplinary approach. It provides course work to the students by the DRC member which highlights the real-life experiences of the members so that students could learn from this in order to have better future in legal field.[11]

7) Mediation Services – Human resources, University of Michigan

It is an informal but structural process through which people jointly work together with the help of the mediator to solve the dispute arising between the parties. The university's mediation services assist teaching and non-teaching staff and resolve workplace related issues by extending discreet mediation and consultation services. The services provided by centers are free of cost and by specifically trained professionals in dispute resolution. The mediator or the consultant at the mediation Service will give a call to the party or will meet the party in person and will focus on whether mediation can be helpful in resolving their dispute. It is beneficial at earlier stage when there is disagreement between the parties. It helps in developing good communication between the parties before it gets worse.[12]

8) Center of Negotiation and Mediation, University of California

UCLA Law's Negotiation and Conflict Resolution Program encourages practice of management of the competition related to legal, business and interpersonal aspects. It encourages academic study based on negotiation and conflict resolution. The students are equipped with analytical and practical tools, which are necessary for having a mutually agreed agreement and helps in resolving their disputes.

With the help of scholars and students from UCLA as well as Southern California they work together on programmes which focuses on interdisciplinary approach and consider private and public transactions as well as disputes related to domestic and international level.[13]

9) Bluhm Legal Clinic negotiation And Mediation- Northwestern Pritzer School of Law.

At Northwestern's Center on Negotiation and Mediation, the students get opportunity of interacting with attorneys in Chicago regions, students from other law school and with the Kellogg School of Management.

It deals with cases related to civil law suit resolution, transactions related to real estate, neighbourhood, labour disputes and family matters by working in teams or one-on-one and results in, students gaining knowledge. The Mediator can

11 Bond University Dispute Resolution Centre, Australia, *available at*: https://bond.edu.au/about-bond/academia/faculty-law/dispute-resolution-centre, (last accessed on 12th April 2019).

12 Mediation Services – Human resources, University of Michigan, *available at*: https://hr.umich.edu/working-u-m/workplace-improvement/mediation-services/mediation, (last accessed on 10th May 2019).

13 Center of Negotiation & Mediation, University of California, *available at*: https://law.ucla.edu/centers/clinical-and-experiential-learning/negotiation-and-conflict-resolution/about/, (last accessed on 20th May 2019).

be a Faculty member who is a diverse expertise or may be a person from other countries, and even can be a sports agent.[14]

11) The Africa Centre For Dispute Settlement (ACDS) – University of Stellenbosch Business School

ACDS focuses on research work and emphasis is made on matters related to conflict prevention as well as conflict resolution. Further, it has entered into partnership with the government organization, business conglomerate, trade unions etc. in order to minimize the expenses of conflict and results in enhanced collaborative opportunities. It is an interdisciplinary academic centre and also it has collaboration across the Western Cape's public universities.

ACDS performs in various modes:

(i) **Exchange of Ideas.** With the participation of scholars and practitioners it facilitates the exchange of ideas.

(ii) **Action research.** It encourages its research scholar and persons affiliated to center to design and conduct research for monitoring and evaluation. It further focuses on comparative learning as well as actionable insight. It depicts its interest in action research.

(iii) **Capacity building.** The research scholar and practitioner affiliated to center works to ensure context-appropriate training covering different aspects of dispute resolution such as arbitration, mediation, negotiation etc. which is available from the grass root levels to the international levels. These courses may be accredited for academic purposes. It performs functions as a partner in capacity building.[15]

12) Mediation Clinic- University of Strathclyde

The Mediation Clinic is a free and student-led mediation service help people to resolve disputes without going to court or tribunal. It also helps students in developing their valuable arbitration skills. It believes in serving the community at large. It provides relevant and free legal solutions for its people in order to have a positive impact on society. It provides mediators, which are experienced practitioners and are also registered with the Scottish Mediation Register. A lead mediator and a student mediator will conduct each mediation session. The student mediators can be postgraduate students who are studying master of law or Master in Mediation and Conflict Resolution. The Mediation Clinic runs through donations.

It deals with practical and financial matters except family mediation. After mediation the mediators will record the agreement, which has reached. Everyone

14 Bluhm Legal Clinic negotiation and Mediation- Northwestern Pritzer College of Law, *available at*: http://www.law.northwestern.edu/legalclinic/negotiations/, (last accessed on 16th June 2019).

15 The Africa Centre For Dispute Settlement (ACDS) – University of Stellenbosch Business School, *available at*: http://www.usb.ac.za/disputesettlement, (last accessed on 15th July 2019).

is provided a copy of it. In most of the cases mediation achieves a resolution. In such circumstances the rate of compliance is very high.[16]

13) University of Hull Mediation Centre-

Centre for Effective Dispute Resolution, is one of the United Kingdom's well-known providers of mediation training and research and contributes in University's mediation. In University of Hull, the Mediation Service is offered by Professors of Law duly accredited by the (CEDR). In accordance to the CEDR Code of practice the mediators are required to be wholly independent and impartial of parties aggrieved. With the consent of aggrieved party to the dispute in advance the law students may be allowed to observe the mediation proceedings without any right to intervene. The revenue realized from the mediation services is used for the legal aid centers of the Law School.

The mediator's role is to facilitate a settlement agreed by the parties which reflects their interests. If parties willingly go into mediation with a desire to settle the chances of success are excellent. Mediation can be used in a wide range of contexts from a divorce settlement to a multi-party business dispute.[17]

14) Mediation clinic, UC Hasting College of Law, San Francisco

It encourages students to deal with conflicts effectively as well as personally on regular basis. The Clinic provides excellent training and instructions for its students so that they could use it after their graduation. Under this Clinic the student studies matter related to dispute resolution theories, helps in developing their communication skills and process management skills.

By working in two person teams the student learns and provides a structured and collaborative process. This encouraged in allowing disputants to design their own solution to their conflicts. The mediation focuses on helping students in gathering information and identifying interest, options and strategies. The students learn how to deal with emotions and help the parties to negotiate and do drafting in relation to settlement agreements.

The clinic deals with cases of landlord-tenant, services, and property damage disputes. By providing mediation services to low-income and other legally underserved groups, the Mediation Clinic provides a valuable community service.[18]

15) Belgorod National Research University - Mediation Centre

The Mediation Centre at Belgorod National Research University provides framework for enriching the practice of negotiation, Mediation, conflicts

16 Mediation Clinic- University of Strathclyde, *available at*: http://www.strath.ac.uk/humanities/lawschool/mediationclinic/, (last accessed on 4th September 2018).

17 University of Hull Mediation Center, *available at*: http://www2.hull.ac.uk/fass/law/mediation-service.aspx, (last accessed on 4th October 2018).

18 Mediation clinic, UC Hasting-College of Law, San Francisco, available at: http://www.uchastings.edu/academics/clinical-programs/clinics/mediation/index.php, last accessed on 24th October 2018.

resolution in cooperative ambience and arriving consensus. Their emphases are on developing legal means for mediations training, skills and reaching settlement agreement through the help of professional mediators.

The mediators also ensure that parties to dispute maintain civilized communication and preserve the relation. The Centre's propagate the merit of mediation as an alternate way of resolving dispute by organizing works of seminar, conference, sort term training programmes and skill development. The centers also review the draft settlement agreement reached through protected negotiation in civil matters. Further, dissenter also undertakes and offer services in mediation and dispute resolution for companies as well as individuals.[19]

16) Brunel University- Mediation Services

The aim of the University Mediation Service is to resolve the problems in quick manner and easily. It is complementary in nature to the existing services that supports. For instance, counselling, the disability and dyslexia service. It also run along with the complaints procedure sidewise.

When a complaint is brought under University's Complaints Procedure then the party may be offered mediation by the college or by the support department from which the problem has arisen or it can be a student complaints and Investigating Officer. If the party agrees for mediation it will be referred to any one team of mediators who are trained specially in mediation.[20]

17) Columbia Law School- Mediation Clinic

Columbia's Mediation Clinic provides a service, which is unique in itself as it is by and large informal and confidential forum. In this the mediator are the well-trained law students, which act as neutral third party in this process. With the support of the mediator discussion is done between the parties and emphasis is made on to have solution for their dispute. Mediator encourages practice of having good communication between the parties and reach to an agreement, which fulfil both party's needs and interest. Mediation is confidential and voluntary process where the mediator doesn't express which party is wrong or right but finds a solution to settle the dispute between them.

The Mediation Clinic also assists students who desire to make mediation as part of their professional life. It assists in building their skills and ethical values. It assists students to know about the limitation and benefits about mediation and other dispute resolution techniques which results in better counselling of their clients and provide them better choices. By this it helps the students to see how feelings, background values and personal style can affect their professional performance level. It further provides a quality to parties when the disputes are considered by the clinic. In the clinic Students mediate

19 Belgorod National Research University Mediation centre, *available at*: http://www.bsu.edu.ru/en/structure/detail.php?ID=246970, (last accessed on 27th October 2018).

20 Brunel University Mediation Services, *available at*: https://www.brunel.ac.uk/life/documents/pdf/Mediation-Doc-Dated-1-August-2014.pdf, (last accessed on 29th October 2018).

actual community disputes at the Community Mediation Center which is at Safe Horizon. It acts as a non-profit victim-assistance, advocacy and violence prevention organization.

It considers cases in related to disputes between neighbours, roommates, and co-workers and matters related to disrespectful treatment, noise complaints, harassment, assaults and discrimination. It also deals with matters related to business and organizational conflicts.

By following mediation one can overcome the disputes, complaints and conflicts which one come across their life. It allows the parties to reach to an outcome by settling the conflict between the parties in a dispute. Subsequently, it will help in reducing stress and inflexibility between the parties and will result in continuing working relationship by the people.[21]

19) University of Otago- Conflict Resolution & Mediation Services.

Mediation at University of Otago is an informal process. It is designed to resolve problems and differences at earliest. Mediation at Otago is a voluntary act between the parties to resolve their conflict. Its confidentiality is maintained and no one knows mediation has occurred between the parties and no records at kept. With this process each person is able to express his or her own perspective and allows hearing the perspective of the other person. It identifies causes which lead to know what went wrong in the past. It further encourages those practices which results in better future. The role of the mediator is to support everyone in order to solve the dispute between the parties and comes with a satisfying outcome.

It considers all the difficulties and problems with a discussion and makes an effort to resolve them. Further, focuses on how to reach to an agreement and work together as well do things together in future well. The party may write it down and it can be both oral and written agreements and confidentiality is maintained until both the parties agree to share with another person. In this mediator does not keep any notes or records. Also, nothing will be added to party's record without any further agreement. In this every member of the contact network are trained in listening to the issues a person. They help the person identifying the responses and courses of action. They make people aware about the resources available in the University. Further, they can suggest places where the party can ask for more help. They may suggest that one can even talk to the mediator. For example, the mediator can help a party/person if they have any behavioural concern, which might relate to their work or study.

It may deal with issues such as harassment or discrimination. It even covers problems about the academic supervision relationship. If a person is not sure about the mediator options then mediator can suggest other resources. In such circumstances any person who is a member of the Otago University community can use the Ethical Behaviours Network and the Mediator. The service focuses building relationships between members of the University community. Most

21 Columbia Law School- Mediation Clinic, *available at*: http://www.law.columbia.edu/clinics/mediation-clinic, (last accessed on 31st October 2018).

people contact university for the service directly. The discussion can be small or too big as the case may be. If one is responsible for staff or students one can contact the mediator for confidential advice. One can suggest that they can meet with the mediator to discuss their concerns. The individual is free to decide whether he want to avail the service or not.[22]

20) Montclair University- Mediation Resource Center[23]

The Mediation Resource Center (MRC) at Montclair University is established to strengthen the students in and university community in inculcating the habit of living in the multilingual and multicultural community by building a caring community based on healthy relationship and responsive to the needs of the others. The MRC provides neutral surroundings to encourage the open and direct communication between the students so they will be able to discuss their issues and develop a positive resolution for resolving inter personal conflict.

It covers psycho educational programming for students, which include developing communication skills, stress management, resolving conflict, diversity training, college adjustment as well as healthy and responsible living. They also provide a blackboard course for incoming freshmen in residential living.[24] By collaborating with campus partners they create student programming which focuses on strengthening the campus community. They assist parents and their family members in understanding the campus life experience. They also focus on potential adjustment needs of their students.

21) Centre for Restorative Justice & Peacemaking- University of Minnesota

The Centre serves to different stakeholders by engaging international peacemakers, program managers, facilitators, trainers and researchers by focusing on restorative justice. The Centre assists the people involves in traumatic incidents, conflict and petty crimes by organizing workshops, instructional videos, presentation and lectures including local pilot programme. It has broadened out into many realms of application beyond criminal justice. Further, it has also broadened out into various models to address harms and conflicts.

The Centre considers dialogue to be a centrepiece in any process. It encourages workshop participants in order to maintain and strengthen restorative dialogue on all levels. The Centre performs various activities and services such as for instance; they do a research-based article. It also considers instructional videos, presentations and lectures. It also provides trainings and workshops. It provides consultations for program design. It highlights on case coaching and also supports for local pilot programs.[25]

22 University of Otago Conflict Resolution & Mediation Services., *available at:* http://www.otago.ac.nz/mediation/, (last accessed on 11th December 2018).

23 Montclair university- Mediation Resource Center, *available at:* https://www.montclair.edu/residence-life/mediation-resource-center/, (last accessed on 4th Jan 2019).

24 Ibid.

25 Centre for Restorative Justice & Peacemaking- University of Minnesota, *available at:* http://www.cehd.umn.edu/ssw/RJP/About/default.html, (last accessed on 19th Jan 2019).

22) Strathmore Dispute Resolution Centre (SDRC) - Strathmore University

The Strathmore Dispute Resolution Centre is a Mediation Centre at the Strathmore Law School. It focuses on facilitating and promoting mediation and other forms of Alternative Dispute Resolution as a form of settling disputes and conflicts between individuals, within groups and in organizations. It was established in 2012 and its objective is promoting mediation as an efficient, sustainable and cost-effective dispute resolution mechanism in areas such as Kenya and the wider East Africa. Further, it believes in developing the mediation and dispute resolution capacity of individuals, groups and organizations. This is possible by providing world class mediation and conflict resolution services and trainings to fulfil local needs and settings. The services provide efficient and cost effective, creative in settlement of disputes. It enhanced control of parties over outcome of disputes.

Disputes that may be presented to SDRC for resolution include contractual, commercial, family, environmental, labour & Community matters. SDRC through its well qualified panel of mediators and arbitrators offers top quality mediation, arbitration, services to individuals, groups and organizations. SDRC maintains a well-qualified and dynamic panel of mediators whose experience range from commercial to family and to community matters.

Since its inception, SDRC has conducted various dispute resolution sensitization trainings for various sectors such as banking sector, industrial relations and in partnership with the Judiciary of Kenya has trained judges and magistrates in a bid to prepare the judicial sector for its well-informed initiative to introduce court-mandated mediation in Kenya in line with the Constitution and various statutes.[26]

23) Osgoode Mediation Clinic- York University (Toronto, Canada)

The primary goal of the Osgoode Mediation Clinic is to provide free mediation and conflict resolution to the surrounding community of the York University. It empowers individuals to play a critical role in the outcome of their conflicts and disputes. Moreover, it encourages and promotes access to justice.

Under the supervision of professors, the Osgoode Hall Law School students work with the local community organizations as well as groups in order to assist the community. Their primary functions of the center to offer its students free mediation services, conflict resolution training and coaching.

They specialize in following areas such as youth conflicts (including bullying), housing disagreements, family disputes, campus related issues and personal and professional conflicts. However, their free conflict resolution workshops and coaching sessions are not limited to these five areas, and are available for any conflict area.[27]

26 Strathmore Dispute Resolution Centre (SDRC) - Strathmore University, *available at:* http://www.strathmore.edu/sdrc/, (last accessed on 10th Feb 2019).

27 Osgoode Mediation Clinic- York University (Toronto, Canada), *available at:* www.osgoode.yorku.ca/community-clinics/osgoode-mediation-clinic, (last accessed on 19th Feb. 2019).

24) Mediation Centre -University of Wisconsin Law School (United States)

The Mediation clinic is a program of University of Wisconsin Law School. It provides an alternative method for dispute resolution to litigation. The purpose of the mediation center is to provide vital services to Madison, Dane Country and Wisconsin by helping people in resolving their personal and legal conflicts. It also provides a training experience for law students, which work under the supervision of the law professors.

The Mediation clinic law students follow mediation for a variety of cases in the Dane Country Small Claims Court, which includes matters related to Rent, contract, service matter and auto-accident as well as issues related to property. The mediation center also considers cases related to the UW-Division which is meant for student's life and other campus organization. It focuses on establishing a pilot child protection mediation program.[28]

25) Centre for Dispute Resolution- Missouri State University (Missourie, United States)

The Center for Dispute Resolution (CDR) is an organization located in the Department of Communication and the college of Arts and Letters at Missouri State University. The CDR exists to provide educational and outreach services that give people, organization, and communities the tool they need to productively manage conflicts. The mission, goals, and activities of the CDR are directly related to the public affairs mission of Missouri State University, in particular the goal of community engagement, which states that, "students will recognize the importance of contributing their knowledge and experience to their own community and the broader society."

Its main functions are to offer conflict management, mediation, training and educational services, to support educational and community programs; and by forming collaborative partnerships with key agencies to promote alternative forms of dispute resolution and innovative programs and processes in conflict management and resolution. The CDR offers community mediation services and mediation referrals for a variety of types of disputes.[29]

26) Mediation Centre of University of Oregon School of Law

The Oregon Dispute Resolution Centre and Oregon Consensus are public service. It provides a wide array of dispute resolution services to near community, which are ranging from the mediation of interpersonal disputes. It focuses on facilitating complex public policy dialogues. Moreover, it supports 16 community dispute resolution centers which are across the State. They offer dispute resolution experts which provide services such mediation, facilitation and education. They believe in restorative justice and provide other programs, which are designed to provide conflict resolution skills to individuals and groups. In addition, the centers have

28 Mediation Centre -University of Wisconsin Law School (United States), *available at:* http://law.wisc.edu/eji/mediation/index.html, (last accessed on 21st Feb 2019).

29 Centre for Dispute Resolution- Missouri State University (Missourie, United States), *available at:* http://www.missouristate.edu/cdr, (last accessed on 28th Feb. 2019).

with collaborative partnerships helps in acting effectiveness as well as in building a healthy community conflict resolution capacity. Moreover, it provides a robust student engagement opportunity which advances the public service mission of both programs.[30]

27) Mediation centre of University of Texas School of Law

The center for public policy Dispute resolution is located in Texas School of Law. Since its inception, the center has grown its programs and services in order to meet the needs of the community, which it serves. The Central staff member also serves UT and the law school by offering courses to the public and to students related to dispute resolution. Their trained faculty members provide mediation to the community on the four basic principles such as voluntariness, self-determination, flexibility and confidentiality. The mediation clinic in law school deals with the Community Mediation Center closely and also with the East Texas mediation community in order to promote the use of mediation. It provides training and professional development opportunities for community mediators.

It covers areas like divorce and custody, employment discrimination as well as workers' compensation. Moreover, the law students' co-mediate cases with experienced volunteers.[31]

28) Harvard Negotiation and Mediation Clinical Program

It was founded in 2006 and the program focuses on matters, which are related to dispute systems design, negotiation, mediation and facilitation. The clients in the center are US bases and international. It includes private corporations, non-profit organizations, government's agencies and community groups. The law students develop critical problem-solving skills and they apply the theory to practice and deliver solution to the problem. They train the Harvard Law School students in the theory as well as practice of negotiation and conflict managements. It serves clients by building their capacity for effective conflict management and successful negotiation. It serves the legal profession and the dispute resolution field by producing practice-informed scholarship and creating innovative teaching pedagogy. It inspires and builds a community of problem-solving law graduates.

Conclusion

Mediation centers have become an integral part of Universities or Law Schools across the globe. These mediation centers are entrusted with the purpose of solving the disputes of various kinds like consumer right cases, business contract cases and workplace disputes.

In general, some of these mediation centers are government funded and some of the mediation centers also run on donation. The mediation is beneficial because it is informal. It is voluntary thus at any time any of the party can refuse to go for

30 Mediation Centre of University of Oregon School of Law, *available at:* http://law.uoregon.edu/explore/OOCDR, (last accessed on 1st March 2019).

31 Mediation centre of University of Texas school of Law, *available at:* http://www.law.utexas.edu/cppdr, (Last accessed on 1st March 2019).

mediation. Mediation is a welcoming step in Indian scenario as the Indian laws have given recognition to mediation as an alternative mode for settling down a dispute. It is a platform where the parties are encouraged solving a matter between the parties with the help of the third person. Where law students and professors can plays an important role.

Therefore, in order to make mediation procedure efficient in India, there are urgent needs to establish more centers which could help in facilitating such activities. By making Mediation process open to the youth and public as the case may help in maintaining the sanctity of legal system. It promotes ethical and uniform practice which encourages in having well trained and organized mediation centers.

Also, there is need to create awareness among the public in the society about the significant role played by mediation which is properly done in abroad in the Universities. Therefore, by maintaining international standards we can improve the present situation so that parties refer to go to mediation.

Mediation being voluntary and maintain confidentiality encourages the faculty, students, and staff to motivate in this profession and encourages them to bring up future mediators for the upcoming generation as well. In addition, some of the Universities have been working with a collaboration of other public Universities so that they could make use of their ideas and provide better facilities. Inform of Clinics few Colleges has reflected on making students well efficient and trained in their mediation skills where they learn all the basics of becoming a mediator. Therefore, by maintaining international standard one can make the parties comfortable and this will be also beneficial for the commercial world.

Decoding Boundaries of Hate Speech During Elections A Comparative Analysis of India and USA

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Manaswi* *

Abstract

The state, in a democratic welfare society, is presumed to play the role of protector of its citizens and upholder of their rights. Even the international forum recognizes free speech as per "Article 19 of Universal Declaration of Human Rights"[1] (hereinafter UDHR). Underlying these rights is the unanimity amongst democracies of the world to not recognize these rights absolutely. Certain checks on these rights are a must to prevent any anarchy like situation. Thus, the states have an inbuilt mechanism to ensure there is no misuse of these rights. These days hate speech has grown as an important area of debate around the world. The controversial area of hate speech, at the municipal level, is dealt with directly by the constitution or indirectly via judicial pronouncements. For instance, the Indian legislature does not explicitly deal with hate speech yet it gets its implied recognition under Representation of People's Act. Judicial interpretations are crucial here. This paper primarily focuses on the hate speech jurisprudence of two countries India and the USA. While India recognizes free speech subject to "reasonable restriction", on the other hand, the First Bill of Right to the United States Constitution provides ample protection to expressional freedom, except where such speech invites "lawless action".

Keywords: Hate speech, representation of People's Act, free speech, hate speech, jurisprudence

Conceptual Analysis of Hate Speech: A layman's analysis of the situation here might lead him to interpret that speech is absolutely free in America while our nation restricts it on certain grounds. The Apex Court of the United States has time to time reiterated that this freedom is not unbridled. An observation of areas where hate speech has been recognized-be it defamation; obscenity; behavior of subjugated class etc. both the nations have exhibited a nontolerant spirit to abuse of this freedom of speech. What needs to be realized is that both nations recognize free speech and condemn hate speech. The essential difference lies in the degree of tolerance to misuse of freedom.

The term free speech and hate speech legislation have been debated worldwide. The debate related to restricting freedom of speech can be traced back to the death sentence of Socrates in 399 BC for advocating against the then accepted beliefs.

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1 U.N.G.A. Res. 217 A (III), 1948.

Similarly, protest against Galileo's claim of sun not revolving around the earth in 1633 AD, Voltaire's protest in 1770 AD, etc. But the more significant developments against hate speech took effect after world war two when the UDHR was adopted. UDHR its Article 19 embodies "freedom of expression"[2]. Remembering the chilling effect of the war, member states wanted that the history of Nazi Germany should not repeat itself[3]. Julius Stretcher who continuously incited the killing of Jews was found guilty under the Nuremberg trials. The United Nations International Criminal Tribunal of Rwanda followed the same genocide rules in 1994. Later International Convention for Elimination of All Forms of Racial Discrimination (hereinafter CERD) was formally embraced in 1965 which condemns racial discrimination and overtime has broadened its horizon to include any gender discrimination as well. With this broader interpretation, the line of segregation between hate speech and free speech is very difficult to identify, especially when vulnerable sections of society need to be adequately protected.[4]

The UDHR has played a pivotal role against racism, xenophobia, etc. One of the most successful events was the abolition of apartheid in South Africa but the way ahead is long before achieve a discrimination-free society. The incitement of Northeast exodus based on false images, which were falsely portrayed to be images of Assam riots, are amongst the recent instances of how hate speech can provoke genocide, terrorism, and ethnic cleansing amongst the masses. But various judicial pronouncements around the world have re-established the fact that freedom of speech cannot be exercised in ways that jeopardize the values enshrined in international conventions and under comparative constitutionalism.

Identification of Hate Speech

The targeting of certain people on their "race, religion, personnel conviction, national origin, gender, religion, language, sexual orientation"[5] in the form of "hatred or incitement"[6] broadly points to hate speech. Once it is determined that the boundary of free speech has been crossed mostly the courts dwell into the following three points[7]-if the traversing of the boundary "is justified by law"[8]; "if it has a direct nexus with the object"[9] and "if it is essential in a democratic nation"[10]. Thus, all these criteria are to be seen together and the European Commission of Human Rights (hereinafter ECHR) tries to balance them through hate speech is not defined by it.

2 U.N.G.A.Ress.217 A(III), 1948.

3 Peter Longerich, *Goebbels: A Bibliography* 212-213 (Random House, New York, 2015).

4 https://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf, last assesed on October 1, 2018.

5 William B.Fisch, "Hate Speech in the Constitutional Law of the United States", 50 Am.J.Comp.L.Supp.463,492 (2002).

6 Ibid.

7 Anne Weber, Manual on Hate Speech, Available at: https://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Hate_Speech_EN.pdf (last accessed on October 1, 2018).

8 Delfi AS v Estonia, Application no. 64569/09 (2015).

9 Handyside v United Kingdom, Application no. 5493/72(1976), at para 49.

10 ECHR, Article 17.

Further nations via various judicial decisions have benchmarks for identifying a speech as hate speech. The Supreme Court of India has ruled that the restriction of 19(2) applies only when the "speech reaches the level of incitement"[11]. This incitement entails both the incitement of violence as well as discrimination. This is akin to the "imminent threat of lawless action test"[12] of United States. Wide speech protections are given by first amendment is based on premises that government "is incapable of differentiating between various speeches"[13] and that there should be "equality in the marketplace of ideas"[14]. This later concept embodied in the free speech neutrality leaves the vulnerable sections of the society unheard. Thus the equality in this sense imbibes giving voice to the weaker section in the plural society and this freedom is not without restrictions even in America where the Supreme Court stated that an unbridled license of speech or publication that gives the author or the speaker the absolute power for speech without any restriction as to its quality, is not what the free speech clause of the Nation's constitution seeks to protect[15]. Further the speech must portray an extreme emotion to be out of the purview of constitutional protection and also be of "low value"[16]. The societal strata of the speaker at times is pivotal in interference by the courts especially if the speaker stands at special political or religious status to the listeners[17]. Further, if the victim is a political leader as opposed to an individual person he is presumed to be prepared for "a greater degree of criticism"[18]. Another important perspective is the context in which the speech is made since the fine line between hate speech and free speech has to be decided keeping in view of the nature of each case[19].

Free Speech Restriction Standards

International Framework

The UDHR even though not legally binding, embodies free speech & expression for all people. Moreover, the Convention on Elimination of All Forms of Racial Discrimination has a very important provision with respect to hate speech, which also provides punishment to the perpetrators of hate speech. In addition, it obligates member states to pass the requisite legislation. As per Article 4 of the convention provides that if any person involves "dissemination of ideas based on racial superiority or hatred [and] incitement to racial discrimination"[20] to be punished. The International Covenant on Civil and Political Rights "prohibits any form of racial or religious hatred that constitutes incitement to discrimination,

11 Shreya Singhal v Union of India (2013) 12 SCC 73.

12 Brandenburg v Ohio 395 U.S. 44 (1969).

13 Cohen v California 403 U.S. 15 (1971).

14 Police dept.of City of Chicago v Mosley, 408 U.S. 92 (1972).

15 Giltlow v New York.

16 Chaplinsky v New Hampshire 315 U.S.568 (1942).

17 Pravasi Bhilai Sangathan v Union of India & Ors. (2014) 11 SCC 477.

18 Lingens v Austria (1986) 8 EHRR 407.

19 Bobby Art International v Om Pal Singh Hoon (1996) 4 SCC 1.

20 CERD, Article 4.

hostility or violence"[21]. The United Nations had three global conferences from 1973 to 2003 on the issue of discrimination. It is to be noted that the United States was against these restrictions to free speech and even when ratifying the above treaties in the 1990s, America attached reservations and excluded the parts which were against its free speech provisions.

"Report of the special reporter on the promotion and protection of the right to freedom of opinion and expression of the Human Rights Council"[22] restricted free speech if it transgressed the line of hate speech. Similarly, article 10 of ECHR also imposes certain forms of penalties and restrictions on the free expression rights[23] with article 17 restricting "state, group or persons"[24] from abusing these rights.

Legal Framework in India:

Certain restrictions in Article 19(2) exist to the fundamental right embodied in Article 19(1)(a). Though explicit definition of hate speech is absent in India, yet legislations prohibit free speech of certain forms. Like the Indian Penal Code penalizes "sedition"[25], "promotion of enmity between different groups"[26], religious feelings being deliberately outraged by malicious acts[27] and "publication or circulation of any statement, rumor or report causing public mischief…"[28]. The Representation of People's Act (hereinafter RPA) prohibits a person from the election if he misuses free speech[29] and penalizes him for participating in "corrupt electoral practice"[30]. Even the cable networks and film screening[31] are prohibited from functioning beyond the established code of conduct. Under the Criminal Procedure Code (hereinafter CrPC) as well State government is authorized to forfeit punishable "publications"[32]. Executive Magistrate is empowered to deal with cases of "public nuisance"[33] and "nuisance or apprehended danger"[34]. Recently the Law Commission of India in its 267th report suggested proposed

21 ICCPR, Article 20(2).

22 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(May16,2011) , avaliable at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (last accessed on october 1 ,2018).

23 ECHR, Article 10(2).

24 Supra n.9.

25 Indian Penal Code, 1860 (Act 45 of 1860), S.124A.

26 Ibid, S.153A.

27 Ibid, S.295A.

28 Ibid,S.505.

29 Representation of The People Act,1951, S.8.

30 Ibid, S.123(3A) and S.125.

31 Cinematograph Act, 1952, S.4,5B and 7.

32 Code of Criminal Procedure,1973, S.95.

33 Ibid, S.107.

34 Ibid, S.144.

changes in Indian Penal Code (hereinafter IPC) and Cr.PC in the light of dealing with such speeches and their effects[35].

Upholding the trinity of freedom of expression, along with republican principles and the rule of law, is the greatest challenge that the democratic set up of India faces. For instance, at times the vague wording of constitutional provisions like S.295A has caused banning of authors like Taslima Nasreen and Dan Brown, but also made the Apex Court rely excessively on the sentiments of a particular section to ban a historical fiction[36]. Another problem arises because of the faulty construction of S.95 of the Cr.PC which allows administrative decision of violation of either S.124A, 153A OR 295A to be based on only a "prima facie" evidence. Judicial intervention can check the grounds of such action but it cannot question the administrative action. This warrants a discretionary behaviour of the government while depriving an individual of his fundamental right on hate speech grounds. But we need to understand that "…as democratic culture undergirds democracy in the narrow sense without being identical to it, cultural dissent is an important source of political dissent without being subsumed by it…"[37].

Legal Framework in the USA:

The First Amendment of the U.S. Bill of Rights crowns the Congress with three broad categories of prohibition on transgressing the free speech lines-Firstly when the speech is of low standard like that of "defamation"[38] which was known to be false, "true threat to commit a crime"[39]," fighting words"[40], "obscenity"[41] including very explicit material, and "child pornography"[42]. Secondly, the speech of a person in a special relationship with the government may be prohibited for e.g. prohibiting the person from divulging "classified information"[43]. Thirdly, there might be "content-based discrimination"[44] but if such discrimination blatantly prohibits all public demonstrations then it violates the first amendment[45].

35 It suggested adding new provisions on "prohibiting incitement to hatred" following S.153B and "Causing fear,alarm or provocation of violence in ceratin cases" following section 505 IPC and accordingly amending first schedule of the CrPC.

36 Sri Baragur Ramachandra v State of Karnataka (2007) 3 SCC 11.

37 Balkin Jack M, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society.

38 New York Times v Sullivan 376 U.S. 254 (1964).

39 Watts v United States 394 U.S. 705 (1969).

40 Chaplinsky v New Hampshire 315 U.S. 568 (1942).

41 Miller v California 413 U.S. 15 (1973).

42 New York v Ferber 458 U.S. 747 (1982).

43 Pickering v Board of Education 391 U.S.563 (1968).

44 Supra n.16.

45 Schenck v United States 249 U.S. 47(1919).

Hate Speech Jurisprudence

India

The courts in India have time and again recognized that hate speech cannot be confined within narrow limits of a "manageable standard"[46]. Thus the court did not adjudicate into the matter of hate speech by an election candidate where there was no doubt in the intent of the legislature. Hate speech can also be curtailed on the ground of state security and in the case of Brij Bhushan[47] the "public order" was equated to such security to bring it under protection. But the court later in Ram Manohar Lohiya v State of Bihar[48] distinguished the two stating the public order is a bigger cycle incorporating security of the state. Also in Ramesh v Union of India,[49] the apex court held that a movie imparting social message could not be considered violative of 19(2) unless "it has a potential effect on public tranquility and a proximate and direct danger test"[50] was laid down for curbing expression. Thus the absence of any direct relation between the act and the restriction can lead the impugned section restricting the act to be struck down[51]. The test with respect to speech having a "pernicious tendency of creating public disorder"[52] in order to be restricted applies even today with reference to S.124A of IPC. But the religious sentiments of the public can get hurt even when no public disorder is created and thus calling in public a person from the scheduled tribe as "chamar"[53] attracts s.3(1)(x) of the 1989 Act.

Elections

Speeches during elections often exploit the societal sentiments for vote gains but the same should not kindle any hateful environment. Thus, free profession of one's political views needs to weighed against restrictions in societal interest. "Like an unchecked cancer, hate corrodes the personality and eats away the vital unity"[54]. Hate speech is the catalyst behind communal violence and promotes prevalent tensions and discrimination in the community and might ultimately lead to the extinction of the group in the extreme cases against whom the speech is perpetrated. Political awareness, valid criticism, legitimate expressions are the grounds to oppose restrictions by free-speech proponents. But, in a plural democracy like that of India where organizing elections on election lines is recognized as a corrupt practice, such restriction is justified to preserve the multicultural democracy. Thus in 2009 when, Varun Gandhi was found guilty

46 Supra n.17.

47 Brij Bhushan v State of Delhi 1951 SCC 270(4).

48 (1996) 1 SCR 709.

49 1988 SCC (1) 668.

50 Ibid.

51 Shreya Sighal v Union of India (2013) 12 SCC 73, the court struck down section 66A of the Information Technology Act 2000.

52 Kedar Nath v State of Bihar 1962 SCR Supl. (2) 769.

53 Swaran Singh v State (2008) 8 SCC 435.

54 Quote by Martin Luther King Jr.,avaliable at http://www.quotationspage.com/quotes/Martin_Luther_King_Jr(Last accessed on October 2, 2018).

of seeking votes on religious lines, Election Commission registered case against him under IPC and RPA or abridging Model Code of Conduct (hereinafter MCC) but the Election Commission (hereinafter EC) having no penalizing power in its hand and also given the fact that corrupt practices appear before apex court only post elections, the EC found itself quite helpless. The organization of politics on communal lines with different sects of religious organizations marked the birth of hate speech in politics. Thus, such speech has spread its tentacles either via its communal policies as in the infamous Gujarat Assembly elections case[55] or via exclusionary tactics as adopted by Bal Thackeray of Shiv Sena. These tactics take the politics away from the ground realities of the society.

The Representation of People Act, 1951 penalizes offenses during elections and corrupt practices in its part VII. The former can be brought to notice the moment it is committed the later requires elections to be over to be proceeded as per article 329(b) of the constitution. In particular S.123(3), S.123(3A) and S.125 of RPA deal with hate speech. A liability of the candidate for corrupt practice arises only on the date or after filing nomination and not before that. This is an actual flaw of the RPA Act that is open to huge abuse. Also for the candidates' actions to be related to other actions, his assent is of utmost importance as per the provisions of this act. The lengthy process of disqualification of a candidate as per S.8 of the RPA requires High Court then-Secretary of State Legislature then President and finally the Election Commission to give its opinion on corrupt practice which then the President finally decides. Also, the election petitions remain pending for so long that the accused's term expires and this defeats the purpose of justice. Apart from reducing the above delays, the Law Commission recommended the removal of a candidate from the election if trial against him begins. These recommendations could largely clean election process.

The court, in Ramesh Prabhoo v P.R.Kunte[56], where deprecatory statements were made against Muslims and charges of corrupt practices brought, held that mere reference without specifying the context in which reference to religion was made did not make such speech violative of s.123(3) and s.123(3A). In other Hindutva case court viewed that using Hinduism to seek votes depicted only "Indian way of living and was not an offense"[57]. This paved the way for several hate speeches during elections by both BJP as well as Shiv Sena. The main tenets of the nationalist philosophy of BJP involve Ram Mandir, a total cow slaughter ban amongst others. But recently[58] the supreme court held in Abhiram Singh's case that votes sought on caste or religious lines as corrupt practices and stated that such election would not be upheld. Similar prohibition is found also under the MCC which also prevents the candidates from widening the prevalent communal tensions. But however, it has remained largely as a passive document as it has neither legal nor statutory backing. Thus, it is the need of the hour that it should be backed with stringent enforcement mechanism.

55 Avaliable at https://sabrangindia.in/article/hate-speech-text-and-analysis-speech-delivered-then-cm-gujarat-narendra-modi-mehsana, last assesed on October 1, 2018.

56 (1996) SCC (1) 130.

57 Manohar Joshi v Nitin Bhaurao Patil 1996 SCC (1) 169.

58 (2014) 14 SCC 382.

United States

The nation has seen a shift in the test to qualify a speech as hate speech from "clear and present danger test"[59] to "imminent threat of lawless action test"[60]. The US Supreme Court in 1942 laid down that certain speeches like "fighting words, slanderous words were low-value speeches"[61] as being exceptions to free speech protection given under the constitution. Following the above case, Supreme Court in Beauharnais v Illinois[62] held "that libelous utterances which on the ground of religion or race abrogated peace were not essential to exposit any idea"[63]. A narrow interpretation of" fighting words" was done in another case of R.A.V v City of St. Paul wherein Minnesota Ordinance, which convicted the person for burning cross in black family's lawn, was found invalid on the ground of "content-based discrimination"[64]. Contrastingly, in Wisconsin v Mitchell[65] the statue prohibited conduct i.e. "hate crime" and thus was upheld as valid since the first amendment protects only expression and not conduct.

Elections

Again if we look at campaign finance laws of the nation which regulate monetary funding of the political candidates there has been a shift in Supreme Court's rulings from allowing no prohibition on candidate spending as same abridges freedom guaranteed under the first amendment[66] to severe restrictions on such advertising to partly overturning such "stringent restrictions on political campaigning as violative of a corporations' freedom"[67].

Recently the turbulent elections during Trump's campaigning kindled racism, xenophobia and saw flaming of hate speech via the internet. Communal, racial and sexual attacks were made by unidentified people at various places. Even Trump made several controversial statements holding blacks responsible for a lot of hardships to white men and that Mexicans were rapists. Yet a federal appeal court acquitted him of all the charges justifying his speech within the protective ambit of first amendment. Thus several hate crimes were overlooked.

Having looked at the jurisprudential trends and legislation in these two nations an important question that arises is how do we tackle hate speech?.

Deeper Questions Surrounding RPA Act

Under IPC provisions many books were banned or people arrested for criticizing politicians on public forums. Prior to prohibition and making such offenses

59 Schenck v United States 249 U.S. 47(1919).

60 Brandenburg v Ohio 395 U.S. 44 (1969).

61 Supra n.40.

62 343 U.S.250 (1952).

63 Ibid.

64 505 U.S. 377 (1992).

65 508 U.S. 47 (1993).

66 Buckley v Valeo 424 U.S. 1 (1976).

67 Citizens United v Federal Election Commission 558 U.S. 310 (2010).

cognizable seem to create havoc for free speech in a number of instances. But a question that arises here is that is the issue only one of a flawed procedure? Regulating hate speech needs to be balanced with the democratic principles and be in line with article 19(2) of the Constitution of India. For instance, nonprecise framing of S.295A of the IPC and associating it in a number of instances to only "public order" has created havoc for writers and artists like Dan Brown and Taslima Nasreen. The apex court in Pravasi Bhilai Sangathan[68] while acknowledging adequacy of present laws to tackle hate speech during elections relied on Canadian decision[69] clarified that the speech was not about individual hardships rather of their societal status vis-à-vis other members which gets subjected to hardships. This is in consonance with Jeremy Waldron's views that hate speech mainly targets "inclusivity" and "dignity" both of which originate from "equality in society".

The judicial pronouncements so far have very tactfully ignored the deeper questions surrounding hate speech. How far do the "reasonable restrictions" criteria clearly demarcate the boundaries of hate speech? This question never provides a satisfactory answer. This is largely because the answer itself moulds as per the prevailing conditions and the mindset of the people at that point in time. Also, the level of tolerance, education, and awareness our society had a decade ago is far lesser than today. With the fourth pillar, namely the media playing a very proactive role and the media trials gaining huge outcry in the modern society, the question boils down to determining if the hate speech benchmark applied a decade ago still holds good or in the garb of reasonable restrictions are, we throttling up free speech in excess.

Returning to the cases under the RPA act, the Bal Thackeray case cannot skip a mention. Herein s.123(3) was argued to infringe 19(1) (a). Refuting the arguments court said that decency referred to "action in conformity with current standards of behavior and not just sexual morality"[70]. The dilemma here is brought out in these lines-"If I invoke religion in my election speeches to persuade people to vote for me, and I am successful, on what ground can it be argued that the public considers such an approach contrary to decency?"[71] Another point on which speech gets restricted in this sense is that of "autonomy" and court's interpretation with respect to cases related to S.123(2) and s.123(3) seem to emphasize that such speech can overpower the free will of these groups. Similar is the tone when the court said that a strong religion associated feelings during elections should not hamper people's choices[72]. This tone again seems flawed in the sense that people are capable of self-disciple and controlled choices and cannot be said to be swayed merely by such speeches. They are final judge to decide to be or not to be influenced by such speeches and thus these restrictions need to be rooted not in public sentiments but in constitutional ideals.

68 Supra n.17.

69 Sasketchewan v Whatcott(2013) 1 SCR 467.

70 Bal Thackeray's case,para 29.

71 Gautum Bhatia: *Offend, Shock or Disturb:Free Speech Under The Indian Constitution*, 170-171 (Oxford University Press, Londo, 1st edn. 2016).

72 S.Harcharn Singh v Sajjan Singh (1969) 3 SCC 492.

Dealing With Hate Speech

In the U.S. the burning of flag[73] or burning cross[74] is not punishable. The robust protection granted to speech via the first amendment of the United States constitution, even if they are distasteful or offensive speeches, is to allow healthy and fearless debate on matters of public concern. Only when the threat is imminent or a section of persons or groups get cornered via violent targeting as a result of these threats that such speeches get criminalized. Beginning from 1969 case laying down "imminent lawless action"[75] as the criteria for branding a speech as disparaging and hateful, even now the extra "breathing space"[76] to the speeches ensures that unpopular or unorthodox views are not brought under a prior restraint. This serves twin fold purpose of not only restraining the speech which is absolutely intolerable but also leaving the comparatively less tolerable speeches in the public domain to discuss, debate and decide on the same. In McIntyre v Ohio Elections Commission[77], the Supreme Court, while reiterating the significance of anonymous free speech, observed:

"Anonymity is a shield from the tyranny of the majority…It thus exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation…at the hands of an intolerant society…"

Although, it is to be noted that even though hate speech is tolerable to a large extent under the US constitution, hate crime, which comprises of physical abuse or incitement to violence or conspiracy to hurt another is intolerable even under this constitution.

In the Indian scenario, it's unthinkable to allow tolerance to hate speech at such high levels. The greatest reason for it is the moral sentiments people attach to such matters. In many of these instances, it's debated that prior restraint should be imposed but given the progress and informed choices made by people today, I feel the work or policy should be brought in public fora and left to their wisdom to decide.

Nevertheless, some of the non-legal ways used to tackle this issue in other nations include a reduction in communal tensions via active participation of religious heads, appealing the targeted individuals against the spread of harmful hearsay and mobilization of the mob. Apart from this, legal and statutory backing should be given to MCC and enforcement power given to EC itself and it could act as a Tribunal giving judgments in a fixed time frame so that the court delays could be avoided. Moreover, the final say in case of any misuse of power would lie with apex court in the form of judicial review. Prior restraint on any inflammatory statement by EC may be difficult and thus necessary changes could be brought in S.153A and RPA itself. The existing equality standards need to be well rooted

73 Texas V Johnson 491 U.S. 397 (1989).

74 R.A.V. v. City of St. Paul 505 U.S. 377 (1992).

75 Brandenburg v Ohio 395 U.S. 444.

76 Boss v Barry 485 U.S. 312.

77 514 U.S. 334 (1995).

and revised, the delicate balance between legitimate dissent and the one that kindles violence needs be achieved via adopting laws for the same, the issue of hate speech needs to be addressed at the international forum as per Jakarta Recommendations, a regional consultation on religious freedom. Also, the 267th Law Commission report recommended the insertion of new provisions as mentioned above in the criminal code. Also bringing the corrupt practices to books post-elections hardly serves any purpose. Thus the sanction powers of the police must be activated moment such speech is made. The same was opined by the Administrative Reforms Commission as well in its 7th report.

Sufficiently trained electoral personnel and a rise in awareness of voters can help counter the effects of hate speech greatly. Also with regard to electoral stakeholders like- political parties: having wide candidate variety, separating from violence-inducing radicals; for judiciary: tackling hate speech in accordance with international adjudicatory standard; for media: adhering to hate speech-related conduct guidelines; reporting and conducting anti-hate campaigns, ethical reporting; for legislature: checking the gap in existing legal framework and effective enforcement of anti-hate speech laws; and for community leaders :moral sanction and promoting gender equality and tolerance; all these can effectively deal with the dilemma surrounding hate speech.

Conclusion

Though hate speech targets various sufficiently trained electoral personnel and a rise in awareness of voters can help counter the effects of hate speech greatly. Also with regard to electoral stakeholders like- political parties: having wide candidate variety, separating from violence-inducing radicals; for judiciary: tackling hate speech in accordance with international adjudicatory standard; for media: adhering to hate speech-related conduct guidelines; reporting and conducting anti-hate campaigns, ethical reporting; for legislature: checking the gap in existing legal framework and effective enforcement of anti-hate speech laws; and for community leaders :moral sanction and promoting gender equality and tolerance; all these can effectively deal with the dilemma surrounding hate speech.

Personal Law Reforms and the Muslim Women (Protection of Rights on Marriage), Act, 2019 A Study of Triple Talaq After 'Shayara Bano'

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Abstract

The hot debate over the subject of triple talaq was in the air currently through Shayara Bano's case and again it was revived through the ordinance passed in this regard in 2018 which failed in Rajya Sabha. Now, the parliament has brought out the Act as a reality. Though Muslim law prohibits exercise of talaq by the threats of divine displeasure, still chaos exists in matters of talaq and Muslim women get humiliated and even their human rights are being denied. In this paper, the gender equality issues related to triple talaq prevailing in Muslim law is examined in the light of the recent judicial decision of Shayara Bano v. Union of India and the Act passed in this regard. It classifies triple talaq as a cognizable offence and provides that it is void. Though the earlier Bill does not provide compounding, the Act provides for compounding which of course is a step for reconciliation. In many respects, the ordinance and the subsequent Act is a progressive one, but there are still some grey areas. The plight of the Muslim woman is not going to be changed unless the proper screening of talaq is ensured with. This article discusses triple talaq as denying the human rights of Muslim women, how it was addressed by the Apex court and also whether the Act passed now can settle the matter effectively or not. A critical analysis of the Act is done and it is suggested that we need to have a paradigm shift in the patriarchal system of the society to bring the desired social change.

Key Words-Divorce, Talaq, Law, Ordinance

Introduction

After 33 years of the controversial Shah Bano[2] maintenance case, now Indian legal scenario is hot with debates about triple talaq. The debate is understood by many or made so as an -Muslim law versus-women's rights issue as done in Shah Bano. As the current Shayara Bano[3] issue goes, the argument is between those who see Muslim law opposing the notion of equality in the Constitution and those who believe that divorce through this method is anti-Islamic and Quranic verses.[4] In this context, it will be interesting as well as useful to know the real jurisprudential

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2 *Mohd. Ahmad Khan v. Shah Bano Begum*, (1985) 2. S.C.C. 556.

3 *Shayara Banov. Union of India & Ors* W.P No 118 of 2016,Writ Petition (C) No. 118 of 2016 , (2017) 9 SCC 1.

4 SeemaChishti, Why the triple talaq case before Supreme Court is different from Shah Bano's in 1986 *available at:* http://indianexpress.com/article/explained/triple-talaq-case-islam-shayara-banu-triple-talaq-case-supreme-court-2933621 9 (last visited Nov 8,2016).

status of this particular form of divorce. The present study analyses whether the Muslim husband's right to pronounce by repeating the word 'talaq' three times in a single stretch is justified through any sources of Islamic law or by a logical extension of its provisions. The judgment in Shayara bano[5] is discussed in detail and the ordinance issued on 19thSeptember, 2018subsequent to the judgment and the Act passed now is also critically examined to identify the pros and cons.

In spite of the fact that for the creation of a well-balanced society women stand as essential as men, they are still regarded as mediocre citizens and are deprived of very basic rights in many societies due to the socio-cultural norms, religious beliefs, patriarchal family settings and dominance of male counterparts. This is predominantly experienced in matters of marriage and family. Though this is the same for almost all the societies, it is widely understood that gender justice is denied altogether under Islamic law. It is because the Islamic principles on this issue are least understood and most misrepresented. The revelations of Islam which Holy Quran had expressed happened to be in Arab tribal society. During those times, female infanticide, unrestricted sexual promiscuity and an inheritance system through male descent were prevalent there. Gradually revelations of Quranic verses were reflected in their animalistic life styles and the subsequent mandatory directions calling for improving the status of women worked effectively among them resulting in the emancipation of women from the discriminatory system of the Arab tribal system.[6] The present society may not reflect this change due to the patriarchal imposition of cultural norms or misinterpretation of principles, but the jurisprudential standards of Islam are not responsible for this decay. The institutionalization of Islam by a few patriarchal forces actually hijacked the spirit of the provisions. In this context, an authentic overview regarding the true standard of gender equality in Islamic jurisprudence is done here.

Sources of Muslim law

The rules and regulations about the marriage as well as divorce of Muslims are based upon the Quran and Sunnah. There are four Sunni schools of law. The Shias also processed their own Sharia and legal system of their own. The Quran which is considered as words of God that reached people through its revelations to Prophet Mohamed and Hadith which includes Sunnah, the deeds of Prophet Mohamed and the sayings of him are considered as the fundamental sources of Muslim law which can be traced back to 7th Century. The hierarchical order as to the sources of Islamic law follows that in case of any issues at hand, the solution shall be searched in Quran and the resolution provided by it cannot be overridden by any other source.[7] If the case in hand does not find a solution in the Quran, it is to be settled down seeking a help through Sunnah if it can offer one applicable to the situation.[8] If both the above stated sources are silent on the matter concerned

5 *Supra* note 2.

6 J.Espisto and N.J. Delong-Bas, *Women in Muslim Family Law* 4 (New York Syracuse university press, New York, 2ndedn, 2002).

7 F.E. Peters, *A Reader on Classical Islam* 166-69 (Princeton University Press, Princeton,1993).

8 John Bruton, *An Introduction to Hadith* 17,22 (1994).

under dispute, in such cases the Ijma of scholars of Islamic law who were the companions of Prophet can be based to arrive at a decision.[9] This shows that Islamic legal system pre-supposes an arrangement to meet the requirements of the society.

The Hanafi doctrine is that the provisions of Shariat law must change with the changing times. The Maliki doctrine, which under pins the above argument, contends that new facts that emerges as society march forward necessitates new decisions in order to fulfill the changing aspirations of the Islamic society. The doctrine of ijtihad which means using one's own reasoning to deduce a rule of Shariat law was developed, even though the passage of time has restricted this liberty to a great extent and by the 9th century it was considered as the privilege of great scholars of the past. The last source is qiyas meaning reasoning by analogy and it is merely a rule of interpretation rather than laying down a new principle. A situation at hand can be governed by applying a principle through logic and reasoning even though the language of the text and the situation at the hand are, not strictly the same. There is also a concept of blending desirable rules from a variety of sources within Islamic jurisprudence and it is known as talfiq.[10] The fathwas or legal opinions of scholars though not a source of law have been instrumental in the development and enrichment of legal principles.[11]

Roots of gender equality- some references from Holy Quran

The Quran and Sunnah provide the source of what Islam contributed towards gender equality in general and woman's dignity in particular. The spirit of equality is well-reflected throughout the Islamic system of life and it is obvious from different verses of Quran from which, all other laws of Islamic society are derived. Distorted interpretations of many verses of sacred book lead to many misconceptions about different concepts in the Islamic societies in spite of the fact that Quran contains explicit language frequently to preach its fundamental goal. For example, consider the verse below.

> *"I will not allow the work done by any one of you to be lost, be the male or female; ye are from one, another"*[12]

It indicates that gender equality is not only acknowledged, but insisted as a norm in Islam. It shows that the natural distinction of men and women will not affect the individual's right to human dignity in life and worldly affairs, nor a person's spiritual relationships with his Lord.[13]

There is a growing concern that the gender equality which is an essential part of justice cannot be accommodated in Islamic legal thought. What justice requires

9 Majid Khadduri and Hombostel, *Islamic Jurisprudence: Shafi's Risala* 285, 287 (1961).

10 DJM. Derrett, *The Death of Marriage Law: Epitaph For The Rishis* 8 (Vikas Publishing House, New Delhi, 1978).

11 Hidayathullah & Hidayathullah, *Mullah's Principles Of Mohammedan Law* XXIV (19thedn, 1990).

12 Qur'an 3; 195.

13 Yusuf Ali, *The Meaning of Holy Qur'an* 180 (Amana publications, 2002).

and permits, its scope and its manifestation in laws, and its roots in Islam's sacred texts, have been the subject of contentious debates.[14] Those who believe in this line of argument find a reason that Islamic law is not holding good in modern contemporary conditions, and are against the values cherished by the modern societies.[15] These are faulty and unacceptable views on the basis of an impartial analysis Quranic law and Islamic commentaries. A verse from Quran runs as follows.

> *"Whoever do good deeds, they will enter paradise irrespective of their gender and not the least injustice will be done…."*[16]

It is a direct proof that the notion of justice is embedded in Islamic law for which the Quran is the first source and it says so. It substantiates that gender justice cannot be washed out of the Islamic legal system. Now, if it is well accommodated in the primary source of Muslim law itself, how can it be diluted or denied by taking recourse to other sources however authentic they claimed to be?

Glimpses of historical aspects on Islamic Jurisprudence

"Many aspects of the life of Muslims including their views about women and their family laws rest in substantial part on medieval Islamic jurisprudence. Scholars based this jurisprudence on two components: religious and cultural. The cultural component gave rise to certain fundamental social and political assumptions. These assumptions are deeply-rooted in Islamic jurisprudence and gave rise to common model of family relationships which are best described today as authoritarians/patriarchal."[17]

It is highly detrimental to women and also caused serious damage to society as a whole.[18] It is also observed that the patriarchal forces are trying to reduce the status of women in society by holding their grip on Muslim countries, thereby pushing women to a group of inactive, immature and dependent beings who are unable to control even their own destiny.[19] It can be considered as the beginning of the lowering the dignity of women under Muslim law. On a comparison with the lives of Muslim women during the Prophet's period, it can be seen that they were active members of the society in various roles of business women, poets, jurists

14 Kari voget, Lena Larsen & Christian Morsen, *Justice and Ethics in Islamic Legal Tradition* 218-219(I. bTauris & Co Ltd. Publications, London, 1988).

15 For a discussion of concepts of justice in Islamic texts, Majid Khadduri, The Islamic Conception of Justice *available at:* https://www.researchgate.net/publication/291681949. (last visited on June 20, 2019).

16 *Qur'an* 4;124.

17 Shahzadi Pakeeza, "Reforming Muslim Women's Rights: Transforming Modernism, Identifying Secularism and Re-Defining Islam" available at http://iri.aiou.edu.pk/indexing/wp-content/uploads/2016/07/eng-2-Shehzadi-Pakeeza-21-07-17.pdf(last visited Nov 14, 2019).

18 Azizah al-Hibri, "Islam, Law, and Custom: Redefining Muslim Women's Rights" 12 Am.U. J. INT'L L. & POL'Y. 1,6 (1997).

19 Azizah Al-Hibri, "A Study of Islamic Her story: or How Did We Get into This Mess" 5 *Women's Studies International Forum*. 207, 214-15 (1982).

etc., The best example is the first wife of Prophet Muhammad, Khadijah, who herself was a business woman and she appointed him as her business agent when she came to know about his value based personality.[20] Similarly, the second wife, Aisha of Prophet Muhammad also contributed as a political and religious leader of the Muslim society of that time.[21] All such credible legacy was distorted though the Islamic legal system and this fact is rightly appreciated by many scholars.

> "Muslim law in its pristine purity was an admirable system of jurisprudence providing, as it did, many rational and revolutionary concepts which could not be conceived by the other systems of Law then in force at that distant date."[22]

It is a matter of regret that a remarkable and progressive system of jurisprudence turned to be surprisingly static. It is not even static, but even more, that it failed to march with times, in spite of qiyas and ijtihad which were provided in the system itself to meet the requirements that may arise in human affairs. It is truly expressed in the following words.

> "These principles played a prominent part in the use of reason in the domain of jurisprudence. But late jurists who were traditionalists steeped in local traditions and patriarchal values abjured the analogical deduction and personal judgment, stuck to the doctrine of taglid and preferred blind adherence to traditions."[23]

Its effect was the shutting down of the gates of reason and stifling the freedom of thought and expression. What was destroyed in the process was not a mere body of thought but the very apparatus of thinking. This has led to a pernicious effect on the progress and advancement of Islamic law, which 'lost its way into the dreary desert sand of dead habit.'[24] The resulting phenomenon is that women are left to suffer under suppression. Before going to the various aspects of triple talaq, it will be better to understand the concept of marriage and divorce under Muslim law first.

Islamic Law of Divorce- Provisions and Practices

Prophet envisaged that marriage is sacred and dissolution of such a sacred tie should follow the sacred injunctions rather than following one's fancies. After reforming the old marriage laws in a far-reaching way, Prophet Muhammad abrogated many customs that were prevalent among them and gave importance to temporal and religious aspects of marriage. The changes that he brought in

20 Farzana Moon, *No Islam But Islam* 50 (Cambridge Scholars Publishing, 2015).

21 Id. at 55.

22 A.M. Bhattacharjee, *Muslim law and the Constitution* (Eastern Law House, 1985)

23 Justice Kader in foreword in Dr. kausarEdappagath, *Divorce And Gender Equity In Muslim Personal Law Of India* vi (Eastern law house Kolkata, 2017).

24 Id.

the concept about marriage in Muslim law should be understood prior to any discussion regarding divorce in Islamic law.

Marriage under Muslim Law

A regular form of marriage was rare in Arabia of that time and the relationships were uncertain also. Islam reformed these types of old marriage systems in a sweeping and far reaching way. Prophet Muhammad reformed the then existing sexual unions like prostitution, adultery, polyandry etc., and marriage where dower was paid to women was given the seal of acceptance. He made it compulsory that dower which is a token of respect for wife is to be paid and her consent is to be ensured for a valid marriage. The Quran declares:

> *"Paying the bridal due in good cheer is your duty and you are allowed to use it if they (women) happily permit it "*[25]

Also women were made sharers to the property which was a new step in empowering them. The Quran provides,

> *"Just like men get a share in the property of parents and other relatives, women too are entitled."*[26]

In short, she was given a new status by marriage and changed her status from the prevalent concept of women as a mere chattel. Moreover, marital relationships were given a place of importance from religious lines which is evident from the Quran:

> *"It is His signs that your spouses are created from yourselves so that you might find repose with them. Affection and mercy is kept between you and of course these are the signs for you to understand."*[27]

The marriages as per Muslim law is considered as that of love and mutual respect.[28] Prophet has directed men to be kind and respectful towards their wives. He said

> "The best among you is those who are most kind to his wife."[29]

25 Abdullah Yusuf Ali, *The Holy Qur'an Text, Translation and Commentary* 178 verse 4:4(7th edn, 2009); it says: "He created you from a single being; then of the same kind made its mate.".

26 *Id. at.*180, verse 4:7.

27 *Id. at.*1056, verse 30:21.

28 *Id. at.* 178, verse 4:1; at 398 verse7:189. The second cited passage refers specifically to mates dwelling with each other in love.

29 Riyadh Us- Saliheen1:280. *Hadith* reported by Abu Dawoud, a companion of the prophet Muhammad, available at https://muflihun. com/ riyadussaliheen /1/ 280.(accessed on (Jun. 22, 2016).

Islam consider performance of marital obligations as a worship itself.[30] It is understood that sexual relations are not solely for procreation but for a couple to connect and strengthen themselves.[31] The mutual consent and witnesses are mandatory[32] with clear proposal and acceptance.[33] Consent of the woman or someone on her behalf to the marriage is essential. If she is in pardha, usually a relative of the woman go to her inside the house along with two witnesses.[34] It was this relative to ensure her willingness for the marriage within the hearing of the witnesses to ensure her authorization her consent to the marriage.[35] When both the sides have consented, the marriage is completed.[36] It can be proved that it ensures the capacity of Muslim male or female to decide whom they should marry.

It is interesting to note that the concept and the nature of Muslim marriage has been a matter of discussion in the legal circle. Generally, it is considered as a contract. More specifically it can be said that marriage is not a sacrament, but a civil contract.[37] Another sound observation by Rajasthan High Court is that unlike Hindu marriage, Muslim marriage is "a contract with a view to mutual enjoyment and procreation and legality of children".[38] A very informative consideration of the marriage is given in the judgment of Pakistan Supreme Court observing "Muslims marriage is not a sacrament, but in the nature of a civil contract."[39] Justice Mahmood of the Allahabad High Court as early as in 1886 concluded that Muslim marriage is in the nature of a civil contract and nothing more than that. Justice Mahmood observed: "marriage among Muhammadans is not a sacrament, but purely a civil contract."[40]

The marriage (nikah) plays a vital role Islamic jurisprudence and almost every legal concept is related to it. Basically, it is a civil contract.[41] Its validity depends upon proposals and acceptance. The dower is paid by the husband as consideration. It is not mandatory that any particular form is to be followed, when it is written it is called Kabin Nama meaning, marriage contract.[42]

30 Hammudahabd Al Ati, *Family Structure in Islam* 54-56 (1977) quoted in Jaafar-Mohammad Imani & Charlie Lehmann, "Women's Rights in Islam Regarding Marriage and Divorce"4 *Mitchell JL & Prac.* 3 (2011).

31 *Id. at* 56.

32 *Id.*

33 *Id. at* 60.

34 Aqil Ahmad, *Mohemmadan Law* 114 (Central Law Agency, Allahabad, 24thedn, 2011).

35 *Id.*

36 *Mst. GulamKibriya v. Mohammad Shafi,* A.I.R. 1940 Peshawar 2, 3.

37 Mulla, *Principles of Mahomedan Law* 329 (20thedn, 2013).

38 *Hasina Banov.Alam Noor,* A.I.R. 2007 Raj. 47.

39 *Mst. Khurshid Bibi v. Muhammad Amin*, PLD 1967 SC 97.

40 *Abdul Kadir v. Salima*, ILR (1886)8 All 149.

41 Tahir Mohmood, *The Muslim Law in India* 45 (2nd edn, 1982).

42 A AAFyzee, *Outlines Of Muslim Law* 149 (4th edn,1974).

It cannot be considered as a civil contract only because marriage in Islam is of great religious value.[43] The Muslim marriage is an ibadat (devotional act) as essential as any devotional act that has been obligated to Muslims. It is advised as essential for every physically fit Muslim who could afford it. It was said,

> "When a person marries half of the religion is done, the other half to be done by leading a virtuous life in constant fear of God."[44]

All these shows the religious content of marriage in Islam with an objective to create a moral society. Islam conceives marriage as a solemn divinely ordained covenant giving rise to wide and varied reciprocal rights and duties to the parties thereof.[45] Thus, Muslim marriage envisages the protection of society by guarding human beings from foulness and unchastity.[46] The famous jurist and philosopher Al-Ghazzali also regards marriage as a means of "attaining nearness to God."[47] Sir Shah Sulaiman, C.J says in AnisBegam v. Mohd. Istafa, said, "Marriage in Islam is not regarded as a mere civil contract, but a religious sacrament too."[48] Apart from many similarities[49] with a civil contract, Muslim Marriage should also be seen in the light of sunnah of the Prophet and the rights and obligations imposed by Almighty in the Quran.[50] Sir Abdur Rahim had defined marriage in a better way incorporating both the above aspects that "the institution of marriage as partaking both of the nature of ibadat(devotional acts) and muamlat(dealings among men)."[51] Thus, it gives equal weightage to both the implications of marriage, namely, temporal and religious. The renowned scholar Tahir Mahmood also says that it is a misconception to say that there is no religious or social aspects attached to a Muslim marriage.[52] Fyzee also observed that while considering the religious and legal aspects, the religious implication of marriage is often neglected or misunderstood that marriage partakes of the nature both of ibadat and muamlat.[53]

Thus, marriage in Islam is a sacred covenant and it is recognized as the basis of the society aiming the upliftment and continuation of the human race. It legalizes

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43 But from what Justice Mahmood has said up to this point, he can only be accused of neglecting the religious aspect of marriage. See, V. P. Bhartiya, *Syed Khalid Rashid's Muslim Law* 55 (4thedn, 2004).

44 Id.

45 Saleem Akhtar &MohdWasim Ali, "Repudiation of marital tie at the instance of Muslim wife: Misgiving and clarification of Marital Tie at the Instances of Muslim Wife" 45 JILI. 471 (2003).

46 Ameer Ali, *Mohammedan Law* 179 (4th edn,1985)

47 Id.

48 ILR 1933 All 743

49 Muslim marriage like any other contract is constituted by *Ijab* (offer) and *Qabool* (acceptance), consideration of *Mahr* (Dower). See, Abdul Kader v. Salima, *supra note* 39.

50 Mulla, *Supra note* 36, at 330.

51 Abdul Rahim, *Principles of Muhammadan Jurisprudence* 327 quoted in Ibrahim Abdel Hamid, Supra note 45.

52 Tahir Mahmood, *Supra note*, 40.

53 A.A.A. Fyzee, *Outlines Of Muhammadan Law* 89 (4th edn,1964)

connubial relationship, putting duty on husband to take care of the wife and prescribes dower an essential part of the marriage. The dower is viewed like an element of sale as well.[54] Mulla defines it as "a sum of money or other property, the wife can claim from husband as consideration of marriage."[55] There is another view that it's not consideration, but a sign of respect for her.[56] They substantiate it by pointing out that non-specification of dower at the time of marriage will not render marriage invalid. So it must be considered as a nuptial gift which a Muslim man is bound to make to his wife.[57] The amount is fixed by agreement between the parties. It can be fixed before marriage or at its time or settlement can be done even after the marriage.[58] It can be equated to an actionable claim which can be recovered by wife from the husband.[59] Thus, the nature of marriage in Islam is not only contractual in nature, but it is considered to be a sacred obligation on each individual to get married and perform marital obligations to each other, to the society and to his religion. Thus, any argument that since it is purely a civil contract, it can be terminated at any time on the basis of whims and fancies of the parties is not correct.

Divorce and Muslim law

Divorce is permitted in Muslim law, but disapproved. It has been permitted to avoid greater evils. The Quranic idea of talaq is that only when it is impossible to live together as the dispute between them cannot in any way prolong the marital tie, they must be separated peacefully. Under Islamic system, the divine way of life, the Shariat has developed and elaborated the rules to deal with marriage and divorce. This is to achieve certain objectives by solemnizing[60] marriage and intended to make it like ahsan.[61] It means that marriage is to be construed like a fort wherein spouses can lead their life as strong as that of fort. Usage of this term indicates its relevance on the social life that Islam wanted to establish it stronger than any other. Terming it as a firm pledge[62] and making it an engine[63] of love and mutual respect, marriage is given a wide social impact even by comparing the spouses to each one's garments.[64] It is not making the ties united forever, instead, the Shariat realized the inevitable circumstances which justify the separation of parties.

54 A.A.A.Fyzee, *Outlines Of Muhammadan Law* 133 (4thedn, 1978)

55 Mulla, *Principles of Mohamedan Law* 308 (18thedn, 1985)

56 Id.

57 Paras Diwan, *Muslim Law in Modern India* 95 (4thedn, 1993)

58 *Kapor Chand v. Kedar Unnisa*, (1950) SCR 748.

59 *M. Amir Hasan Khan v. H. Mohammad Nazir Hasan*, A.I.R. 1932 All 345&346.

60 Abdulla Yusuf Ali, Supra note 23, at 187, verse 4:24, "except for those, all others are lawful, provided ye seek (them in marriage) with gift from your property, desiring chastity not fornication."

61 *Ahsan* in Arabic means 'very good'.

62 Abdulla Yusuf Ali, *Supra note* 23, at 185, verse4:21, "…and they (women) had taken from you firm pledge."

63 *Id.* at.1056, verse 30:21; see also verse7:189 at 398: "It is He who created you from a single soul, and there -from made his mate so that he might find comfort in her."

64 *Id.* at73, verse 2:187.

When the important objectives of marriage to create mutual love and affection among both sexes fails and consequently, they fail to perform their social responsibilities as they are devoid of the happiness and satisfaction for each other,[65] then there is no meaning in living together. When the peace between them is destroyed, the relationship also begins to shake which may end in the separation of the two. Then, at this point of time, the law should favor the separation of spouses rather than acting like a compelling force to make them lead a disappointed life of conflict of interests and here it is misinterpreted to a large extent.[66]

A brief account of historical background is necessary here where it was a tool of torture. Divorce among the ancient Arabs was very common. Men divorced their wives out of sudden caprice or whim.[67] Harassment of the wife was done through false accusation of adultery so as to escape the liability to maintain.[68] Among pre-Islamic Arabs, the powers of divorce possessed by the husband were unlimited.

Since it was difficult and not practical to put a full stop to this age-old practice entirely all on a sudden, Prophet controlled it through prescribing some conditions. It was allowed with these conditions so that it will act as some checks on husband's powers. But men may exercise their dissolution power at will, anytime, and for any reason or no reason at all. Here come the issues associated with the present practice of talaq.

Talaq

Divorce signifies the dissolution of the marriage. If it is done from the side of the husband by his declaration to that effect it is termed as talaq. Its literal meaning is that of taking off any tie or restraint. It also means get rid of a thing. For example, in case of a, a she-camel tied up with a string and when it is untied, the Arabs mention this state as: "talaqa al-naqatatalaqan"[69] meaning thereby that the she-camel has been released. The word talaq comes from a root (tallaqa) which means 'to release (an animal) from a tether. Husband is having many options to end up the marital tie.[70] But the best way of divorce is talaqul-sunna, in the ahsan form (best form). Here the husband pronounces a single repudiation considering the period of tuhr[71] and also when the sexual relationship between them has not taken place. This is to make sure the possibility of reconciliation when the wife

65 *Id.* at185, verse4:21.

66 The divorce is the most copious and uninhibited aspect of Muslim Matrimonial Law. See Dr. Paras Diwan and Peeyushi Diwan, *Family Law* 131 (9th edn. 2009).

67 Ahmed A. Galwash, *The Religion Of Islam* 117 (1945) quoted in Furqan Ahmad, "Understanding the Islamic Law of Divorce"45 JILI. 485 (2003).

68 Ibrahim Abdul Hamid, *Supra note* 45.

69 Nirma Qasimman, Divorce Final *available at*: https://www.scribd.com/ document/189910924/ Divorce-Final., (last visited on May,5, 2016).

70 For the different forms of repudiation available under Islamic law, see also Sampak P. Garg, "Law and Religion: The Divorce Systems of India", 6 TULSA J. COMP. & INT'L L 1,7-10(1998).

71 Means State of purity

"is in state of purity, and the husband is physically close to her and in this case, he might be persuaded to reconsider his decision."[72]

This is the 'most approved' form because the husband behaves in a gentlemanly manner with the wife.[73] The word 'ahsan' means 'the best' which signifies that talaq pronounced in this form is the best kind of talaq. It consists of one single pronouncement in one sentence made during the wife's tuhr. This waiting time is prescribed by the Quran itself.[74] The pronouncement of divorce is revocable during iddat. It can be done either using expressed words or implied ways. For example, resuming of the life with the wife[75] or if a person pronounces the word talaq and then says to his wife that 'I have retained thee', the divorce is revoked.[76] But on the lapse of the period of three tuhrs, the talaq becomes irrevocable.[77] In other words, after expiration of iddat, it cannot be revoked. 'Hasan' is also a kind of talaqulsunnat but considered less approved than talaqulahsan.[78] It consists of three pronouncements. It is to be made during three successive tuhrs and at the time of each of these pronouncements, sexual relationship must not have taken place. But it is not recommended as because the word talaq is repeated during three successive tuhrs.[79]

Among the various methods, the most recommended one is talaqulsunnat, more particularly ahsan form of talaq, because there is only one pronouncement and he gets opportunity to re-think and repudiate his earlier pronouncement of talaq.[80] The third mode of divorce is known as triple talaq. It is to be noted that the instant divorce of triple talaq becomes effective with immediate effect from the moment of pronouncement. The conditions to be fulfilled are:

i. Husband shall make three declarations of divorce

ii. It may be in one sentence or separate sentences. For example, "I divorce thee thrice" or "I divorce thee, I divorce thee, I divorce thee".

iii. One single declaration is enough if it is made with an irrevocable intention of ending up of the marriage.[81] For example, "I divorce thee irrevocably". This will immediately sever the marital tie.[82]

72 Haifaa A. Jawad, *The Rights Of Women In Islam* 78 (1998)

73 Furqan Ahmad, *supra note* 66, at 491.

74 Abdulla Yusuf Ali, *Supra note* 23 at 178, verse2:228. It says, "And the divorced woman should keep themselves in waiting for three courses". See also, verse 38:4:

"And those of your woman who despair of menstruation, if you have a doubt, their prescribed time is three months, and of those too, who have not had their course."

75 Aqil Ahmad, *Supra note* 33 at 171.

76 FaizBadruddinTayabji, *Muslim Laws* 146-147(1968).

77 Furqan Ahmad, *supra note* 66, at 489.

78 YawerQyawerqazalbash, *Principles Of Muslim Law* 129 (2ndedn, 2005).

79 Aqil Ahmad, *Supra note* 33.

80 J. Espisto& N.J. Delong-Bas, *Supra note* 5 at 105.

81 *Sheikh Fazlur Rahmen v. Mst. Aisha*, (1929) 8 Pat 690.

82 *Mohammed Ali v. Fraeedunnisa Begum*, A.I.R.1970 AP 298.

Thus, it is operative after iddat in ahsan form and on the third declaration. But in the case of talaqulbiddat, it will become effective from the moment of pronouncement of talaq. If it is in written form, it will be concluded along with the execution.[83] In the various modes of divorce like ahsan or hasan, reconciliation is given importance. Nowadays the popular method is talaqul-bid'a or talaq of innovation. Here, husband simply says "anti taliq" in a single stretch.[84] It being the easiest or simplest in giving immediate result of divorce, unfortunately this least recommended method has become popular.[85] Triple talaq exists amongst Muslims and only the husband can say to his wife to make an instant divorce. "As an example, a man, who does not like his wife's dinner, or a comment she has made to him, can utter, 'talaq, talaq, talaq"[86] and the spousal relationship is disappeared.

There are two forms of talaqul-bid'a as well. The first form consists of three declarations of divorce occurring at one time. The 'triple declaration' is made during a single tuhr by pronouncing one sentence, 'I divorce you thrice.' It can also be made through three separate sentences, 'I divorce you; I divorce you; I divorce you,' ['talaq; talaq; talaq'] or one irrevocable declaration. It can be in oral or written form and once it is pronounced marital relation ends all on a sudden.[87] Neither of them are approved by Prophet and still why it is accorded sanction to get practiced is the big question here.[88]

Triple Talaq- Jurisprudential Status

As discussed above, the traditional mode of divorce is further sub-divided into three and one among them is triple talaq. Bid'a means forbidden and it is not acceptable. In common parlance, this is also called 'instant triple talaq.' It is sinful form of divorce. It was an innovation by Omayyads[89] with an ulterior motive.[90] The talaq-ul-biddat has two forms, triple irrevocable talaq and single irrevocable talaq. If we consider what the Quran and Sunna require, we will reach

83 Asaf .A.A. Fyzee, *Outlines Of Muhammadan Law* 155 (9thedn, 2005).

84 For a critical examination of the institution of triple talaq, see Mohammed Imad Ali, "Triple Divorce: A Critical Analysis", in ZalehaKamaruddin, *The Islamic Family Law: New Challenges In The 21 St Century* 133-60 (2004).

85 Ashar Ali Engineer, *Rights Of Women In Islam* 150 (2004) ;UrfanKhaliq, "Beyond the Veil?: An Analysis of the Provisions of the women's Convention in the Law as Stipulated in Shari'ah" 2 BUFF. J. INT'L L. 1,35 (1995).

86 Karen Leslie Hernandez-Andrews and Carol Fontaine, Talaq, Talaq, Talaq—Women Suffering In India Because of the Misuse of Triple Talaq available http://wunrn.org/news/2007/10_07/10_01_07/100707_india.htm (last visited on Octo.13, 2016).

87 John Esposito, *Women In Muslim Family Law* 31 (Syracuse: New York, Syracuse U P, (2001)).

88 Ibid.

89 According to tradition, the Umayyad family (also known as the BanuAbd-Shams) and Muhammad both descended from a common ancestor, AbdManafibnQusai, and they originally came from the city of Mecca in the Hijaz. Muhammad descended from AbdManāf via his son Hashim, while the Umayyads descended from AbdManaf via a different son, Abd-Shams, whose son was Umayya. The two families are therefore considered to be different clans (those of Hashim and of Umayya, respectively) of the same tribe (that of the Quraish).

90 Aqil Ahmad, *Mohammedan Law* 169 (21stedn 2004).

a conclusion that it was not permitted as it is practiced today. There is universal condemnation regarding this practice as reprehensible.[91] Surprisingly all surviving Sunni schools of law accords validity to it whereas the Ja'fariShi'I school alone prescribes it as void. As per this method of divorce, immediate divorce of woman is done though there are doubts regarding the number of pronouncement in a single occasion or three multiple occasions. Muslims, especially among Hanafis in India, Bangladesh, Pakistan, and Iraq, practice it by a pronouncement of three times on one occasion.[92] Imam Abu Hanifa held it is biddat, and not allowed, whereas Imam Shafi hold the view that it is a right of the husband.[93]

The peculiarity of this mode of divorce is that it's immediate effect and no chance for reconciliation. This was why the Prophet refused it and hence it was not practiced during his time. It can never be stated thus that this was granted his approval at any point of time. Instead, once one of his disciples had divorced his wife, giving the three talaqs at the same time, he held that it was nothing short of playing with God's words and rejected it.[94] Shias and Malikis do not accept this mode of divorce.

Historical Background of Triple Talaq

During the Prophet's lifetime and during Abu-Bakr's reign and in the first two years of Hazrat Umar's rule there was no practice of pronouncing three divorces in one sitting. If someone did that, it was treated as one.[95] It got an approval during the latter part of Caliph Umar's rule. While Imam Haneefa and Imam Malik hold it as not allowed, it is said[96] that Imam Ahmad bin Hanbal, had first hold a positive view but later reconsidered and changed his opinion in this regard and held that a true study of Quran proves this as invalid. The Holy Quran allows only revocable divorce across a time span of three months.[97] Imam IbnTaymiyyah, also supports this view and certifies the same stand of Imam Ahmad IbnHanbal also.[98] From these it is undoubtedly clear that triple talaq cannot exist as per the Holy Quran.

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91 Kecia Ali, Graduate Program in Religion, Duke University -- kecia.ali@duke.eduamerican Academy of Religion Annual Meeting, November 2001 3 available at: https://www.academia.edu/10471563/Teaching_about_ Women_Gender_and_Islamic_Law_Resources_and_Strategies (last visited on Octo.15, 2019).

92 Nehaluddin Ahmad, "A critical appraisal of 'triple divorce' in Islamic law" 23 International Journal of Law, Policy and the Family. 53-61 (2009), available at http://lawfam.oxfordjournals.org/ at Aligarh Muslim University (last visited on June,17,2015).

93 Maulana' Umar Ahmad ' Usmani, *Fiqh al-Qur'an* ., Vol II, 204 quoted in Nehaluddin Ahmad, Id at 60.

94 Ammer Ali, *Mohammedan Law* II, at 51 quoted in Dr. Nishi Purohit, *The Principles Of Mohammedan Law* 194 (2nd edn, 1998).

95 HafidhibnHajar al-Asqalani, *Bulugh al-Maram*, 314 quoted in Dr. Nishi Purohit , Ibid.

96 Id. at 202–3; see also Susan A. Spectorsky, Chapters On Marriage And Divorce: Responses Of *IbnHanbal And IbnRahwayh*, (University of Texas Press,1993).

97 According to Imam Ahmad bin Hanbal, even if three divorces are pronounced on a single occasion, they should be treated as one, see quoted in Nehaluddin Ahmad, *Supra* note 95 at 57; Imam IbnTaymiyyah also has thrown much light on this issue in his fatwa (religious edicts), see also FatwaImamIbnTaymiyyah (Cairo,n.d.),vol.III,22.

98 Maulana 'Umar Ahmad 'usmani, *Supra* note 96 at 209.

The Logic Behind Umar's Decision

The reliability of this practice commenced from the period of Caliph Umar. It will be noteworthy to study why Umar has validated such a practice and what was the logic and rationale behind this. It is said that some of the extraordinary situations of that time compelled him to do so.[99] During wars of conquest, Arab men wanted to marry the beautiful women from Syria, Egypt, and other areas from where they were brought to Medina after capturing their places in war. These women were reluctant to live with co-wives and insisted to do triple talaq them so that they thought Arab men cannot take them back again. It was because these women from different places did not accept the Quranic view that triple pronouncement will be considered as one. In order to satisfy these women, Arab men did what they said, later on leading to conflicts and disputes when they took back their former wives. To overcome these difficulties, Umar thought it fit to enforce three divorces in one sitting as an irrevocable divorce.[100] With an objective to settle down these claims Umar held that men are bound by their words and triple divorce they pronounced is effective.[101] It was a temporary alteration of rules due to the pressure of events by an ordinance type by a ruler to meet a specific situation. Unfortunately, ijma of subsequent generations of jurists followed the legal reasoning (ijtihäd) of Umar rather than on divine legislation.[102] Thereafter, it has become an integral part of Islamic Shariat among the Sunni Muslims[103] and being enforced as a divine law.

Triple Talaq-A Critical Introspection

The basic teachings of Islam on talaq have been with an objective of putting an end to marital ties when it fails beyond repair. The real situation in life around is such that there are many reported cases of triple talaq by mail, over telephone and even through text messages.[104] Even though divorce is the normal outcome of an unhappy marriage, people do not understand that divorce should be the last resort according to the teachings of Islam. Moreover, the practice which does not have the support of Prophet or the Quranic approval is also followed under the guise of religion and one among them is this.

Unfortunately, its usage is making the lives of women worse through the way the woman is irrevocably divorced. The husband cannot take her back, even if he repents or if he wants her in his life. No one can help the wife either. The religious scholars could have issued a clarification in this respect. What else prohibits them from taking a bold stand in this matter as Prophet himself has expressed his

99 Quoting the noted Egyptian Islamic scholar Muhammad Husain Haykal in Nehaluddin Ahmad, Supra note 95 at 58.

100 Umar Ahmad usmani, *Supra* note 96 at 237-9.

101 John L. Esposito With Natana J. Delong-Bas, Women In Muslim Family Law 204 (2ndedn, 2001) available at https://books.google.co.in/books?redir_esc=y&id=MOmaDq8HKCgC&q (last visited on Octo.13,2016), YossefRapoport, "Imam IbnTaymiyya on Divorce Oaths 'The Mamluks in Egyptian and Syrian Politics and Society'", in Michael Winter &AmaliaLevanoniet..al, *The Medieval Mediterranean' People, Economies And Culture* 195 (2004).

102 *Id. at* 204.

103 Nehaluddin Ahmad, *Supra* note 95 at 58.

104 *Id. at* 57.

discontent upon this? Moreover, matters related to the marriage is interpreted not as a contract but a spiritual one too, and in that sense a believer is expected to follow strictly what his supreme leader has directed than merely following what the later ruler adopted to deal with a situation. It is nothing but to save the arbitrary male interests.

It is a clear contradiction of Quranic principles.[105] Another point to be noted is that there is no scope for remarriage between the spouses except after an intermediate marriage of wife.[106] A social evil simply continues due to the ignorance of community leaders as well as the community as a whole.[107] It is nothing but an oppressive form of emotional abuse which is neither supported by the Quran or Sunnah.[108] It appears to be completely unilateral, unguided and absolute with no rationale background to support triple talaq. It cannot be easily identified with Muslim culture and as a part of Muslim law though its supporters claims it to be so. The above study proves that it is not a part of religion and hence, does not hold any sustainable claim to have a continuation of existence under the right to practice or propagate religion.

August 22, 2017 was a memorable day as it was on that day; the Supreme Court of India has declared triple talaq as unconstitutional by a five judge bench with the two judges dissenting the majority view.[109] It cannot be denied that, as in any other religion, Islam also disapproves divorce except in cases of extreme situations where the spouse cannot carry on the marriage relation any further. There are a lot of provisions in Islamic law that warns its followers not to indulge in the unwanted use of divorce procedures. Moreover, reconciliatory steps are also recommended before the spouse has to take the final decision of divorce between them. Quran requires two arbitrators from both sides for resolution.[110] In spite of

105 The relevant verse of the Quran can be relied upon: "A divorce is only permissible twice; after that, the parties should either hold together on equitable terms, or separate with kindness. It is not lawful for you, (men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by Allah. If you (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she give something or her freedom. These are the limits ordained by Allah; so do not transgress them, if any do transgress the limits ordained by Allah, such persons wrong (themselves as well as others) The Holy Quran, Sura-II, Ayat- 229 in translation by Abdullah Yusuf Ali,Supra note 23.

106 The Quranic injunction regarding this condition is: "If a husband divorces his wife (irrevocably), he cannot, after that, remarry her until after she has married another husband and he has divorced her. In that case, there is no blame on either of them if they're -unite, provided they feel that they can keep the limits ordained by Allah, which He makes plain to those who understand' , The Holy Quran, Sura-II, Ayat- 230, Ibid.

107 Sona Khan, Veil of Ignorance: Muslim Women's Talaq Trapavailable at: http://expressindia.indianexpress.com/news/fullstory.php?newsid=35361 (last visited on Oct. 15, 2016).

108 Karen Leslie Hernandez-Andrews and Carol Fontain, *Supra* note, 89.

109 Shayara Bano v. Union of India,Writ Petition (C) No. 118 of 2016 (India), (2017) 9 SCC 1,available at: https://www.thehindubusinessline.com/multimedia/archive/03194/Supreme_Court_judg_3194881a.pdf(last visited on Sept.22,2017).

110 The Quran says: As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (next) ref use to share their beds, (and last) beat them (lightly).But if they return to obedience, seek not against them means (of annoyance), for God is most high, Great (above you all), Abdullah Yusuf Ali, The Meaning of the Holy Qur'an (8th. edn. trans. 1996),p.1482, at verse 4: 34.

these, still, chaos in talaq matters exists in Islam and the prominent among them is about triple talaq. The matter reached the Supreme Court through the case of ShayaraBano[111] and the Apex Court had a wonderful analysis of Muslim law as it is given in its primary sources and declared that triple talaq is unconstitutional. Subsequent to this, the Government brought now an Ordinance to do away this social evil[112] in the light of the judgment of Supreme Court declaring triple talaq as unconstitutional. The bringing of Ordinance has paved way for deliberations-positive and negative, on the topic throughout the nation which has been discussed in the forthcoming parts of this article.

Shayara Bano v. Union of India- An Analysis

Facts of the case

Mrs. Shayara Bano has approached the Supreme Court against the triple divorce by her husband. He had pronounced the following words. "I gave 'talak, talak, talak', and hence now onwards there is no relation of husband and wife. From today I am 'haraam'[113] and I have become 'naamharram'. In future you are free for using your life …" Shayara Bano has sought a declaration of what her husband pronounced to be void. She argued that an abrupt, unilateral and irrevocable divorce, under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 is unconstitutional. Also the 'talaq-e-biddat' is not a part of 'Shariat' (Muslim personal law). Moreover, the divorce of the instant nature which cannot hold to be valid as per the Shariat Act also violates the fundamental rights guaranteed as per Articles 14, 15 and 21 of the Constitution of India.

The petitioner's husband, Rizwan Ahmad claimed that the marriage between the petitioner and him was solemnized as per 'Shariat'. As per the divorce deed, the husband claimed that he had pronounced 'talaq' as per the Muslim law and followed all the requirements under the Hanafi sect of Sunni Muslims.,

Analysis of the Judgment

The Supreme Court of India left all other related issues like polygamy and halala and focused on 'talaq-e-biddat' or triple talaq, It was submitted in Supreme Court that triple talaq is not permitted by the Quran nor by hadith. The Supreme Court analyzed verse 222 of section 28 of sura-II[114] that the verse mandates,[115] that in case there is a threat of hurt to the woman, she deserves consideration. Verse 223 was interpreted as it exalts the husband; to be wise and considerate towards her, and treat her in such manner as will neither injure nor exhaust her."[116] The Verses 224 to 227 were assessed in their context of existing customs which were very unfair to married women and were interpreted by the Supreme Court that they work as a caution to husbands to understand, that an oath in the name of God was not a

111 *Supra* note, 112.

112 The Muslim Women (Protection of Rights On Marriage) Ordinance, 2018, (Act 7 of 2018), s.4.

113 The word 'haram' means 'unlawful'.

114 Means Chapters in Quran.

115 *Shayara Bano v. Union of India*, *Supra* note,112 at 14.

116 *Id* at 15.

valid excuse since God looks at intention, and not mere thoughtless words. The Quran accordingly suggests that in such a situation, divorce is the only fair and equitable course. At the same it is recognized, that divorce is the most hateful action, in the sight of the God."[117]

The Hon'ble Court concludes through the perusal of the aforesaid 'verses' that divorce for the reason of mutual incompatibility is allowed.[118] But, "to prevent erratic and fitful repeated separations and reunions, a limit of two divorces is prescribed. In other words, reconciliation after two divorces is allowed. After the second divorce, the parties must definitely make up their mind, either to dissolve their ties permanently, or to live together honorably, in mutual love and forbearance – to hold together on equitable terms."[119] The judgment clearly cautions that after the divorce, a husband cannot seek the return of gifts or properties that he may have given to his wife. Such retention by the wife is permitted, only in recognition that the wife is economically weaker. An exception has been carved out in the second part of verse 229, that in situation where the freedom of the wife could suffer on account of the husband refusing to dissolve the marriage, and perhaps, also treat her with cruelty; it is permissible for the wife, in such a situation, to extend some material consideration to the husband. Separation of this kind, at the instance of the wife, is called khula.[120]

Verses 232 and 233 are also critically assessed in the judgment.[121] It indicates that the termination of the contract of marriage is treated as a serious matter for family and social life. The relevant verses of 1 and 2, in section 1 of Sura LXV are also dealt with.[122] It endorses the view, that of all things permitted, divorce is the most hateful in the sight of the God. Even though, the verse provides for divorce, it proscribes the husband from turning out his wife/wives from his house. It also forbids the wife/wives, to leave the house of their husband, except when they are guilty. The Court observes that reconciliation is suggested, whenever it is possible as the Quranic mandate. It is recommended at every stage. The first serious difference between the spouses is first to be submitted to a family counsel, on which both sides are to be represented and verse requires the divorce to be pronounced, only after the period of prohibitory waiting.

The court held that applying the test of manifest arbitrariness to the case at hand, it is clear that triple talaq is a form of talaq which is itself considered to be something innovative and an irregular or heretical form of talaq. The Court quotes the opinion of Fyzee that the Hanafi school of Shariat law, which itself recognizes this form of talaq that though lawful it is sinful in that it incurs the wrath of God. The court reiterates its view in *Shamim Ara v. State of U.P*[123] that "the correct law of talaq as ordained by the Holy Quran is that talaq must be for

117 *Id* at 18.

118 *Id* at 19.

119 *Id*. at 20.

120 *Id*. at 20.

121 *Id*. at22.

122 *Id*. at 26.

123 (2002) 7 SCC 518, Para 13.

a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters, one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected. Again, quoting the judgment in Rukia Khatun case[124] that as ordained in Holy Quran, talaq must be for a reasonable cause and that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, talaq may be affected.

It was concluded that since it involves an instant nature of terminating the relationships and irrevocable, it does not offer any sort of reconciliation. Hence it is arbitrary and based merely on the whims and fancies of the Muslim husband and it is violation of the fundamental right contained under Article 14 of the Constitution of India. As far as the 1937 Act is concerned in, enforcing triple talaq, it comes under expression 'laws in force' in Article 13(1) and must be struck down as being void to that extent.[125] It is to be noted that the then Chief Justice of India, J.S.Khehar. J employed the Supreme Court's rare and extraordinary jurisdiction through Article 142 of the Constitution of India to injunct Muslim Husbands from divorcing their wives for the next six months through instant talaq, while such a move was doubted by another member Justice Kurian Joseph as whether fundamental right can be injuncted by way of A.142 But Chief Justice issued the direction under Article 142 observing that even theocratic Islamic States had corrected this practice and banished the instant talaq. Thus, the result was that though the majority judgment set aside the triple talaq, the Chief Justice wanted to invoke Article 142 for putting an injunction on husbands from divorcing their wives for the next 6 months through this rare and extraordinary jurisdiction and sought for a legislation to end this evil. This finally culminated in an attempt to pass a Bill for this, failing which resulted in the Ordinance which is analyzed in this paper next.

The History behind the Ordinance No. 7 of 2018 &the Muslim Women (Protection of Rights on Marriage), Act, 2019

In pursuance of the judgment in Shayara Bano case, the government has decided to initiate an enactment to implement the Supreme Court decision through a new legislation on triple talaq and wanted penalize it.[126] The Bill in this respect was introduced and an imprisonment of three years was proposed to those who practice it. It also had a provision making all forms of it, in verbal, written or electronic as illegal. It proposed that this practice is a cognizable and a non-bailable offence. But the new legislation was cleared in the Lok Sabha on December 28, 2017, but it was unable to get the sanction of Upper House due to the deadlock over the Opposition's demand for close scrutiny by a Select Committee. In this situation, Government brought it as an Ordinance namely, the

124 (1981) 1 Gau LR 375.

125 *Supra* note112 at 393.

126 The Muslim Women (Protection of Rights on Marriage) Bill, 2017, available at: http://www.prsindia.org/billtrack/the-muslim-women-protection-of-rights-on-marriage-bill-2017-5008/ (lastvisited on Octo.5,2019).

Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 on September 19, 2018.[127]

The bill was reintroduced and passed by the Lok Sabha and by the RajyaSabha in July 2019. Thereafter, the bill received assent of the President of India.[128] The Act also protects an aggrieved woman by claiming maintenance for her dependent children. It was subsequently notified as law in the same month. The acts stand to be retrospectively effective from 19 September 2018.

Analysis of the Ordinance & the Act

The various provisions of the Ordinance are critically analyzed and the strength, contradictions and issues are listed below. Of course, it is a progressive step; still the gaps need to be filled.

1. Section 2 (c) in the Ordinance[129] which stands as S.2(b)in the Act specifically provides that jurisdiction related to any information related to triple talaq can be entertained by the magistrate having jurisdiction over the woman's residential place. This of course is a women friendly approach where jurisdictional aspect is defined by limiting it to the place where she resides.

2. The defining Section 2(c) of the Act (previously s.2 (b) of the ordinance)[130] which decides talaq as talaq –e-biddat is misnomer and is leading to confusions. While, the word talaq indicates other types of talaq including talaq-ahsan, talaqhasan or talaq –e-tafweez which are left untouched by the Ordinance, the use of the word talaq throughout the Ordinance and Act is quite confusing leading to further conflicts. This necessitates a rewording of the word talaq.

3. As a consequence of this faulty definition clause, Section 3 in the Act provides that "any pronouncement of talaq by Muslim husband is void" is not at all specific and meaningless because the talaq as it is understood stands still valid except triple talaq.

4. The penalizing Section 4 which provides that any Muslim husband who pronounces talaq shall be punished with 3 years of imprisonment and fine is again meaningless because all men who pronounce talaq is not punished.

5. Section 6 of the Act which provides for the custodial right of children to women in the event of pronouncement of talaq is again questionable because if the talaq itself is void , she is still having the right to matrimonial home and the marriage is still valid and how can the separate custody can be claimed while nothing has been displaced from her as the pronouncement is void.

127 available at http://www.prsindia.org/billtrack/the-muslim-women-protection-of-rights-on-marriage-ordinance-2018-5456/ (last visited on 5/10/2018).

128 available at: http://legislative.gov.in/actsofparliamentfromtheyear/muslim-women-protection-rights-marriage-act-2019(last visited on Oct.23, 2019).

129 *Supra* note115, s. 2 (c).

130 *Id* at Sec.2 (b).

6. Though the earlier Bill does not provide compounding, Section 7(b) of the Ordinance is retained in the Act and provides for compounding which of course in itself is appositive step promoting reconciliation between parties.

7. As per Section 7(c), no person punishable under this Ordinance is to be released on bail. Bail will be considered only if the Magistrate had heard the woman upon whom talaq is pronounced and is satisfied. It means that the bail is made dependent on an extra judicial fact i.e the sweet will of the woman against whom he has a strained relation. This further complicates the possibilities of reconciliation between the parties. The only positive part of this provision is that it can be utilized by the woman for reaching any financial bargain if at all she does not wants to continue the married. Still it may necessarily involve the interest of advocates too as it's a matter of bail too.

Other Grey Areas

By declaring triple talaq as void, it means it amounts to no pronouncement at all in the eyes of law which is contradicting the judgment in ShamimAra case. Moreover, there are the practical difficulties in ensuring the gender justice. The declaration of triple talaq as void or illegal, does not prevent in any way from pronouncing talaqahsan or talaqhasasn. While in ShamimAra case, the Supreme Court took a view that triple talaqas one single pronouncement of talaq, after ShayaraBano or Ordinance, there is nothing to prevent him from making a second or third pronouncement subsequently. In this case, the woman will have two months of legal status as wife, whereas under the Ordinance, she will have one day or one-month advanced legal status as the husband can pronounce a valid talaq even from jail as and when he comes to know what he pronounced wasvoid.

The plight of the woman is not going to be changed unless the proper screening of talaq is ensured with. It is submitted that it should not be an offence of cognizable nature as the penal provisions related with the wife can generate a higher degree of hatred in husband making reconciliation impossible. If the purpose is gender justice, criminalization in itself cannot serve this objective. Marriage is after all a civil matter; effort of reconciliation should be given more importance and, in this perspective, criminalization of a procedure of divorce cannot bring the desired result.

It is true that as per the Islamic belief, divorce should be a deliberate and thoughtful practices which will take normally take several weeks and the instantaneous triple talaq pronouncement is against this established principle of Islamic law. But it must not be forgotten that it's not a civil contract and hence it is logical to follow a civil procedure in case of a matrimonial offence under it. The Act speaks of subsistence allowance and custody of children as if the marriage is dissolved while the law itself declares that triple talaq is void and will not dissolve marriage. The provision of post-divorce matters ignoring the effect of triple talaq as void is meaningless. The Act cannot secure justice to women by putting the husband behind bar as there is no alternative way suggested to secure her economic rights in his absence because of his imprisonment. The single-step

criminalization needs legislative reconsideration in a manner that the primary objective of safeguarding the rights of Muslim women.[131]

Now, the All India Muslim Personal Law Board has filed a plea in the Supreme Court challenging the law which criminalizes instant triple talaq. The plea has challenged the Constitutional validity of the Act on the ground of manifest arbitrariness as well as violation of Articles 14, 15, 20 and 21 of the Constitution and makes unwarranted/wrongful interference in the Muslim Personal Law as applicable to Hanafi Muslims. Another argument is that the impugned Act is a criminal statute having adverse impact on the life and personal liberty of those on whom penal consequences are to be visited. It is the elementary principle of law that any act or omission which is dealt with penal consequences should be defined with accuracy and precision. Moreover, since talaq-e-biddat, has already been declared to be unconstitutional and its practice set aside, such utterance has no legal/civil consequence, it said. Consequently, despite such utterances, marriage survives and thus it was totally redundant and irrational to declare statutorily the practice of talaq-e-biddat as void. It also raised that section 3 of the Impugned Act also suffers from internal contradiction because if any act which is declared void has no existence in the eyes of law and it is redundant and contradictory to declare non-existent act illegal. "The section, therefore, suffers from manifest arbitrariness as it makes provision of law which is totally unnecessary," the plea said.[132]

Suggestions

It is noteworthy in this context that even now, the present legal system struggles by making laws for preventing the female infanticide. Right to birth and life for women is yet to be implemented and accepted by many of the societies even now. But the Quran introduced this as a mandatory social norm and effectively ended the cruel pre-Islamic practice female infanticide through its bold declaration, many years before of the Human Rights Declaration of 1948. It advocates for fundamental human rights without reserving them to men alone. It projects that these rights are opportunities to develop all of our inner resources. It protects the absolute value of each human life by declaring that each person has the right not only to life but also to respect through its verse quoted below.

"Verily, we have honoured every human being."[133]

It is to be noted that the word 'human being' is used and the verse does not discriminate between men and women. It expressly warns that,

"When the female (infant) buried alive is questioned for what crime she was killed."[134]

In this regard, the right to life and recognition of human right of Muslim women by the primary source of Muslim law in unequivocal terms means nothing short

131 M.S.Priya,Need for Reconsideration Of Triple TalaqBillavailable at: https://www.livelaw.in/need-reconsideration-triple-talaq-bill/https://www.livelaw.in/need-reconsideration-triple-talaq-bill/(last visited on Oct. 7, 2018).

132 available at:https://www.indiatoday.in/india/story/muslim-body-moves-sc-challenging-law-triple-talaq-1611659-2019-10-22 (last visited on Oct 20, 2019).

133 Quran 17:70.

134 Quran 81:8.

of adignified life equal to that of Muslim man. It is quite illogical to argue that while the primary source of Muslim law itself provides for gender equality, a practice like triple talaq can claim its back up by Muslim law. So it is suggested here that there are better ways to abolish this unhealthy practices in the personal law itself. A proper codification of the Muslim law in tune with Constitutional principles and Quranic spirit can resolve these issues. It will be more convenient to persuade people also in this way as religious matters are more of highly sensitive areas. In this way, the criticisms like political motive of the government, vested interest of political parties etc., can be avoided.

Conclusion

Reformation of Personal laws in tune with the ideals of justice is always to be welcomed, but a little bit of caution and avoidance of hasty steps could bring desirable social change more effectively.[135] Scholars like Prof. Tahir Mahmood had commented that the pronouncement of triple talaq at one sitting by the Muslim husbands is making the lives of Muslim women miserable due to its purported irrevocability.[136] Justice Krishna Iyer also pointed out that it is a popular fallacy that a Muslim male enjoys under the Quranic law unbridled authority to liquidate the marriage.[137] We need a more humanistic interpretation of law in this context which is present in Muslim Law itself which is evident from the below quoted opinion of Justice Krishna Iyer.

> "Islamic jurisprudence, it seems to me is more sinned against than sinning and progressive interpreters do great service to the universe of law if they present many dimensions of Muslim law in its pluralist versions and value based unity tempered by a modern synthesis of justice and juristic semantics."[138]

This humanistic element is eclipsed by the patriarchal forces through mixing law with unhealthy cultural elements. Even though there are strong criticisms based upon religious facts, this unhealthy treatment against women are continued, mostly through the narrow interpretations of Ulemas or Moulavis of the different school. It is correctly observed by Justice Kader, quoted below.

> *"What was destroyed in the process was not a mere body of thought but the very apparatus of thinking. This has led to a pernicious effect on the progress and advancement of Islamic law, which 'lost its way into the dreary desert sand of dead habit"*[139]

Still, no space for desperate cries, as democracies work through institutions and time will make a demand for change. So, it is not surprising that new generations

135 The Indian express, Sept. 21, 2018.

136 TahirMahmood, "Muslim Women too have Rights", The Hindustan Times July 10, 1993.

137 Yousuf v. SowrammaAIR 1971 Ker 261 at 264.

138 Justice V. R. Krishna Iyer in foreword in Justice S A Kader (Former Judge of High Court Of Madras), *Muslim law of Marriage and Succession in India* (Eastern law house Kolkata, 2017)

139 *Ibid*.

of Indians are knocking at the Supreme Court's door to demand equality and liberty[140] and it is quite appreciable that these issues are well addressed by the Hon'ble Court. But Judgment leaves much confusion and even after the Act still a lot many of contradictions exist in this area which has to be studied and resolved. Time has come to say a big 'no' to this practice forever. And for it to happen, much more is yet to be done.

140 Tufail Ahmad, Triple talaq issue: Muslim women fighting for their rights is a great moment for democracy, available at :http://www.firstpost.com/india/triple-talaq-issue-muslim-women-fighting-for-their-rights-is-a-great-moment-for-democracy-3064028.html(last visited on Oct.7,2018).

Patent on Green Technology and its Impact on Environmental Protection- With Particular Reference to Technology Transfer Mandate

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Abstract

The evolutionary theory of innovation has shown that scientific inputs play a growing role in the innovative process. It indicates technological paradigm and also recognizes the relationship that exists between technology and investment. In fact, technology is not just information that can be easily communicated, but requires a capacity to learn and invest in order to incorporate it into the industrial production system. Investment capital significantly promotes the establishment of research and development activities within and beyond the arena of industries. As a result of innovative research, new inventions are flooded into the market and occupy a great quantum of market enrichments. Moreover, patent plays a very pivotal role in encouraging and enhancing technology and also mandates transfer of technology. It is indeed evident that if patented technology is transferred, the local industry may learn and develop the capacity to reproduce the same after the end of the patent period. As a consequence of technology transfer, there are a lot of new technologies that will be invented and commodified. Most significantly, scholars and researchers are currently producing environmentally sound technology, which is specifically known as "Green Technology". Green Technologies protect the environment from pollution and other kinds of environmental degradation. Green technologies protect the environment, ensure less pollution, use all resources in a more sustainable manner, recycle their wastes, handle residual wastes in a more acceptable manner, etc. The Patent given to these green technologies is called green patent. Patents over these kinds of environmentally sound inventions prevent environmental problems throughout the world. Thus, this research paper affirmatively discuss the impact of patents over green technologies in the context of mandatory technology transfer and sustainable innovation.

Keywords: Green Technology, local industry, environmental problem.

Introduction

Due to the onward march of science and technology, the facets of invention and innovation got a new dimension. Researchers all over the world entered in new fields based on their expertise and produced desired end-result, for which the society had been waiting for quite a long period. Patent encourages inventors and innovators to do further research for the enhancement of technological development. Currently, investors are promoting their economy rather than individual inventors by bringing novel product or process to the market. It is understood that research and development is quintessential for the promotion

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of new technology in the market. As a result of this new technological extension, inventors produced environment friendly inventions in various perspectives. This will obviously help society from hazardous consequences of inventions. These kinds of inventions are badly required by the society, the present scenario is concerned more so, WIPO like international organizations which was also started for encouraging members in countries to take appropriate initiatives to introduce inventions, based on green technology and which further require technology transfer through patent information. This research work makes an attempt to discuss the role of patent system in encouraging new technological innovations like Green Technology and the significance of transfer of Green Technology in the context of TRIPS Agreement.

Invention and Innovation as Tools for Patent

Invention is considered to be the bedrock of innovation. It is the first step of innovation. Statutorily, invention means, "any new process or product involving inventive step and capable of industrial application"[2]. In a liberal sense, an invention is an idea, concept or design for a new or improved product or process that is available as concrete information in the form of a description, sketch or model. On the other hand, innovation means an expansion of an invention. Innovation obviously brings more inventions in the market place. Thus, it is understood that invention is the basic aspect of innovation but innovation often requires significant additional development activity beyond that basic step in order to get new products for consumers[3]. The concepts of invention and innovation indeed, got new dimensions. Thus, the very practice of research and development is facing new challenges and concerns in terms of sustainable development. As a consequence, some international legal frameworks are imposed for multi-faceted obligations to lead the international communities so as to meet the future challenges with the golden thread of contemporary innovative policies, for example, green technology.

Interface between R&D and Innovation

Innovation, research and development are directly interconnected with each other. In fact, invention is the by-product of R&D and patent is the key component of economic growth. In its relation to R&D expenditure, patents serve as the financial reward for everyone especially one who is willing to incur R&D costs. Patent provide a significant role in the total technology life cycle from early R&D to the market introduction stages.

With the specific end-goal of R&D new technologies, the patent system used to give great incentives by way of conferring monopoly. The investors are completely depending upon the R&D outputs for the introduction of new technologies in the market. Moreover, it is evident that R&D needs higher level of capital, so that researchers would be able to bring something new and innovative techniques for the society. The patent system certainly recoups the

2 Sec 2(j) of Indian Patent Act 1970 as Amended in 2002.

3 Henry. C. Su; *Invention is not Innovation and IP is not like other forms of Property*. – Available at http://www.americanbar.org.

expenditure invested by the inventor. Patent protects the interests of the inventors whose technologies are truly ground – breaking and commercially successful by ensuring that an inventor can control the commercial use of this invention.[4] This creates opportunities for inventors to sell and get trade license for their patented technology with others.

Moreover, the long-term prospect for an emerging worldwide system of innovation ultimately depends on the level of investment- based R&D. Thus, giving monopoly by way of patent. The patent stimulates further improvement in the existing efficacy and promotes technological innovations as a form of new products and processes. In addition to this, there are highly complex technologies which require technological experience and strong engineering capacity. On the other hand, there are technologies that can be easily applied and can be produced practically anywhere. Between these two extremes, there is a broad middle ground, covering activities including the range of R&D and improvements based on manufacturing processes. Apart from encouraging innovation by enabling inventors to exploit this invention through exclusive rights, the patent system supports innovation through the dissemination of technology, which allows further research and development initiatives to build upon existing technology.

Green Technology as an Innovation

The term 'green technology' is widely used for any kind of clean technology or environment friendly innovation. More importantly, the term relates to products of innovation used to promote sustainability[5]. Encouraging development of green technology obviously requires benefits for the innovation just like the pharmaceutical industry spends lot of money on R&D to push new products in the market. Innovative engineering will be a key component in making these technologies accessible both physically and economically and therefore relevant protection is necessary.

The underlying technology behind green innovation which differs greatly or range from high technology of innovation of GM crops to low-technology innovation of mechanical farming techniques. At present, it seems to be more debate on the term green technology. The UNFCCC refers to environmentally sound technologies which are intended to encompass the following technologies[6]:

1. Technologies protecting the environment;
2. Less polluting techniques;
3. Technologies using resources in a mere systematic manner;
4. Technologies aiming at recycling wastes and products;
5. Technologies handling residual waste, for e.g.: purification process.

4 Dr. Elizabeth Verky; Law of Patents, 2nd Edition, Eastern Book Co, Lucknow, pg.no.10

5 Anders kalson; *Green Technology Patent*. Available at, www.diva.portal.org>smash>get>diva2:764784>FULLTEXT01

6 Ch:24 of the Agenda 21 of UNFCCC

While there is no commonly accepted definition of the term green technology, we can affirmatively use the term green inventions, which is understood to refer to environment friendly inventions that often involve energy efficiency, alternatives to fossil fuels, carbon generation, products or processes which emit less pollution, water purification, safety and health concerns etc. The patent system obviously promotes new technological developments including green technology. Green technology patents are generally related to certain inventions which are safe in the context of health, emitting less pollution, hazardous substance and so on. Currently green technology is considered as a great solution for number of environmental problems and challenges. For example; global warming, climate change, pollution in air, land and water, radiation etc. Thus, few countries in the world have already taken several positive initiatives to develop green technology.

Green Technology Initiatives

In US, the government had taken an interesting programme in the end of 2009 to promote innovation of green technology[7]. It was a dedicated route to ensure faster protection and thus a faster way to the markets for patents. Through USPTO[8] innovators could then specifically apply to have their green technology innovation put in the patent examination highway. In fact, this kind of fast-track system encouragers the innovators to invest huge capital and do deeper research in new areas. The European Union emphasizes that environmental challenges are global and must be handled through a joint global incentive[9]. The World Intellectual Property Organization has also taken some kind of initiative known as WIPO GREEN. It aims at promoting package technology licensing agreement for green technologies in order to accelerate their dissemination throughout the world especially in developing countries[10]. This programme involves an online platform that provides information to private and public sector entities around the world on available green technologies. The primary goal is to create a global network promoting for this green technology. It is clearly understood, in WIPO's point of view that the technological information relating to green technology should be sufficiently transferred to all the Member States of TRIPS Agreement.

Technology Transfer Relating to Green Technology- The Role of Patent

Technology is believed to be one of the major forces underpinning economic growth[11]. Technology is the principal which means adopted by the nation, that seeking developmental progress and higher standard of human life. UN Conference on Trade and Development defines ''Technology'' as " systematic knowledge for the manufacture of a product for the application of a process or

7 *Ibid*.

8 United States Patent and Trademark Office.

9 The Seventh Environment Action Programme. Decision of the European Parliament of the Council on a general Union. Environment Action Program, 2020. Available at, http;//ec.europe.eu/environment/newprg/pdf/PE600064.en.pdf.

10 Ibid

11 GoelCohen; Technology *Transfer – Strategic Management in Developing Countries*. 1st Ed, Sage Pub. Pvt.Ltd, 2004, p.20.

for the rendering of a service"[12]. Technology is not just information that can be easily communicated but its transfer requires a capacity to learn and investment to incorporate it into the firm's production system[13]. Based on this statement, it is understood that once a product enters into the market after acquiring patent, the knowledge and the technology related to that product is transferred in the market. Moreover, the local or domestic industries shall improve their capacity to learn, adopt, reproduce the learned technology and also promote their ability to produce new technology in the market. Obviously, the patent system played a pivotal role in the technology transfer process[14].

Patent stimulates the licensing and selling of technology to firms having downstream capabilities in case of small innovating firms. Most importantly, technology markets also have a say in increasing the diffusion of public and private R&D outcomes and permit more competitive prices for consumers[15]. Patents can serve as a basis for contracting and ensuring the commercialization of technology. Moreover, the TRIPS Agreement also mandates the Member Countries to transfer the technology. It says that,

> *"The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations"[16].*

Thus, the TRIPS Agreement made Transfer of Technology as mandatory and this will only encourage technology transfer for social welfare also. A central point in that technology transfer is generally related to costly and complex. A complete transfer that takes place through formal channels involves the shift of codified knowledge, tacit knowledge and contractual obligations. These formal channels include FDI, licensing and patent documentation and various minor forms. Technology is also transferred through informal channels. Most evidently, technological information flows across the borders through international trade in advanced inputs, reverse engineering of technology embodied in goods and replication of production processes in published patent[17].

Patent Disclosure as Technology Transfer

According to TRIPS Agreement, "Members shall require disclosure of the invention in a manner sufficiently clear and complete for the invention to

12 UNCTAD Draft International Code on the Transfer of Technology.

13 Keith. E.Markus (Edr) ; *International Public Goods and Technology Transfer Under a Globalised IP Regime* , 1st Ed, Cambridge University Press, London 2005, P.230.

14 *Ibid.*

15 A. Gambardelli; *Successes and Failures in the Markets for Technology*, Oxford Review of Eco. Policy, Vol.18, No:1, p.52.

16 Art. 7 of the TRIPS Agreement 1995.

17 Jonathan Eaton and Samuel kortum; *Trade in Ideas, Patenting and Productivity in the OECD*. 40. J.INT.L ECON. 251 (1996).

be carried out by a person skilled in the art[18]. It is understood that sufficient description about the invention or complete disclosure is mandatory by TRIPS Agreement. In addition to, it has been argued that the disclosure of invention mandated by TRIPS Agreement constitutes a mode of transfer of technology. Although full disclosure of the invention is a basic principle of patent law and it is one of the traditional justifications for granting monopoly to the inventor. Hence, the information furnished in the patent document should enable the person skilled in the art to reproduce the same inventions without consulting the inventor or any other expert. So that at the end of the patent period the same product can be reproduced by local industries.

Transfer of Green Technology as Public Interest Concerns

Technology transfer is a compulsory process in the area of patent system. It is clearly understood that if an inventor invents green technology like inventions, he is under an obligation to transfer the technology involved in the product. It is noted that some technologies relating to green inventions are so complicated. Provided, if the patent is given upon such kind of inventions, the inventor has to sufficiently disclose about his invention to the person skilled in the art.

More particularly, a major quantum of green technology based upon inventions that are produced by the developed countries. The investors spend huge capitals for their R&D, as a result the industries are fixing heavy prices for the product. If the technology involved in the green technology is rightly transferred or disseminated to the industries belonging to the developing countries, then they also can produce more environment friendly inventions. This would obviously ensure the greatest public utility and interest. Most significantly, as technology transfer is mandatory under TRIPS Agreement, and transferring of green technology is also mandatory. At present, there are two ways for effectively transferring the technologies particularly green technology which are,

(a) Voluntary licenses and

(b) Compulsory licenses

(a) Voluntary Licenses

The industries are usually selling or transferring their technologies through licensing practices. As the investors contributed their investment for R&D, they show more interest in granting license to the third parties so as to get more economy. It is quite evident that voluntary licensing in the patent system is a boost factor for the innovative processes. Thus, giving voluntary license over green technology makes more utility, but the problem here is the price of green technology through licensing is so costly and it is rather complex to developing and least developed countries.

More so, the main challenge in promoting voluntary licensing in green technology is that the private sectors in industrialized countries has not defined financial

18 Article 29 0f TRIPS Agreement 1995; Section 10 of the Indian Patent Act 1970 also discussed about complete disclosure.

benefits that will flow from licensing to parties in developing countries.[19] In order to make voluntary licensing initiative, work as an effective means of increasing access to green technologies for developing countries. In addition, TRIPS Agreement provides the developed countries members shall provide incentives to enterprises for the purpose of promoting and encouraging technology transfer to least developed countries in order to create a sound and viable technological base.[20] This requirement is applicable only to the least developing countries.

(b) Compulsory Licensing of Green Technology

The concept of compulsory license is too old,[21] but the practice of compulsory license is new. Even though compulsory license is permitted it has not been frequently used. It is clear that environment is not a main focus addressed in TRIPS Agreement but public health, is strongly addressed. Therefore, we must interpret what is included under actions to protect public health. It is not ruled out that green technology could be included. There is a strong connection between health and environment. The TRIPS does not define what measures that are allowed to use in order to achieve public health for up to the member states to determine. Health is something which is so important and should be both promoted and facilitated under the TRIPS. For example, both disease and climate change constitute a threat to public health. So far, there is no known case where compulsory license to green technology has been granted to protect public health and not as a precautionary measure.

Recent development shows that it might be possible to widen the scope and at least expand the classic use. TRIPS Agreement has emphasized about the significance of compulsory licensing in terms of public interest including public health contemplated under Article 8 of the TRIPS Agreement[22]. Thus, it is noted that to interpret Article 31 we must read the provision in terms of Article 8 of the TRIPS Agreement. Article 8 is a goal, whereas Article 31 is a means to achieve the goal. Compulsory license is usually with medicine but it has been suggested that it applies to patent in other fields as well[23]. Thus, in the liberal interpretation of TRIPS may give positive solution for transferring green technology to get public interest including public health.

Conclusion

In the end, providing green technology has to happen on a global level in order which is to be effective and to bring down prices. This push is rather important because even if one country has a very developed and environment friendly industry moving production to other regime can result some positive results. Moreover, the initiatives have been taken by the international community to

19 *Ibid*

20 Art 66.2 of TRIPS Agreement

21 Statute of Monopoly - 1623

22 Article 8 and 31 of TRIPS Agreement 1995.

23 TRIPS and pharmaceutical patents, Fact Sheet. WTO 2006. Available at http://www.wto.org/ english/tratop2/trips./tripsfactsheet .pharma2006 -pdf

promote and transfer green technology which are not so adequate. The industries involved in making green technology related the inventions that are not ready to distribute the product at lower and affordable prices. The problem is that they are continuously engaging the fact that the R&D cost, is very high and to equate with the R&D costs they are forced to fix very high price for the products which are environment friendly. In spite of TRIPS mandate, member countries are not ready to transfer green technology because of its high production cost. On the other hand, researchers would like to suggest that ensuring sufficient description in the patent documents and issuing compulsory licenses in case of great importance can make the goal a feasible one.

Contextualizing Disability in the Evolving Human Rights Paradigm

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Kislay Soni**

Abstract

The issue surrounding disability is fraught with enormous difficulties. These issues manifesting in the form of physical barriers, social barriers and visceral perceptions are endemic and detrimental. It comes no surprise that the problems faced by persons with disabilities are often ignored and completely glossed over. This paper tries to disaggregate disability for the better understanding of the issues involved. It looks further to investigate the legal framework which deals with disability. The effort is laid to investigate the underlying reasons for the 'invisibility of disabled/disability' in the mainstream.

Keywords: Disability, legal framework.

I Introduction

People with disabilities are vulnerable because of the many barriers we face: attitudinal, physical, and financial. Addressing these barriers is within our reach and we have a moral duty to do so..... But most importantly, addressing these barriers will unlock the potential of so many people with so much to contribute to the world. Governments everywhere can no longer overlook the hundreds of millions of people with disabilities who are denied access to health, rehabilitation, support, education, and employment—and never get the chance to shine

Stephen Hawking

It is no gainsaying that the people with disabilities are acutely vulnerable as they face enormous barriers on a daily basis at various levels. It would definitely be impossible to controvert that the human society predominantly is apathetic to persons with disability (hereinafter referred as PWD). Appropriate concern and well-intentioned support initiatives for PWD have been few and far between. Unfortunately, most of the narratives around the issue pertaining disabilities are clouded by conjectured and blinkered notions surrounding them. Deep-rooted societal perception has engendered many barriers manifesting in multitudinous ways. As Stephen Hawking[1] himself underscored that it is the - *attitudinal,*

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1 Stephen Hawking was one of the most influential theoretical physicists who contributed to the fields of cosmology, general relativity etc. and led the ground-breaking work on black holes. Most of his life he was wheelchair-bound and dependent on a computerised voice system due to slow-progressing form of motor neuron disease Amyotrophic Lateral Sclerosis. *See* http://www.hawking.org.uk/about-stephen.htmlhttps://www.physicsoftheuniverse.com/scientists_hawking.html; *See* also:https://www.theguardian.com/science/2018/mar/14/a-life-in-science-stephen-hawking (Last Visited February 1st 2019).

physical and financial barriers – which profoundly militate against the welfare of PWD. These societal-contrived barriers not only have an incapacitating effect, but they also tend to marginalize a significant proportion of human population.[2] Narratives surrounding disability - most often than not - have failed to capture the multidimensionality involved with the issue. Needless to say, that the mainstream discourse has also failed to address the issues raised by PWD themselves. The predicament faced by them can also be attributable to the "legacy of the past, when people with disability were often virtually invisible citizens of many societies".[3] It was not uncommon to see the majority of them living a rather shrunk and fettered life severed from any meaningful direct participation within their society. The societal reaction and of the general public and policymakers was of either pity or revulsion. Therefore, disability became the "ground for exclusion rather than a cause for celebration of the diversity of the human family."[4] In commiserating or showing indifference - the reactions of the members of the society often bordered on the extremes and was found so ubiquitously in every culture throughout history. Despite the closed mindedness and often paternalistic attitude of the 'abled-majority'- the 'lived-experience' of PWD was nothing short of life lived extraordinarily. Facing incessant hardships – patent or otherwise – many among them have etched an indelible mark by distinguishing themselves in various fields. Its no wonder that their stories elicit pure awe, respect and inspiration.[5] Having said that, it must be emphasized that - for majority of PWDs their 'continuous-lived-experience' has unfailingly been shorn of dignity and fraught with insuperable challenges. The United Nations has ruefully highlighted the "disproportionate levels of poverty, their lack of access to education, health services, employment, their under-representation in decision-making and political participation"[6] as some of the major issues faced by them within the

2 As per the UN Report around 15 percent or estimated 1 billion of the world's population live with disability. See:Factsheet on Persons with Disability, United Nations – Disability (Department of Economic and Social Affairs).Availableat:https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html (last visited on February 1st 2019); See also:Summary World Report on Disability Available at https://apps.who.int/iris/bitstream/handle/10665/70670/WHO_NMH_VIP_11.01_eng.pdf;jsessionid=C3EC148AA9DA12C3DD4450A80EA5DC89?sequence=1. See generally:https://www.worldbank.org/en/topic/disability; https://www.disabled-world.com/disability/statistics/ (Last visited 1st February 2019)

3 Gerard Quinn, Theresia Degener, "The moral authority for change: human rights values and the worldwide process of disability reform" in Gerard Quinn et al.Human Rights and DisabilityThe Current use and future potential of United Nations human rights instruments in the context of disability, New York, Geneva: United Nations23 (2002).

4 Ibid.

5 President Franklin Delano Roosevelt, Marlee Martin, Stevie Wonder, Arunima Sinha, Elton John inter-alia have all defied the odds and are well-established names. Each one of them had some form of disability. See generally: https://www.huffingtonpost.com/2013/10/22/famous-people-with-disabilities_n_4142930.html ; For comprehensive list of famous people with disability See:https://www.disabled-world.com/disability/awareness/famous/ (Last visited 1st February 2019).

6 United Nations, Department of Economic and Social Affairs, UN Flagship Report on Disability and Development: "REALIZATION OF THE SUSTAINABLE DEVELOPMENT GOALS BY, FOR AND WITH PERSONS WITH DISABILITY", 24 (2018). Available at: https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2018/12/UN-Flagship-Report-Disability.pdf.

mainstream society. These certainly bode ill for the overall interest of PWDs. The aforementioned issues do render them marooned and invisible. The UN report further explicate the underlying reasons which act as barriers-to-inclusion by pointing out that the "discrimination and stigma on the ground of disability, lack of accessibility to physical and virtual environments, lack of access to assistive technology, essential services, rehabilitation and support for independent living"[7] as some of the important barriers which thwart the possibility of full and equally participative role in the society.

II Disaggregating Disability

Comprehension of 'disability' in totality is no simple task.[8] This term seems to cover such a -diverse condition that its intrinsic complexities often fail to get understood or get diffused within the apprehensibility of common masses. It must be noted that this is not a specialized term giving a straitjacket definition but on the contrary it seems to be used ordinarily to refer various conditions. Very often used interchangeably and loosely with other descriptions such as Impairment, Handicap etc., these different usages although convey different phenomena.[9] As pointed out by UN Department of International Economic and Social Affairs Statistical Office, it avers that the "Disability description is confounded by divergent use of terminology by Governments, professionals, legislators, by disabled persons and their representative groups".[10] In this regard, the World Health Organization has taken effort in outlining the contour of disability. It has defined disability as: "the interaction between individuals with a health condition (e.g. cerebral palsy, Down syndrome and depression) and personal and environmental factors (e.g. negative attitudes, inaccessible transportation and public buildings, and limited social supports)."[11] World Health Organization manual, International Classification of Impairments, Disabilities,

7 Ibid.

8 The Report prepared under the aegis of the World Health Organization and the World Bank states that "disability is part of the human condition – almost everyone will be temporarily or permanently impaired at some point of life, and those who survive to old age will experience increasing difficulties in functioning. Summary World Report on Disability World Health Organization (2011) Available at:https://apps.who.int/iris/bitstream/handle/10665/70670/WHO_NMH_VIP_11.01_eng.pdf;jsessionid=C3EC148AA9DA12C3DD4450A80EA5DC89?sequence=1 (Last visited February 1st 2019).

9 World Health Organization, International Classification of Impairments, Disabilities, and Handicaps, A manual of classification relating to the consequences of disease,(1980) has defined various terms as follows:
"Impairment: In the context of health experience, an impairment is any loss or abnormality of psychological, physiological, or anatomical structure or function.
"Handicap: In the context of health experience, a handicap is a disadvantage for a given individual) resulting from an impairment or a disability, that limits or prevents the fulfilment of a role that is normal (depending on age, sex, and social and cultural factors) for that individual.
Also available at: https://apps.who.int/iris/bitstream/handle/10665/41003/9241541261_eng.pdf?sequence=1

10 Department of International Economic and Social Affairs Statistical Office Disability Statistics Compendium Series Y No. 4 (1990) Sales No. E.90.XVII.17. Available at:https://unstats.un.org/unsd/publication/seriesy/seriesy_4e.pdf.

11 https://www.who.int/news-room/fact-sheets/detail/disability-and-health.

and Handicaps, has defined disability as: "any restriction or lack (resulting from impairment) of ability to perform an activity in the manner or within the range considered normal for a human being." Furthermore, document drafted under the aegis of WHO has stated that disability is "a restriction or inability to perform an activity in the manner or within the range considered normal for a human being, mostly resulting from impairment."[12] Similarly, International Classification of Functioning, Disability and Health[13] defines disability which "serves as an umbrella term for impairments, activity limitations or participation restrictions."[14] Standard Rules on the Equalization of Opportunities for Persons with Disabilities states: "The term "disability" summarizes a great number of different functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature."[15] WHO further notes that "Over a billion people are estimated to live with some form of disability. This corresponds to about 15% of the world's population." It goes on to highlight that the "People are disabled by society, not just by their bodies"[16] alone, to underscore the role played by the society and their attitudinal indifference towards PWDs. The aforementioned definition underscores some of the important attributes which are important marker to understand the intricacies of disability. In extrapolating disability, one would find that it being of - markedly diverse kinds and degrees – can bring forth atypical challenges which are unique to each and every single person suffering from some or other form of disability. It is to be noted that even the same-kind- of-disability would manifest and can be experienced differently by every other disabled person. To illustrate the point, it must be specified that every person who is visually impaired does not suffer the same degree of impairment and therefore their relative behavioural, bodily as well as experiential experiences varys accordingly. As in the scenario such as "a person who can see but not hear has very different sensory experiences from a person who can hear but not see, who in turn has very different experience from a person who can see and hear but cannot move his legs".[17] Furthermore, it should be borne in mind that it is the existence of various-external-factors which dictate the way disability is experienced and dealt with. These factors singularly bear down as debilitating the lives of Pwd.

12 https://www.who.int/bulletin/archives/79%2811%291047.pdf.

13 World Health Organization, International Classification of Functioning, Disability, and Health; Available at:https://apps.who.int/iris/bitstream/handle/10665/42407/9241545429.pdf;jsessionid=176E8EE1436F4571FE873E55631D7307?sequence=1.

14 Supra note 11.

15 Also available at https://www.un.org/disabilities/documents/gadocs/standardrules.pdf.

16 https://www.who.int/features/factfiles/disability/en/.

17 https://plato.stanford.edu/entries/disability/.

Disability in Figures

It is pertinent to mention that PWD can be grouped as the world's largest minority.[18] Within this large group some group of disabled people are more invisible than others as in the case of children and women. People with intellectual-disability face an even more daunting task - as for them it is hard to progress even as much vis-à-vis the other group with other forms of disabilities.[19] The World Health Organization has come up with the most comprehensive data on disability. As per their report:

> More than a billion people are estimated to live with some form of disability, or about 15% of the world's population (based on 2010 global population estimates).According to the World Health Survey around 785 million (15.6%) persons 15 years and older live with a disability, while the Global Burden of Disease estimates a figure of around 975 million (19.4%) persons. Of these, the World Health Survey estimates that 110 million people (2.2%) have very significant difficulties in functioning, while the Global Burden of Disease estimates that 190 million (3.8%) have "severe disability" – the equivalent of disability inferred for conditions such as quadriplegia, severe depression, or blindness. Only the Global Burden of Disease measures childhood disability (0–14 years) which is estimated to be 95 million (5.1%) children of which 13 million (0.7%) have "severe disability".[20]

In India, as per Census 2011, out of the 121 Cr population, about 2.68 Cr persons are 'disabled' which is 2.21% of the total population.[21] Figures as per Statistics and Programme Implementation, Government of India depict the percentage of people affected by the disability as follows:

Population, India 2011			Disabled persons, India 2011		
Persons	Males	Females	Persons	Males	Females
121.08 Cr	62.32Cr	58.76Cr	2.68 Cr	1.5 Cr	1.18 Cr

Figure 1

Source: Social Statistics Division, Ministry of Statistics and Programme Implementation, Government of India, "Disabled Persons in India A Statistical profile 2016"

18 Factsheet on Persons with Disability, United Nations – Disability, Department of Economic and Social Affairs Available at https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html (last visited on February 2nd 2019); as per the report around 15 percent or estimated 1 billion of the world's population live with disability.
See Disability Statistics: Information, Charts, Graphs and Tables Available at https://www.disabled-world.com/disability/statistics/ (Last visited February 1st 2019)
The factsheet on Persons with disability Available athttps://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html.

19 Supra note 3.

20 World Report on Disability, World Health Organization (2011) 261-62; Available at: https://www.who.int/disabilities/world_report/2011/report.pdf (Last visited February 1st 2019).

21 Social Statistics Division, Ministry of Statistics and Programme Implementation, Government of India, "Disabled Persons in India A Statistical profile 2016" Available at: http://mospi.nic.in/sites/default/files/publication_reports/Disabled_persons_in_India_2016.pdf(Last visited February 1st 2019).See generally: Annual Report 2017-18, Department of Empowerment of Persons with Disabilities (Divyangjan), Ministry of Social Justice and Empowerment, Government of India. Available at : http://disabilityaffairs.gov.in/upload/uploadfiles/files/Annual%20Report%202017-18%20(E)(1).pdf (Last visited 1st February, 2019).

The report further enumerates different types of disability as mentioned below:

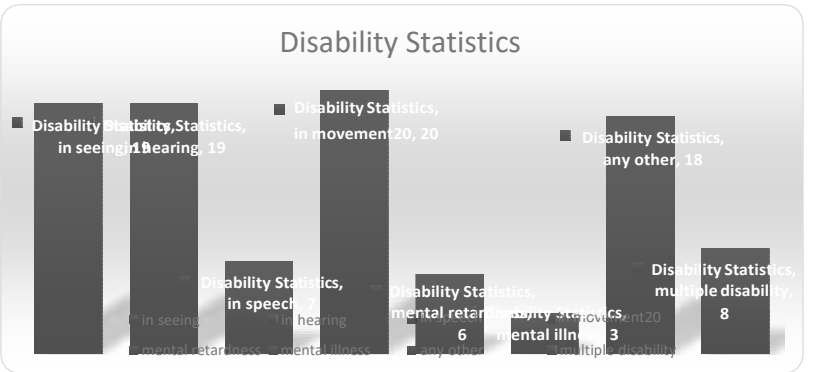

Figure 2

(Disabled population by type of Disability in India – Census, 2011)

Source: Social Statistics Division, Ministry of Statistics and Programme Implementation, Government of India, "Disabled Persons in India A Statistical profile 2016"

The report further states that the majority i.e. 69 percent of the disabled population reside in rural areas. Regarding the age group the report states that "7% of the disabled population is in the age group 10-19 years and 16% of them are in the age group of 20-29 years".[22] The report further states that the "elderly (60+ years) disabled constituted 21% of the total disabled at all India level. The percentage of disabled is highest in the age group 10-19 years followed by age group 20-29 years for both the male and female disabled persons."[23]

III Disability and the Legal Framework

International Level

The United Nations has been the most important agency which has proactively bolstered the formulation of policies and the establishment of framework concerning PWD. Kofi Annan, the former Secretary General of the United Nations, has said that:

> "Persons with disabilities make up the world's largest minority group. They are disproportionately poor, are more likely to be unemployed, and have higher rates of mortality than the general population. All too often, they do not enjoy the full spectrum of civil, political, social, cultural and

21 Social Statistics Division, Ministry of Statistics and Programme Implementation, Government of India, "Disabled Persons in India A Statistical profile 2016" Available at: http://mospi.nic.in/sites/default/files/publication_reports/Disabled_persons_in_India_2016.pdf(Last visited February 1st 2019).See generally: Annual Report 2017-18, Department of Empowerment of Persons with Disabilities (Divyangjan), Ministry of Social Justice and Empowerment, Government of India. Available at : http://disabilityaffairs.gov.in/upload/uploadfiles/files/Annual%20Report%202017-18%20(E)(1).pdf (Last visited 1st February, 2019).

22 Supra note 21.

23 Ibid.

> economic rights. For many years, the rights of persons with disabilities were overlooked"[24]

The General Assembly and the Economic and Social Council adopted number of resolutions to address the issues of PWD.[25] Initially the approaches adopted by the UN were more in tune with the "caring" model. The 'caring' model which prevailed for many years gave way to the "right-based" approach.[26] It all began initially in the 1970s with the General Assembly resolutions entitled "Declaration on the Rights of Mentally Retarded Persons"[27] and "Declaration on the Rights of Disabled Persons".[28] The aforementioned resolutions declared that the PWD have the same civil and political rights vis-à-vis other human beings and that they are "entitled to the measures designed to enable them to become as self-reliant as possible"[29].

The World Programme of Action (1982)

The 1980s witnessed the permanent shift from the "caring" to the "right-based" model. The UN General Assembly came with the slogan "Full participation and equality" and the year 1981 was proclaimed the International Year of the Disabled (IYDP).[30] In 1982 the General Assembly adopted a landmark resolution entitled the "World Programme of Action concerning Disabled Persons" (WPA). The decade from 1983 to 1993 was also proclaimed as the International Decade of Disabled Persons.[31] In the decade of 1990 the UN reinforced its commitment

24 The Secretary General, Message on the International Day of Disabled Persons, 3 December 2005.

25 Maria Rita Saulle's pioneering book *Disabled Persons and International Organizations* (Rome, 1982). The Economic and Social Council inter-alia adopted resolution dealing with "Social rehabilitation of the physically handicapped".

26 It would not be out of context to illuminate on some of the approaches which has been applied to contextualise disability. Most often it had been much in practice in the past to look at the disability via 'medical model'. This method focusses on the health condition of the individual. Disability is regarded as different from what is considered to be 'normal'. It is seen as the problem distinctive of the individual suffering from it. The focus here is on curing the individuals so as to mainstream them. It is needless to say that the aforementioned approach has attracted criticism. It has been hailed as regressive and outrightly an encapsulating method. 'Social model' of disability on the contrary view disability from completely different angle. It regards disability as a barrier such as physical, social and attitudinal which preclude the person living with disability to live life equally and participatively in the society. This method is now the most recognized method which advocates for the change in the physical environment and removing societal barriers.

27 General Assembly resolution 2856 (XXV1) of 20 December 1971.

28 General Assembly resolution 3447 (XXX) of 9 December 1975.

29 Paragraph 5 of the Declaration on the Rights of Disabled Person, Proclamation by General Assembly resolution 3447 (XXX) 9 December 1975.

30 Gerard Quinn, Theresia Degener, "The application of moral authority: the shift to the human rights perspective on disability through United Nations "soft" law" in Gerard Quinn *et al.Human Rights and DisabilityThe Current use and future potential of United Nations human rights instruments in the context of disability*, New York, Geneva: United Nations 2002 30

31 Ibid. The decade of 1980s also saw UN coming up with important studies entitled *Principles, Guidelines and Guarantees for the Protectionof Persons Detained on Grounds of Mental Ill-Health or Suffering from MentalDisorder (1986) and Human Rights and Disabled Persons* (1993).

by adopting key resolutions.[32] Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993 were the major milestone which reaffirmed human-rights as universal. Some of the other watershed moments in 1990s were the World Summit for Social Development and Declaration on the Elimination of Violence against Women. The dawn of the twenty first century saw UN General Assembly Resolution "Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities"[33] which was adopted in the year 2001. The year 2006 heralded the most important turning point with the drafting of "United Nations Convention on the Rights of Persons with Disabilities"

United Nations Convention on the Rights of Persons with Disabilities

It is the most comprehensive and the first human rights treaty of the 21st century. The convention entered into force on 3rd of May, 2008. As per the official statement, "the Convention marks a 'paradigm shift' in attitudes and approaches to persons with disabilities. It takes to a new height the movement from viewing persons with disabilities as 'objects' of charity, medical treatment and social protection towards viewing persons with disabilities as 'subjects' with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.[34] The convention in unequivocal terms explicate Pwd having the "equal access and a right to full and effective enjoyment of all human rights"[35]

Domestic Level

The preamble of the Indian Constitution seeks to attain for all its citizen Justice, Liberty, Equality, Fraternity as the avowed and the enduring goal. The grand sweep of this normative principles is sacrosanct and so is the Fundamental Rights (Part III of the Indian Constitution) which have sanctified Right to Equality, Right to Freedom, Rights against Exploitation, Right to Freedom of Religion, Cultural and Educational Rights and Right to Constitutional Remedies. Protection of life

32 "Principles for the protection of persons with mental illness and the improvement of mental health care" (General Assembly resolution 46/119 of 17 December 1991); "Standard Rules on the Equalization of Opportunities for Persons with Disabilities". General Assembly resolution 48/96 of 20 December 1993

See generally Bengt Lindqvist, "Standard rules in the disability field - a United Nations instrument", *Human Rights and Disabled Persons*, Degener and Koster-Dreese, eds., (Dordrecht, Kluwer Academic Publishers Group, 1995), p. 63.

33 General Assembly resolution 56/168 of 19 December 2001.

34 https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html. The governing principles of the Convention are: (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; (b) Non-discrimination; (c) Full and effective participation and inclusion in society; (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; (e) Equality of opportunity; (f) Accessibility; (g) Equality between men and women; (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities. See generally: http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf.

35 See generally:http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf.

and personal liberty as per Article 21 of the Indian Constitution is infused with expansive attributes and does include Right to Dignity. In Francis Coralie Mullin v. Administrator, Union Territory of Delhi & others the Supreme Court has observed:

> "The fundamental right to life which is the most precious human right and which forms the ark of all other rights must, therefore, be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of human person."[36]

Part Four of the Indian constitution is the blue-print for drafting state policy and is the touch-stone for the good governance.[37] Good governance warrants realisation of Part Four which includes promotion and welfare of the people, equal justice, legal aid, promotion of weaker section, just and humane condition inter-alia. The aforesaid are sine-qua-non requirement of sound state policy. Needless to say, the Constitution quite profusely indicates towards inclusiveness and not myopic towards the less privileged. Indubitably these aforementioned goals, fundamental rights and the directive principles are essentially overarching in coverage and scope. Apart from foregoing provisions there is specific mentioning of disability as seen in entry no. 09 of the State subjects under the Seventh Schedule which makes relief to the disabled as the state subject.[38] Other specific provisions are enumerated under Article 243-G[39] and Article 243-W[40]. Indian Parliament has enacted - The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which was later repealed by The Rights of the Persons with Disabilities Act, 2016. According to the Annual Report 2017-18[41] the law on disability has the "twin objective of harmonising the provisions of the Persons with Disabilities Act, 1995 and also to ensure better implementation" along with giving effect to the United Nations Convention on the Rights of Persons with Disabilities which was adopted in the year 2006.[42] Both

36 (1981) 1 SCC 608.

37 See also, Article 41: the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in the case of unemployment, old age, sickness and disablement, and in other cases of undeserved want. (emphasis added).

38 Entry 09, State List, Seventh schedule: relief of the disabled and unemployable.

39 Entry 26, Article 243-G, Eleventh schedule: Social welfare, including welfare of the handicapped and mentally retarded.

40 Entry 09, Article 243 -W Twelfth schedule: Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.

41 *Supra* note 21.

42 Convention lays down the following principles for empowerment of persons with disabilities, —
(a) respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
(b) non-discrimination;
(c) full and effective participation and inclusion in society;
(d) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
(e) equality of opportunity;
(f) accessibility;
(g) equality between men and women;
(h) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities;

legislations: the old law as well as the new envisage for the creation of barrier free environment for the persons with disabilities. The 2016 legislation inter-alia provides for various rights and entitlements of PWD. It covers "equality and non-discrimination, community life, protection against cruelty and inhuman treatment, access to justice, legal capacity etc. The Act also mandates the appropriate Governments to frame schemes and programmes in the area of social security, health, rehabilitation, recreation, skill development etc. for effective empowerment and inclusion of persons with disabilities."[43] The Act also has penal provision to "ensure effective implementation of the Act."[44] Legislative framework is supplemented with mandates in terms of policies, statutory bodies, agencies, centres, schemes and programmes run under the aegis of central as well state government.[45]

Indian Judiciary

Indian Courts in a catena of cases has highlighted the plight of persons with disability. As recently as in the case of Rajive Raturi v Union of India[46], the Supreme Court in no uncertain terms underlined the hardships faced by the persons of disability including those who are visually disabled. The court took the cognizance of the matter pertaining The "accessibility to public places". It assessed the contention raised by the petitioners of the grievances relating to inaccessibility to the places and mooted on the state-of-affairs regarding accessibility of places such as hospitals, offices, toilets, transportation, railway stations, public/govt. buildings etc. The Court gave a series of directions targeting to render public places accessible to the persons with disability. Similarly, in the case of Disabled Rights Group & ANR. v. Union of India & Ors.[47] the Apex court directed various authorities pertaining to reservation of seats for disabled in the educational institutions.

IV Disability and Human Rights

> Disability is a human rights issue! I repeat: disability is a human rights issue. Those of us who happen to have a disability are fed up with being

43 *Supra* note 21.

44 *See generally*: Annual Report 2017-18, Department of Empowerment of Persons with Disabilities (Divyangjan), Ministry of Social Justice and Empowerment, Government of India. Page 7. Butcf,AilaBandagiKandlakunta "Fact Check: What has the Govt Done for Persons With Disabilities?" The QuintOctober 19th, 2018.Available at:https://www.thequint.com/news/india/fact-check-what-has-the-govt-done-for-persons-with-disabilities. See also: http://disabilityaffairs.gov.in/upload/uploadfiles/files/Annual%20Report%202017-18%20(E)(1).pdf. The Central Government has also notified Rights of Persons with Disabilities Rules in terms of Section 100 of the said Act which provide for: a) Accessibility standards for built environment, passenger bus transport and website and content to be placed on website b) Procedure for applying and grant of certificate of disability c) Manner of publication of equal opportunity policy and maintenance of records regarding employees with disabilities d) Mechanism for implementation of provision of non-discrimination on the ground of disability e) Manner of utilization and management of National Fund.

45 *Supra* note 21.

See generally: Annual Report 2017-18, Department of Empowerment of Persons with Disabilities (Divyangjan),

46 W.P.(C) No. 243 OF 2005, Decided on January 1 2017.

47 W.P.(C) No.-000292-000292 / 2006, Decided on Dec. 15 2017.

> treated by the society and our fellow citizens as if we did not exist or as if we were aliens from outer space. We are human beings with equal value, claiming equal rights…If asked, most people, including politicians and other decision makers, agree with us. The problem is that they do not realize the consequences of this principle and they are not ready to take action accordingly.

The aforementioned speech given by Bengt Lindqvist[48] categorically and quite emotively relates to the issues of PWD as being an essentially human rights issue.[49] As the data suggests people with disability "are among the most marginalized groups in the world. People with disabilities have poorer health outcomes, lower education achievements, less economic participation and higher rates of poverty than people without disabilities."[50] Disability undoubtedly has to be understood as fundamentally a core human rights issue.

V The Universality of Human Rights

Human rights operate within the principle of universality. Universal Declaration of Human Rights, Covenant on Civil & Political Rights, Covenant on Economic, Social & Cultural Rights are the three most important instruments which have reinforced the universality, indivisibility, interdependent and interrelated aspect of human rights.[51] UDHR is the single most important document which has set the contour for the protection of Human Right on the world map. As Michael W. Doyle and Anne-Marie Gardner averred that the UDHR document has "outlined a 'common standard of achievement' for the future of human rights, has become the cornerstone of a burgeoning international human rights regime".[52] The proclamation of UDHR ushered in a new era of recognition and reinforcement of civil, political, social, economic rights as an innate part of human life and human dignity. Drawing on the principles of UDHR - the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were adopted. These three documents which together

48 Special Rapporteur on Disability of the United Nations Commission for Social Development.

49 Gerard Quinn, Theresia Degener, "The moral authority for change: human rights values and the worldwide process of disability reform" in Gerard Quinn *et al.Human Rights and Disability The Current use and future potential of United Nations human rights instruments in the context of disability*, New York, Geneva: United Nations 2002 13; Bengt Lindqvist was appointed as a Special Rapporteur on Disability of the Commission for Social Development in 1994. He was the co-founder of Disability Rights Promotion International. He is credited as the major force behind the disability rights movements and the establishment of International disability Alliance. Source: http://www.internationaldisabilityalliance.org/blog/bengt-lindqvist-1936-2016; https://www.un.org/development/desa/disabilities/about-us/history-of-disability-and-the-united-nations/special-rapporteur-1994-2002-bengt-lindqvist.html ; http://drpi.research.yorku.ca/remembering-bengt-lindqvist-co-director-of-drpi/ (Last visited 1st February, 2019).

50 *Supra* note 16.

51 James MouangueKobila, "Comparative practice on human rights: North-South" in Jean-Marc Coicaud, Michael W. Doyle, and Anne-Marie Gardner (eds.) *The Globalization of human rights* 102-103 United Nations University Press, Hongkong, 2003.

52 Michael W. Doyle and Anne-Marie Gardner "Introduction: Human rights and international order" in Jean-Marc Coicaud, Michael W. Doyle, and Anne-Marie Gardner (eds.) *The Globalization of human rights* 2 United Nations University Press, Hongkong, 2003.

called as - International Bill of Human Rights - has constructed a new paradigm of resurgent recognition of human rights which also obligates states to abide by these enumerated norms.[53]

How did the concept of human rights originate is a hard guess. The very ideation of human rights as a concept though can be said that it did not begin linearly. The effort to unravel its intellectual origins would lead to the diverse narratives. As Michael W. Doyle and Anne-Marie Gardner has stated that "they can be traced back to all values, norms, and institutions which tend to protect human dignity and which are therefore inherent in most civilizations." Human rights are underpinned by the political, institutional and socioeconomic dynamics and their mutual interplay.[54] However, the contemporary idea about human rights can be related to the Universal Declaration of Human Rights. The Declaration is the consequence of the devastation caused by the World War in the early twentieth century. The concern for human welfare and the protection of their rights led to the establishment of the United Nations in the year 1945. As the Charter of the UN states that it was founded "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person."[55] The concept of human rights emerged as "a set of guiding principles and norms" and was proclaimed by the General Assembly of the United Nations as the ''common standard of achievement for all peoples and all nations.''[56] The core human right treaties can be illustrated in following infographic depiction:

Core Human Rights Treaties

<table>
<tr><td>Rights of Migrant Workers CRMW</td><td>Rights of Children CRC</td><td>Rights of Persons with Disabilities CRPD</td></tr>
<tr><td>Anti-Racism Convention CERD</td><td>Women's Rights Convention CEDAW</td><td>Conv. against Torture CAT</td></tr>
<tr><td colspan="2">Covenant on Civil & Political Rights</td><td>Covenant on Economic, Soc. & Cultural Rights</td></tr>
<tr><td colspan="3">Universal Declaration of Human Rights</td></tr>
</table>

Figure 3

Source: Marianne Schulze, "Understanding the UN Convention on The Rights of Persons with Disabilities" A Handbook on the Human Rights of Persons with Disabilities, September 2009 At Page 15

The Issue of Invisibility

Having explicated at length on the universality of the human rightist must be brought out that PWD suffer incredibly due to the phenomenon of invisibility!

53 *Ibid*.

54 Pierre de Senarclens, "The politics of human rights" 138 in Jean-Marc Coicaud, Michael W. Doyle, and Anne-Marie Gardner (eds.) *The Globalization of human rights* 2-3 United Nations University Press, Hongkong, 2003.

55 http://www.un.org/en/sections/un-charter/preamble/index.html.

56 *Supra* note 52.

The continuous affliction stems from the non-visibility which can be credited to the warped institutional arrangement of the society. This issue has remained alive and conspicuous for the longer time since the beginning of the history of human civilization. It would be pertinent here to quote Gerard Quinn[57] and Theresia Degener[58] who are the leading authorities on the disability issues. Elucidating reasons for the non-visibility of the PWD they state:

> This is a legacy of the past, when people with disabilities were often virtually invisible citizens of many societies. They have been marginalized in nearly all cultures throughout history. A common reaction (on the part of both the general public and policy-makers) was either pity or revulsion. There was a tendency to take the relative (or sometimes absolute) invisibility of persons with disabilities for granted or to accept it as "natural". The difference of disability was perceived as a ground for exclusion rather than a cause for celebration of the diversity of the human family.[59]

The authors further note that the children with disability and women with disability face double invisibility.[60]

Human Rights Instrument and the United Nations Convention on the Rights of Persons with Disabilities

Reference must be had to the International Bill of Human Rights which will always be instrumental in reification of the protection of the rights of the PWD. The other Conventions which are crucial are a) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), b) the Convention on the Rights of the Child (CRC) and c) the International Convention on the Elimination of all Forms of Racial Discrimination(ICERD).[61] The United Nations Convention on the Rights of Persons with Disability is the single most important milestone for the protection of the rights of PWD. It must be said here that this treaty "is the first comprehensive human right treaty of the 21st century" which marks the 'paradigm shift' in attitudes and approaches to persons with disabilities."[62] This Convention unequivocally has taken to the new height "the movement from viewing persons with disabilities as 'objects' of charity, medical treatment and

57 Gerard Quinn is Professor Emeritus in law at the National University of Ireland (Galway). He currently sits on the scientific committee (advisory board) of the European Union Fundamental Rights Agency (EU FRA, Vienna). He directs a Centre on International Disability Law & Policy at the Law School of the National University of Ireland. Source https://www.nuigalway.ie/centre-disability-law-policy/staff/staff-listing/gerardquinn/,

58 Theresia Degener is professor of Law and Disability Studies at Protestant University of Applied Sciences in Bochum, Germany and Visiting Professor at the Faculty of Law, University of Maastricht, The Netherlands. She is the director of the Bochum Centre for Disability Studies (BODYS) and Chair of the United Nations Committee on the Rights of Persons with Disabilities. Source https://www.maastrichtuniversity.nl/events/theo-van-boven-lecture-prof-dr-theresia-degener.

59 *Supra* note 3.

60 Ibid.

61 *Supra* note 3.

62 *Suprenote* 34.

social protection towards viewing persons with disabilities as 'subjects' with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.[63]

The guiding principles of the Convention are mentioned hereunder:

(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

(b) Non-discrimination;

(c) Full and effective participation and inclusion in society;

(d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

(e) Equality of opportunity;

(f) Accessibility;

(g) Equality between men and women;

(h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.[64]

The Convention on the Rights of Persons with Disabilities quite explicitly spells out the persons with disability having an unassailable right to fully enjoy all of human rights including having an equal access. Essentially this instrument advocates for the removal of all barriers which curtail the enjoyment of these rights.[65]

VI Conclusion

Disability does pose a formidable stumbling block which fetters persons affected by it. The debilitating effect of disability in its variegated form can only be ameliorated through meticulous planning and well calibrated efforts. The jurisprudence of human rights and of disability has evolved and witnessed tremendous changes. As has been discussed above, the concept of disability and the human rights are not oxymoron concepts. Bolstering the cause of disability would be ably fortified while also invoking the human right issues which are rightfully involved with it. The United Nations through its concerted effort has helped in developing international law on these issues. Having said that, the propitious requirement of establishing synergy between – the United Nations Convention on the Rights of Persons with Disabilities and the Sustainable Development Goal - cannot be overstated. And accordingly, as it can be seen that

63 *Suprenote* 34.

64 http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf.

65 Marianne Schulze, "Understanding The UN Convention On The Rights Of Persons with Disabilities" *A Handbook on the Human Rights of Persons with Disabilities*, September 2009 Available at https://iddcconsortium.net/sites/default/files/resources-tools/files/hi_crpd_manual_sept2009_final.pdf.

the effort is being laid out to build a barrier-free environment for the persons with disability. In Indian context, the new law: The Rights of Persons with Disabilities Act 2016, which has superseded the Persons with Disabilities Act of 1995, has ushered in a new approach to disability in line with the international norm. The Courts especially the Apex Court has been acutely alive to the 'lived-experiences' of the persons with disabilities. It has given various directions in their judgements to suppress the seemingly insuperable challenges created by the monolithic social and physical milieu. Indeed, the evolving human right paradigm has an enormous work at hand!

Privacy and Different Technological Application Interphase Indian Perspective

Dr. Jayanta Ghosh*
Late Naresh Pal**

Abstract

Privacy became the thorny impression difficult to address. Technology became the only reason to misuse. This misuse includes the information of individual, personal autonomy, body and place information of human being. All these misuses come under the purview of privacy. The sharing of the information and the necessity of the mandatory option are how much required is really in doubt. The discloser of information with some authority in true belief is how much reliable is in question. In the sphere of privacy Data Protection plays an integral role. Due to technological advancement, the Data Protection is also in threat and that 'personal privacy' thoughts process getting shifted to an edge. There are some intermediaries by whom the encroacher encroaches the privacy of an individual's namely Identity Card system, Biometrics, Surveillance of Communication, Internet and Email interception, Firewall, Video Surveillance, Workplace surveillance, Mobile, software attacks etc. It is acknowledged by different sources that privacy hindrances are the repercussion of development of information technology in this digitization. Intrusion in privacy is difficult as the boundary less internet world-wide. Often, individuals are unknown to the fact that their privacy is at stake. Similarly use of someone's confidential information without permission is also grave infringement and non-infringement if individuals as a layman. The solution to this fundamental problem is where a mystery lies really. The government, industry and the individual's prima-facie must be a consideration to curb the alarming situation on the privacy concern. Therefore, this fundamental issue must be understood within the technological and constitutional facet at any outlay within the regulatory norms. This paper shows the way forward of technology and legal aspects of Privacy matter.

Keywords: Privacy, Data Protection, Constitution, Technologies.

Introduction

"Technology has the power to touch people's lives."

The above quote is truly applicable in the present day where technology directly or indirectly affects the population of this planet. The way in which technology affects people's lives is unimaginable as it has percolated into the intricate details of our lives. To name a few the clothes that we wear, the food that we eat, the

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** Ph.D. Scholar, Department of Science and Information Technology, University du Quebec en Outaouais, Gatineau, QC, Canada, (In the memory of my beloved friend, may his soul rest in peace).

houses that we live in, the socio-cultural aspects of our lives, our personal interaction with the world. Our personal interaction with the world in the yesteryears was through direct physical interactions with one another. Technology has removed that physical and geographical barrier between people and things have become truly global with the help of internet. Internet has opened the doors to limitless possibilities in the digital world and now the word internet has transformed from its original simple meaning of being a global computer network to something that people cannot live without.

It has ushered in a new digital world. In this new digital world, the amount of and the kind of information available is unfathomable to the human mind. Information about people collected through different channels by different entities is present in the digital space and can be obtained by people who know how to obtain such information. This brings forth concerns regarding the privacy of an individual, which he has an inherent right to, even in the digital age. Right to be let alone and the isolation also come under privacy. informational privacy rights provides the measurement or amount of information of an individual which can be own.

It can be expressed widely may show us the availability of information of an individual in public domain. Once you Googled your information, you may find yourself and connected information which you shared or activity involved with in service provider. This simple internet search can give the glimpse of an individual activity. The amount of private information has increased in an open internet society and level of privacy has decreased. Privacy continues to shrink with technological innovative advancements. However, the Apex Court of India also followed the same as many countries[1]: the right of privacy should not be an burden to the individual as well as to the society. No doubt it is individual's right to know is greater than that. This demonstrates the reason for difficulties in to determine and regulate the infringement of technology in the realm of privacy.

This research explored technology domains such as electronic surveillance, mobile apps and workplace monitoring of personal information where privacy issues are of concern. It is easy to find general information about a person by carrying out a general search in the internet. Those who wish to obtain sensitive information about a person such as financial data, e-mail usernames and passwords etc have plethora of illegal means like phishing[2], viruses, trojans and hacking[3] methods. In addition to that, people have no awareness of online privacy. They freely give-out their personal details to various online marketing gimmicks hoping of winning reward or prize. Various websites ask for personal information even though it might not be required for the task at hand. Since that has become an industry standard people have become desensitized to the concept of online privacy. Things like revealing and sharing your geographical location on Google Maps and

2 Phishing is "Scamming method used to get personal information".

3 *"Hacking is the gaining of access (wanted or unwanted) to a computer and viewing, copying, or creating data (leaving a trace) without the intention of destroying data or maliciously harming the computer. HACK means Break into computer systems or software".*

Creating profiles/accounts in various social media such as Facebook[4], LinkedIn, Google+, Twitter, WhatsApp, Snapchat, Viber etc. can reveal the entire life history of a person through the information provided while creating the accounts.

Apart from an individual providing personal information in the private sphere different governmental agencies have started gathering personal data of individuals and store this information in their independent isolated database servers. There is no unification of data collected by these different governmental agencies as each agency collects personal data for different purposes, as per its own standards and are maintained as per the technology available to it. The technology used is not of the same level for protection of this private information and there have been countless incidents where hacking groups have been able to target some governmental agencies more easily than others. Apart from collecting public personal information, the government has detailed information about its employees in its databases. How can this information be used by the government in carrying out its activities? Does the government have the freedom to use this personal individual information of public as well as its own employees so as to derive specific information which can help in knowing the past and predicting the future actions of a person? Does the individual have any right to privacy to prevent any unwanted intrusion into his private life by the government or private entity?

India recently comes with the exclusive privacy stands.[5] In Article 21[6] and Article 19 (1)(a)[7] of the Constitution given the peanut butter for the citizens. However, the judiciary has finally established the stands on 'right to privacy'. This stand of judiciary makes 'right to privacy' as an action against the breach of privacy by a private as well as organisation. In this regard the concept of data[8] protection, personality right[9] and privacy jurisprudence in India, not developed yet. The concept of the privacy violation due to technology is yet to reach the Indian judiciary's doorstep. But every person connected to the digital world experiences

4 Facebook is a social networking website. It connects the people on it.

Available at: http://www.thehindu.com/news/national/other-states/whatsapp-admins-are-liable-for-offensive-posts-circulated/article18185092.ece (Viewed on Oct 27, 2019).

Available at: https://timesofindia.indiatimes.com/city/pune/Now-marriages-break-over-WhatsApp-connections-of-partners/articleshow/48752696.cms (Viewed on Oct 27, 2019).

5 Justice K.S. Puttaswamy (Retd)& v. Union of India & Ors. MANU/SC/0849/2015

6 Govind v. State of M.P. AIR 1975 S.C. 1378

7 "The right to freedom of speech and expression".

8 Section 2 (o) 'Data' of THE INFORMATION TECHNOLOGY ACT, 2008.

9 'Personality right' "it is the right to control and profit from the commercial use of one's name, image, likeness, etc., and it prevents unauthorized appropriation of the same for commercial purposes". The Madras High Court impose an injunction restraining the release of movie titled as "Main hoon Rajnikanth" invoking personality rights. The superstar in his application stated that, *"A large section of the public across India is, therefore, likely to be misled into viewing such project/film on the mere belief that the said project/film has been approved by their matinee idol. It is to prevent such widespread hysteria and undue confusion amongst the public, besides maintaining his personal integrity; he has chosen to abstain from approving or supporting any project based on his personal self/personality. Besides, such film based upon Rajinikanth's name, image or likeness would be a gross violation of his privacy, and would subject him to needless embarrassment as he does not have any control over the content of any unauthorized or unapproved project/film."*.

intrusion of his online privacy in some form or the other and the individual is silently suffering without being aware of it himself. This is serious issue which needs to be taken care immediately else it may grow out of hand and there may emerge a new world where there is 'No Privacy'. All the ways by which an intellectual invader can encroach the privacy of an individual namely through Identity Card system, Biometrics, Surveillance of Communication, Internet and email interception, Firewall, Video Surveillance, Workplace surveillance, Mobile, software attack etc. must be identified and examined to reach a level of justification.

Impression of Privacy

"Some there be that shadows kiss:
Such have but a shadow's bliss."

—William Shakespeare, The Merchant of Venice

Advancement is overpowered the people and industry has beaten us. We get ourselves vulnerable by dormant assaults of protection matter. We end up destroyed by unmistakable interferences to our personhood. Personhood became the only concern for the world these days. "Inviolate personality" is an anachronism.[10] As a substitute, gossip "has become a skill, which is pursued with industry as well as effrontery".[11] Intimate moments of human life captured on spy cameras, is disclosed for gains.[12] Non-disclosable secrets are published in the society is creating a problem for everyone. Decade ago its saying that "what is whispered in the closet shall be proclaimed from the house-tops".[13] This has appeared in the new generation in a different way as a replica of old. Such reflection might be well-suited Privacy obviously that the private individual data uncovered by any person to Government or non-Government element ought not be uncovered to outsiders without accord of the individual. Fundamentally, revelation of information which can be utilized to recognize a physical individual without following the due technique could be taken as break of security and the sufficient precautionary measures should be embraced while preparing and putting away such data.

Privacy is in its nascent stage and digital privacy is still undeveloped in India. It tries to thump on the entryways of handy idea by characterizing the idea of 'protection'. It offers to perceive huge choices of the Court[14] in attempting to characterize this subtle right with regards to the Constitution.

> *"Right to privacy is an integral part of right to life, a cherished constitutional value and it is important that human beings be allowed domains of freedom that*

10 Messrs. Samuel D. Warren and Louis D. Brandeis *"The Right to Privacy,"* Harvard Law Review (1890).

11 *Gobind v. State of M.P.*, (1975) 2 SCC 148, 156.

12 Devashish Bharuka, "Piercing the Privacy Veil: A Renewed Threat", (2003) 1 SCC J-23; See also Madhavi Divan, "The Right to Privacy in the Age of Information and Communications", (2002) 4 SCC J-12; See also B.D. Agarwala, "Right to Privacy: A Case-By-Case Development", (1996) 3 SCC J-9

13 WARREN & BRANDEIS Supra note 14

14 Supra note 7.

are free of public scrutiny unless they act in an unlawful manner." "Revelation of bank account details of individuals, without establishment of prima facie grounds to accuse them of wrong doing, would be a violation of their rights to privacy." "State cannot compel citizens to reveal, or itself reveal details of their bank accounts to the public at large, either to receive benefits from the State or to facilitate investigations, and prosecutions of such individuals, unless the State itself has, through properly conducted investigations, within the four corners of constitutional permissibility."[15] The *ratio decidendi* of this case are also apt for the concept of privacy.

The concepts of Privacy may in defined in one way as 'A transfer of move towards Property to Person, with Search & Seizure to protect the Dignity & Personal Rights'. In Black's Law Dictionary, the Privacy identified as "right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned". The perception of privacy is culturally relative and different. The use of some confidential information without authorization is also to be treated as an invasion of other's personal right to privacy. This Right to privacy can be sub-categorised into seven facets: 1) the right to be let alone;[16] 2) limited access to the self; 3) secrecy; 4) restrict of personal information; 5) personhood; 6) intimacy; and 7) privacy as a band concept status of human.

This idea of privacy likewise incorporates the meaning of individual information is wide while contrasted with individual touchy information, which is more explicit and incorporates different sorts of data, which, whenever unveiled erroneously, its hampers the monetary as well as reputation of the individual concerned. All the enactments of various nations[17] analysed recorded the accompanying as close to home touchy data: (a) cultural or traditional inception; (b) political connections or conclusions; (c) religious associations and convictions or different convictions of a comparative sort; (d) participation of an exchange association; (e) physical or emotional well-being; (f) sexual life; and (g) criminal record. What's more, the accompanying classes of data have additionally been treated as close to home touchy data in a few jurisdictions.[18] These are (i) Genetic information; (ii) Information or an opinion about an individual; (iii) Monetary data; (iv) Data on an individual personality; (v) Private household relationships; (vi) Biometric Information; and (viii) Govt. Tax Information. These parameters or the so called concepts of privacy has been well-known and can be related to our own lives. There is always an involvement of technology in various facets of privacy related matters.

Technology & Privacy: Interphase Issues

Various activities such as Smart Identity Card system, Surveillance of Communication, Internet and email interception, Firewall, Video Surveillance,

15 Ram Jethmalani and ors v. Union of India and ors, MANU/SC/0711/2011.

16 Warren and Brandeis , *Supra Note* 14.

17 Here legislation includes the DATA PROTECTION ACT 1988, INFORMATION TECHNOLOGY ACT, COMPUTER MISUSE ACT, PERSONAL DATA PROTECTION BILL etc.

18 Here jurisdiction means the countries where the privacy matters are very much relevant in nature.

Workplace surveillance, Mobile Apps and Software Attack etc have raised privacy concerns and are discussed under

a. Valid Identity with Smart Identity Card

In our daily life we use different types of identity cards issued by various government and private agencies to verify our identity. Traditional Identity cards contain basic information about a person, printed on a plastic or similar material, to visually verify against who he claims to be. The credibility of the identity card such as passport, employee card, student card etc. depends on the issuing authority. Gradually these customary cards are being supplanted by Electronic and Smart National Identity cards. They have a programmable chip inserted in them for putting away a few information that can be connected to a focal database. This association with a focal PC database recognizes brilliant ID cards from their paper-based antecedents.[19] These savvy cards have numerous highlights and capacities in a solitary card, and can be utilized both to access taxpayer driven organizations and to associate the holder with a database record. They may incorporate biometric gadget utilizing individual data, for example, fingerprints, facial outputs or iris examines alongside a photo.[20] In those spots where they exist or are proposed, everybody will in the long run be influenced. They have profound ramifications for more extensive arrangement, connections among subjects and the state, and for power relations all the more comprehensively.

Another aspect which needs to be mentioned here is that most of the traditional identity cards such as driver's licence, passport etc. are obtained voluntarily whereas countries in the present age are moving towards a single compulsory smart identity card so that, in principle, all citizens have cards to provide a means of demonstrating who they claim they are.[21] The developed countries like US, UK and other countries have single separate compulsory identity card like social security number for every individual and so India with its Aadhar card number as like as unique identity. These smart national identity cards contain various biometric information. Biometrics information is measures and analyses biological information. It give the authenticity to the human body with measuring as DNA, fingerprints, eye retina and irises, voice patterns, facial patterns and hand measurements. This information is stored in central or decentralized databases. From various States in India have started collecting such biometric information for providing various targeted social schemes.

Different States in India have begun gathering such biometric data for giving different focused on social plans. In May 2010, around 5.8 crore individuals biometric date has been gathered by the Andhra Pradesh State Govt.[22] It took five

19 Lyon, David and Rule, James B. and Combat, Etienne, Identity Cards: Social Sorting by Database (November 1, 2004). Oxford Internet Institute, Internet Issue Brief No. 3. Available at SSRN: http://ssrn.com/abstract=1325259 or http://dx.doi.org/10.2139/ssrn.1325259 (viewed on 20th Oct, 2019).

20 Ibid.

21 Ibid.

22 The Hindu Business Line, Ration Cards: 1.1 Crore Biometric Samples Found to be Duplicate, May 13, 2010, available at http://www.thehindubusinessline.com/2010/05/13/stories/2010051351831900.htm (Viewed on 25th Oct, 2019).

years to accumulate the information and trailed online database arrangements by Aadhar Card. After that approx 1.1 crore card data was found fake.[23] This fake information are used in different domain like Public Distribution System (PDS), National Rural Employment Guarantee Scheme, Pension, and so forth. The civil supplies department was held responsible for this. This accumulation of the card information includes photos, fingerprints and iris also.[24] Number of ration card was issued to the BPL families by the Tamilnadu State government with fake information of biometric by June 2011.[25] There are far reaching protection issues with this framework.

To begin with, all this personal information is stored in a single centralized place and there are inherent dangers in doing so. Whenever a national smart card connects to the database to establish the identity, this transaction is saved and that leads to a thorough trail of a individual activities which can be retrieved by authoritarian access. The system is prone to various threats such as man in the middle, skimming attacks, Abuse by authorized personal, decrypting the data and complicated cyber-attacks etc. which could serve the curated personal information in the databases for ready analysis and tracking of an individual thereby threatening the individual's privacy. The centralized storage of personal information and technology glitches has led, in the recent cyber-attack on U.S governmental agencies, to the loss of millions of personal records of its employees which poses a serious threat to national security and individual's privacy[26].

Another such incident is the hack on Sony Pictures[27] which led to the loss of, among many things, the Social Security Numbers[28] is the weapon for infringement. The protection to data collected by various states and in Aadhar project is insufficient and makes them highly vulnerable to such attacks. In the Neera Mathur v. LIC, Apex Court of India has directed to the authority to necessary changes in the concern of Privacy.[29] Because of the lack of direct judicial or legislative guiding principles on privacy related to such smart cards in India, it is pertinent to understand the situation in other jurisdictions.

By following the Data Protection Act 1988, UK launched the identity card project. The very contentious Identity card project in the U.K.[30] was prepared by

23 Id

24 THE HINDU, Shankar Bennur, Mysore: Biometric Ration Cards Issued to 5.56 Lakh Beneficiaries, (New Delhi) July 17, 2010, Available at http://www.hindu.com/2010/07/17/stories/2010071752020300.html (Viewed on 25th Oct, 2019).

25 Times Chennai, Centre's Nod for Bio Metric Ration Cards, July 26, 2010, available at http://www.timeschennai.com/index.php?mod=article&cat= Chennai& article=5871 (Viewed on 25th Oct, 2019).

26 Supra Note 35.

27 KEVIN GRANVILLE, *9 Recent Cyberattacks Against Big Businesses*, NY Times, February 5, 2015. Available at: http://www.nytimes.com/interactive/2015/02/05/technology/recent-cyberattacks.html?_r=0 (Viewed on 25th Oct, 2019).

28 Unique compulsory number issued to its citizens by the United States.

29 *Dist. Registrar and Collector, Hyderabad Vs. Canara Bank* 1997 (4) ALT 118.

30 BBC News, Identity cards scheme will be axed 'within 100 days', May 27, 2010, available at http://news.bbc.co.uk/ 2/hi/8707355.stm (Viewed on 25th Oct, 2019).

following the Data Protection Act, 1988[31]. Abiding the principles stated in the general rule that "Personal data shall be processed fairly and lawfully and in accordance with certain prescribed conditions", the another one "Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes".[32] Though not explicit they seem to encompass the spirit of privacy. The use of information and the purpose of use of the information is the legal basis to include this principle. The 'fairness test' is set for maintaining the awareness of information who has accessed. The Apex Court in India, established 'tests of reasonableness' for legislative intrusions/ executive orders/judicial orders. In the judicial interpretation only these principles highlighted where Court has not yet issued any guidelines. The US, also has various privacy laws viz Privacy Act, 1974, Computer Matching and Privacy Act, Video Privacy Protection Act etc.[33] The personal data and individual rights over information contained in federal databases is mentioned in the Privacy Act, 1974.[34] This legitimate design is to incorporate what data is utilized as well as to whom it conceivably might be available. The 'reasonableness test' is set for keeping up the familiarity with data who has gotten to. The Apex Court in India set up 'trial of sensibilities for authoritative interruptions/official requests/legal requests. Up to this point, these have proceeded with expansive standards for legal understanding, and no place have the courts given explicit rules. Though U.K. has a far reaching protection law for individual information all in all, the U.S. has various enactments that hold security issues engaged with different parts, for example, Privacy Act, 1974, Computer Matching and Privacy Act, Video Privacy Protection Act and so on.[35] Individual information and individual rights are to be protected under Privacy Act 1974 over government databases.[36] It has become outdated that the benefits of having these smart cards out-weigh the risks. There are serious risks looming over such projects, the core of which is individual's privacy.

b. Surveillance as an Interphase of Communication

The surveillance of communication[37] is another arena which comes within the

31 Available at: http://www.legislation.gov.uk/ukpga/1998/29/data.pdf (Viewed on 25th Oct, 2019).

32 THE DATA PROTECTION PRINCIPLES, UK DATA PROTECTION ACT, 1988, Principle 1, 2, Schedule 1.

33 Jean Slemmons Stratford & Juri Stratford, Data Protection and Privacy in the United States and Europe, Paper presented at the IASSIST Conference, May 21, 1998, at Yale University, Available at http://www.iassistdata.org/downloads/iqvol223stratford.pdf (Viewed on 25th Oct, 2019).

34 S.Bhushan, The UID Project: The 1984 Of Our Times, available at http://ssrn.com/abstract=1598596 (Viewed on 25th Oct, 2019).

35 *Supra note* 35.

36 S.Bhushan, The UID Project: The 1984 Of Our Times, available at http://ssrn.com/abstract=1598596 (Viewed on 25th Oct, 2019).

37 *"Communications include activities, interactions, and transactions transmitted through electronic mediums, such as content of communications, the identity of the parties to the communications, location-tracking, information including IP addresses, the time and duration of communications, and identifiers of communication equipment used in communications."*

purview of privacy matter. For carrying out surveillance of communication,[38] there is a direct technological impact.

"Protected Information" is the information which is not easily available to the public. In traditional way, Surveillance has been assessed in regards to negative approach. This negative approach has been in contrast with the techno-legal aspects. The differentiation comes on several aspects like, content, subscriber information or meta data of an individual. Ownership of data and transfer of onus to data from first hand to third party service provider is a serious concern.[39] However, these variations of the various aspects of interruption are also aa surveillance of private life.

While it has for quite some time been conceded that correspondences content merits vital assurance in law as a result of its capability to uncover delicate data. It is obvious that data generation from the meta data are also a substantial concern where the merits of security identity is in risk. With these frequent uses of meta data a common person choice, conduct, character, affiliation, physical strength and weaknesses can be unfold.[40] The uncoverness can be a challenge to the society to prevent intrusion from known or unknown faces.

By the intrusion, the information of an individual is at stake. These intrusions can be done by the government also, where both the choices is in the hand of the state. State is at liberty to choose the protection of information, where every developing country is doing. It applies to the human rights of an individual. Correspondences Surveillance that prompts the uncover personal information may put a man in danger of examination, segregation, or infringement rights to build up a genuine encroachment on a person's entitlement to security. It will likewise test the delight in other essential rights, including the privilege to free articulation, affiliation, and political interest.

When supporting another Surveillance system or expanding the extent of a current procedure, the State ought to decide if the data should be forgotten. That data falls in the arena of protected information before searching and the legal stands to examine that information is depends on state's legal execution. Since unavoidable or orderly checking or intrusive systems have to acknowledge the surveillance to unfold the private data of overabundance of its basic parts, it can elevate observation of non-ensured data to a dimension of obtrusiveness that requests full security as Protected Information.[41]

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38 *"Communications surveillance in the modern environment encompasses the monitoring, intercepting, collecting, obtaining, analysing, using, preserving, retaining, interfering with, accessing or similar actions taken with regard to information that includes, reflects, arises from or is about a person's communications in the past, present, or future".*

39 *United States v. Jones*, 565 U.S., 132 S. Ct. 945, 957 (2012).

40 *United States v. Jones*, 565 U.S., 132 S. Ct. 945, 964 (2012), *"Short-term monitoring of a person's movements on public streets accords with expectations of privacy"* but *"the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."*

41 *"Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a*

contd. on next page

c. Internet and Email Interception Interphase

In the matter of Internet and email interception, the golden rule: "if you don't need to know, don't collect it". Its moving towards with golden rule "the more you know, the more you're responsible for". Therefore, the subsequent rule is established or apply for this technological advanced age. The privacy is being ending day by day gradual interference of the more and more internet options. Internet gives everything in our door step, starting from early bed to before going to bed every necessary items are easily available on internet. Online shopping become a huge hub in India, in this matter whatever information any individuals are sharing in the internet it has gone to the cloud. Therefore, as a result of that the data receiver and stores of that sharing information can be disclosed without the knowing of the Data provider. Every browsing site has their own privacy policy as per their choice which can be come under the question of validity. The unanimity of the privacy policy is set to require unless it creates a lots of hue & cry situation for the world. The technology of the internet browsing system has also anti virus protection process, but the maker of this anti virus process has some limitation. The limitation of the browser is becoming the weapon to crab the privacy matter of the individuals. The advances allow governments, organizations, and different elements unhindered admission into the lives of the general population. For instance, people are tormented with spam messages and spontaneous showcasing calls/instant messages, hazard misrepresentation and phishing assaults as they execute on the web, have individual data gathered, utilized, and sold without authorization or colleague and hazard having specialist organizations hold client information and history.

Besides, online protection is imperilled as the clients regularly don't have authority over the data that create and the connection between what is private data, and what is open data is frequently indeterminate. This has made a circumstance where data showed on long range informal communication locales can be utilized as proof against an individual or to settle on choices about the person. Worker is presently look into a person's Facebook profile as a component of the procedure for deciding if to contract or advance a man and law authorization organizations settle on choices dependent via web-based networking media content. For instance, in 2012 various people were arrested for remarks tweeted or posted on Facebook in India. This included two young ladies, one of whom had posted a remark on the passing of government official Bal Thackeray, and her companion who enjoyed the remark.[42] By this story, these episodes bring up the issue of whether discourse via web-based networking media is private or open.

church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one's not visiting any of these places over the course of a month. The sequence of a person's movements can reveal still more; a single trip to a gynaecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story. A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups – and not just one such fact about a person, but all such facts." U.S. v. Maynard, 615 F.3d 544 (U.S., D.C. Circ., C.A.)p. 562;

42 BBC. India Facebook arrests: Supreme Court demands explanation. BBC. November 30th 2012. Available at: http://www.bbc.co.uk/news/world-asia-India-20551955. (Viewed on 25th Oct 2019).

d. Video Surveillance & Workplace Surveillance

The video surveillance[43] & Workplace surveillance[44] is the growing phenomenon in the recent years. These are being adopted on a large scale basis at public and private environments in the name of security. Public video surveillance is done by government offices to keep up social control, perceive and screen dangers, and avert/examine criminal movement. In such manner it is significant to feature that not exclusively are governments utilizing this framework, yet possessed social orders in specific zones are additionally utilizing this framework to make a safe and safe condition. The technology used for video surveillance has improved to such an extent that a person or vehicle number plate can be identified from far away distance. In countries with advanced surveillance systems it would be easy to track someone or perform targeted surveillance by performing a facial recognition on the videos obtained from cameras placed at multiple strategic locations in a city. Other forms of abuse can be criminal abuse, institutional abuse, abuse for personal purpose, discriminatory targeting and voyeurism[45]. Such activities are a total violation of individual privacy. Open reconnaissance is essentially restricted by numerous social equality and protection bunches crosswise over various purviews and have communicated uneasiness that by permitting rehashed increments in government observation of subjects that we will wind up in a mass observation civilisation, with amazingly constrained, or non-existent political or potentially close to home freedoms. It makes another component of "CCTV"[46] framework which will end the protection of human. A few nations like U.S, Australia have surrendered their protection worries for security while a few nations, for example, Canada, U.K have endeavored to strike a harmony among security and security. All the problems mentioned above could happen in India as it slowly increases the amount of public surveillance leading to total invasion of privacy. There is no special law or rules dealing with surveillance in India and its associated privacy issues. This would be a contentious area in the coming years as India rapidly expands in its national security policy.

As of now, India doesn't have a very much characterized law on UAVs, and however any sort of automation flying is restricted in India, because of absence of arrangements to book the administrators, specialists can just grab the machines. Further, there are no standards or arrangements set up to guarantee that they

43 *"Video surveillance means a system of monitoring activity in an area or building using a television system in which signals are transmitted from a television camera to the receivers by cables or telephone links forming a closed circuit."*

44 *"Surveillance means close observation or supervision maintained over a person, group, etc., especially one in custody or under suspicion".*

45 *"Experts studying how the camera systems in Britain are operated have also found that the mostly male (and probably bored) operators frequently use the cameras to voyeuristically spy on women. Fully one in 10 women were targeted for entirely voyeuristic reasons, the researchers found. Many incidents have been reported in the United States. In one, New York City police in a helicopter supposedly monitoring the crowds at the 2004 Republican Convention trained an infrared video camera on an amorous couple enjoying the night-time 'privacy' of their rooftop balcony."*

46 *"'CCTV' (closed-circuit television) is a TV system in which signals are not publicly distributed but are monitored, primarily for surveillance and security purposes. CCTV relies on strategic placement of cameras, and observation of the camera's input on monitors somewhere."*

are worked securely. Curiously, they are promptly accessible in real toy shops or even on web based shopping stages like Amazon, Flipkart and so forth, and any native more than 18 years old can get one and fly it. Be that as it may, bringing in automatons without earlier authorization is prohibited in India.[47] Strikingly, while according to the current laws, a wide range of automaton exercises are precluded by The Directorate General of Civil Aviation (DGCA), there is a space for elucidation which permits all administration bodies to work UAVs for their utilization. Truth be told, different government mission mode ventures, including farming and Railways and so on are as of now utilizing automatons. Indeed, even different state offices and police powers are likewise utilizing UAVs for different exercises. Territories like aeronautical photography, looking over, trim splashing, examination of transmission electrical cables and gas pipelines and so on are seeing a tremendous interest for utilization of automatons, as per DGCA.

e. Technological Interphase with Mobile

A time prior, cell phones became history now, tablets, smart phones are in reality,[48] starting at 2012, cell phone holders spoke to a larger part of portable supporters. Moreover, ten years prior, the expression "application" had not touched base out in the open language. There are more than 800,000 accessible in the Apple App Store and 700,000 on Google Play Store information are breached.[49] These mechanical changes going into another imaginative propelled age. An examination says in the coming years, buyers' utilization of cell phones, tablets, and other cell phones is anticipated to develop at astonishing rates.[50] Clearly this quick development of portable advancements gives tremendous incentive to the two organizations and customers. Cell phones are revamping how customers connect, convey, and do ordinary exercises.

In the meantime, because of this versatile innovation benevolences extraordinary security challenges. Right off the bat, more than different sorts of innovation, cell phones are typically close to home to an individual, quite often on, and with the client. This can empower phenomenal measures of information gathering. The information gathered can uncover delicate data, for example, interchanges with contacts, seek inquiries about wellbeing conditions, political interests, and different affiliations, and in addition other greatly close to home data.[51] This information likewise might be imparted to outsiders, in transit of beset

47 Available at: https://www.geospatialworld.net/blogs/drone-laws-for-india-in-the-offing/ (Viewed on 20th Oct, 2019).

48 Nielsen Wire, America's New Mobile Majority: a Look at Smartphone Owners in the U.S. Available at http://blog.nielsen.com/nielsenwire/online_mobile/who-owns-smartphones-inthe-us. (Viewed on 25th Oct, 2019).

49 Available at https://www.apple.com/ (Viewed on 25th Oct, 2018); See Also, Business Week, Google Says 700,000 Applications Available for Android, available at http://www.businessweek.com/ news/2012-10-29/googlesays-700-000-applications-available-for-android-devices. (Viewed on 25th Oct, 2019).

50 App. Nation & Rubinson Partners, *How Big is the US App Economy? Estimates and Forecasts* (2011), available at http://www.slideshare.net/joelrubinson/an3-us-appeconomy20112015 (Viewed on 25th Oct, 2019).

51 Jennifer M. Urban et al., Mobile Phones and Privacy, available at http://ssrn.com/ abstract=2103405. (Viewed on 25th Oct, 2019).

promotions. Furthermore, in the confounded portable condition, a solitary cell phone can empower information gathering and sharing among numerous articles, including remote suppliers, versatile working framework suppliers, handset makers, application fashioners, investigation organizations, and sponsors to a degree unprecedented in the work area setting. This likewise prompts have the subject of security for the clients. Thirdly, cell phones can uncover correct data about a client's area that could be utilized to fabricate nitty gritty profiles of client developments after some time and in manners not expected by client. Unquestionably, the versatile organizations can utilize a cell phone to gather information. The behaviour and plans that used to change the time and again in the lifestyle.[52] Without the proper respect of the individual information and also if these information's falls in strangers' hand, there is a chance to damage the respect/reputation of the individual. These damages cannot be compensated with penny or monetary benefits.

This situation has been expressed by the user of cell phone more often. Because of these worriedness the user either uninstalled the application or declined to share the information.[53] Absence of regard for these tensions could prompt a disintegration of trust in the portable commercial centre, which could be destructive to both client and industry.[54] At long last, with numerous gadgets holding screens of only a couple of inches, there are functional difficulties as far as how basic data, for example, information accumulation, sharing of data, and utilization of geological area of information is transported.

f. Linkage of Software Technology

In general a laymen only knows about the anti-virus which protects the system from virus attack. There are some specific Viruses namely, Wannacry Ransomware, Morris, Jerusalem, Stuxnet, Duqu, Storm Worm, Conficker, Duqu, Melissa, Love Letter, Code Red, SQL Slammer, Black Shades, MSBlast, Trojan horse, Worm, Trapdoor, Logic and Time Bomb, etc. Virus is defined as a machine code which replicates itself wherever and whenever possible. It is established that it protects the system from attack but some viruses may only amuse while others can cause systems to crash. Any virus writer has now to face a number of charges for their misuse. Trojan horse, Worm and Trapdoors are different from viruses. They reside in hosts as parasites and can be used for cracking passwords and allowing unauthorised access in the future without detection. A Logic Bomb is activated by any specified computer process and then triggers illegal activities whereas the internal clock of the computer activates a time bomb. Therefore, the technological aspects of the software matter in privacy invasion is very rampant by the users.

52 United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010).

53 Supra note 53.

54 *Protecting Mobile Privacy: You're Smartphones, Tablets, Cell Phones and Your Privacy: Hearing before the Subcomm. For Privacy, Technology and the Law of the S. Comm. on the Judiciary, 112th Cong.* (2011).

Available at: https://skillonpage.com/computer-virus-names-in-tech-history/ (Viewed on 25th Oct, 2019).

Conclusion

It can be finished that the use of technology with collaboration of knowledge or excellence any one can infringe the privacy. In other way these qualities conscious individual looking for privacy and protection of information. The independence of the rights and freedom towards the privacy is in shaky hand. In the concern of privacy, transparency of handling the Data are very important relating to collection, storage, individual participation, Data quality and security of the shared information to any sector. The accountability of the fair practice of Data handling on technological arena it must be transparent. However, the surveillance on search and seizure in contrast of technology is not fir with the constitutional right of privacy. The privacy right is wider in each and every aspect of the where the interest of individual lies. To tackle the search and seizure of online information the without search warrant is need to be tackle in a sophisticated way. The technological improvement should be at par with the legal sanctioned and legal advancement which can protect the actual right to privacy of an individual.

The overused of personal information to make future analysis for the societal demand also destroy and threat to privacy right. With the advancement of technology, the generation of the data or information which can control the conduct or routine of personal affairs is diminishing the data protection right. It is accepted that the legal sanctioned should be at par with the technological advancement and developed with digital time. With all the modalities of judiciary or legislative approach, there are another approach which needs to develop. The consciousness and respect for others information of an individual is one of the most important aspect need to inculcate. Every law is made by the peoples, for the peoples where the question arises to abide the laws with religious manner. Right to privacy and data protection can be one day comes in the legislation but to make a habit not to breach the law is depends on the awareness and consciousness upon individual. My view on development of technology and privacy laws, "Technology may be change daily but societal laws implementation has to change with circumstances". We need to define privacy laws for each technology.

Towards the Renaissance
Shibli and Maulana Thanvi on Sharia (2019)[1]

Abhishek Gupta*

The zeal of the dominant political class of India for ushering Uniform Civil Code has initiated a parallel discourse and action on the reformation of existing personal laws. The question of constitutional legitimacy is put juxtaposed to adjudicate the legality of religious customs and practices. Now the benchmark for validating a religious practice is not the monopoly of religious community anymore, but the 'constitutional morality'. This new-found benchmark has been further strengthened by the cross-linking of socio-political issues such as gender-justice, national security, public interest and other secular constructs etc., where the traditions of communities are being curtailed for the 'universal greater good'. This was evident in the pro-active approach of the Supreme Court when it struck down the controversial practice of *triple talaq* in *Shayara Bano* case (2017)[2]. Interestingly, the minority judgement delivered by Justice Khehar and Abdul Nazeer went to the extent of upholding the practice as fundamental right guaranteed under Article 25 of the Constitution, but with an effective 'stay-order' on its exercise till a law completely bans it. Similar attempt was made by the Supreme Court in *Sabarimala* case (2018).[3] In the quest for ushering 'modernity' in the matters of faith, perhaps the society and the State has either overlooked or forgot to look into the past methodologies and literature of religious scholars and jurists. *Abhishek Gupta* Research Scholar, Faculty of Law.

The Islamic law (*Shariah*) which has been an exhaustive code for Muslims in India and around the world, has lately been in the limelight of this 'politics of reform'. The stereotyping of *Shariah* as an archaic, oppressive and regressive code has made it an object of target for personal law reform process. The recent *Triple Talaq* Bill of 2019,[4] which had been promulgated as Ordinance several times in the past, is another classic example of a ham-fisted approach of the State to address social problems through legal instruments. On the other hand, very limited resources have been invested in developing an understanding that Islamic Law and jurisprudence in itself has the potential to suggest and institutionalise reforms, especially gender-related issues in its personal laws. The secondary sources of Islamic law such as *Ijma* (Consensus), *Istihsan* (Juristic preference or equity),

1 By Dr. Furqan Ahmad, Indian Law Institute, New Delhi, (Pp. 563, Price Rs. 600/-)

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2 *Shayara Bano v. Union of India,* (2017) 9 SCC 1.

3 *See, Indian Young Lawyers Association v. The State of Kerala, Writ petition (Civil) No. 373 of 2006 (Date of Decision: September 28, 2018).*

4 The Muslim Women (Protection of Rights on Marriage) Bill, 2019 (Bill No. 82 of 2019) was introduced in *Lok Sabha* by the Minister of Law and Justice, Mr. Ravi Shankar Prasad on June 21, 2019. It was passed by *Lok Sabha* on July 25, 2019 and subsequently by *Rajya Sabha* on July 30, 2019.

and *Al-Masalih Al-Mursalah* (Public interest) offer great flexibility to reform the traditional Islamic law in sync with modern developments in the realm of family law and in consonance with the objectives and purposes of *Al-Quran* and *Sunnah*. Thus, what is the need of the hour is not a politically institutionalized movement of personal law reforms, but building an intelligent understanding of the *Shariah* and *Fiqh*, for resolving social incongruities in the Muslim personal laws. But the truth be told, in a secular global order, theocratic arguments and solutions are seen with much suspicion and contempt.

In the light of the above discussion and the ongoing discourse of Muslim personal law reform, the book under review is *Towards The Renaissance: Shibli and Maulana Thanvi on Sharia* (2019)[5] authored by Prof. Furqan Ahmad[6] and published by the Indian Law Institute (New Delhi). As the chorus for Muslim law reform grows louder and louder, this book is a timely effort to survey the academic writings of two noted Islamic scholars – Maulana Ashraf Ali Thanvi and Allama Shibli Numani, and unveil their contribution in synthesising Muslim law with modern developments in society. The author has made an in-depth study of the scholarly works of Maulana Thanvi and Shibli in the light of distortions and misrepresentations that have crept into Muslim law, and attempted to conceptualise and suggest alternate methodologies for reforming various aspects of Muslim law.

The book begins with an introduction written by Prof. Werner Menski,[7] wherein he has unveiled the fallacy of secular state intervention through legislative reforms in the Muslim personal laws. Lamenting at the politicisation of the reform process, he has teared into the official narrative and public discourse on Muslim law especially the issue of *Triple Talaq*. While reposing faith in the potential Islamic mujtahids to reform certain distortions in the application of Islamic law, he has rightly acknowledged the consistent failure of the Islamic law scholars in providing guidance and solutions to the Muslim community at large. Prof. Menski has offered deep and persuasive insights on the role and relevance of Islamic law at a time when the global order with all its international treaties and conventions have consistently diminished the role of theology in law-making process.

The division of book is in two parts with seven chapters, a prologue and an epilogue, along with some appendices for reference. The author has written a critical prologue at the beginning of the book, against the background of raging *triple talaq* controversy.[8] The author has started his discussion with an endorsement of *Ijtihad* as antidote to the ongoing crisis in Muslim personal laws in India. The author has been highly critical of the colonial masters for their "erroneous and partisan" translation of some Islamic legal texts such as *Fatwa-i-Alamgiri* and *Hidaya*.[9] His frustration even extends to academic writers on Islamic

5 Dr. Furqan Ahmad, *Towards The Renaissance: Shibli and Maulana Thanvi on Sharia* (Indian Law Institute, New Delhi, 2019).

6 Research Professor at the Indian Law Institute, New Delhi.

7 Professor Emeritus, SOAS South Asia Institute.

8 The author has previously authored a book dedicated to the issue of Triple Talaq. See, Furqan Ahmad, *Triple Talaq: An Analytical Study with Emphasis on Socio-Legal Aspects* (Regency Publications, New Delhi, 1994).

law such as Mulla, Ballis, Wilson, and Fitzerland for their inept understanding of Islam and *Shariah*. The author has been generous in his praise for the contribution of Maulana Ashraf Ali Thanvi and Allama Shibli Numani throughout the prologue and has lamented the dearth of Islamic scholars of such high stature and scholarship in the contemporary India.

First part of the book deals with Shibli Numani and has three chapters. The first chapter titled 'Life and Works of Shibli Numani' deals with the early life sketch and important scholarly works of Shibli. The author has undertaken an exhaustive and well-researched endeavor to reconstruct the life of Shibli with the help of original and primary sources. The survey of literature and compilation of early works of Shibli is praiseworthy, and the author has succinctly put them in this chapter.

Chapter two is titled as 'Shibli's Juristic and Legal Thoughts' which delves into Shibli's views on various socio-economic, political and legal issues. While dealing with Shibli's jurisprudential thoughts, the author has touched upon various sources of Islamic law such as *Ahadith*, and observations given by Shibli in his writings. The author has not shied away from raising highly debated issues in the Muslim world such as importance of *Itihad* (Judicial reasoning) and *Takhayar* (Eclectic choice) and has articulated the same with Shibli's approval for such doctrines as a means for Muslim law reform. Thereafter, the author has deliberated upon Shibli's contribution to the development of substantive law particularly in the areas of marriage, polygamy, divorce, and inheritance. On political matters, the author has highlighted the Shibli's understanding of Islamic polity and its relationship with democracy. In the next discussion, the author has done a great deal of research in highlighting Shibli's view on women. The referencing and literature survey is rich and exhaustive, which is reflected in author's articulation in the content. The author has stressed upon Shibli's stand against male chauvinism, which could serve as a valuable source of information of an Islamic scholastic perspective on gender-justice. Subsequently, the focus shifts on economic issues, where the author has only dealt with one aspect i.e. bank interest. The author could have expanded this aspect to include other economic aspects. The last part of the chapter is Shibli's views on judicial administration which deals with the appointment of *qadis* and *muftis*. The author has made a good effort in tracing the history of appointments and role of judges in the Islamic Arabia.

Chapter three is titled as 'Family Waqf Movement and Contribution of Shibli Numani'. It is a dedicated chapter which traces the development of waqf institution in India and Shibli's contribution to it. The survey of judicial approach and controversy arising out of the Privy Council judgment in *Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdry*[10] has been carried out quite extensively, and the use of apposite authorities have given credence to the quality of discussion put forth by the author. However, the formatting and the manner of presentation could have been better, so as to make it more reader-friendly. But the overall analysis of the *wakf* institution in India and its neighbouring countries like Pakistan and Bangladesh, was found to be comprehensive. However, it would

10 (1891) ILR 18 Cal 399.

have been better if new developments in *waqf* law were added in the book. For instance, the author has only given a passing reference to the Wakf Amendment Act of 2013.

Second part of the book is dedicated to Maulana Ashraf Ali Thanvi and has four chapters (Chapter four to seven). The fourth chapter titled 'Life and Works of Maulana Thanvi' is a life sketch of Maulana Thanvi', and a compilation of his academic works and writings. Apart from minor footnoting and formatting related discrepancies, the study of Maulana Thanvi's life and works has been carried in a concise yet inclusive manner. The author has painstakingly reviewed and cited original records and monographs of Maulana Thanvi's lifetime.

Chapter five is the core of author's study on Maulana Thanvi's contribution to law. The chapter titled as 'Maulana Thanvi's Juristic and Legal Thoughts' deliberates upon various socio-legal issues relating to Muslim personal laws in the light of Maulana Thanvi's interpretations and opinion on them. Maulana Thanvi's emphasis on the process of *ijtihad, taqlid* and *takhayar* as the most appropriate means of resolving inter-school divergence, has been advocated by the author as the best possible methodology for reforming distortions developed in Muslim law over the years. The author has been successful in highlighting the views of Maulana Thanvi and reconcile them with the legal issues of modern society. For instance, Maulana Thanvi's views on marital rape and its injunction under Islam underlines the pro-women provisions inherent in Islam, as opposed to the popular narrative.[11] Similarly, the firm stand taken by Maulana Thanvi against *muta* marriage, which in his opinion undermined women's dignity, or his advocacy for monogamy or widow re-marriage in Islam, reinforces Prof. Menski's assertion that Islam has the distinct capability to reform itself, and sustain its identity amidst fluctuations of time, through the process of progressive deliberation among the *mujtahids*. Apart from dealing with the Muslim personal law, the author has written extensively about Maulana Thanvi's views of other socio-economic issues such as labour reforms, bank interest, bribery, family planning and abortion etc. Interestingly, unlike Shibli who tolerated *sudi* (interest-based) transactions, Maulana Thanvi took a different approach and forbade the same. Therefore, Maulana Thanvi agreed with the classical Islamic law where the bank interest formed part of *riba*, and was, thus, *haram* (forbidden) for Muslims. The author while dealing with the issue of *riba* in banking could have expanded the content with classical as well as modernist debates on *riba*. Unlike chapter three, where the author dedicated a separate chapter to deal with Shibli's contribution towards the institution of *waqf*, author has briefly dealt with Maulana Thanvi's role in the development of *waqf*. It is worth pointing out that the research conducted by the author is meticulous but dealing with so many divergent themes and sub-topics in one monolithic chapter could have been avoided, a reader might lose track while reading different aspects of legal thought.

In Chapter six titled as 'Movement for Women's Right to Inheritance: Contribution of Maulana Thanvi', the author has traced the roots of Islamic law on succession and delved into the Islamic law of inheritance with special reference to

women. The chapter proceeds with discussion on customary deviations prevalent in certain parts of British India which deprived Muslim women from inheriting property, and counters them with the factual position of Islam on inheritance rights for women. However, the author has dealt with this crucial aspect very briefly by giving a passing reference to one just one *Qur'anic* verse. It would have been desirable if the author had cited additional authorities from *Al-Qur'an* or *Ahadith* and also some secondary sources of Islamic law on the question of women inheritance rights. Moving forward the author has undertaken a scrupulous effort in compiling valuable correspondence, opinions and *fatwas* (rulings) advocating women's right to inherit property. At the conclusion of the chapter, the author has deliberated upon the Muslim Personal Law (Shariat) Application Act, 1937 and its repealing effect on the discriminatory customs prevalent in some Muslim communities. The author has also chided the ongoing demands and attempts for repealing the Act of 1937, calling it a regressive step towards the objective of gender-justice. However, the author has steered clear from discussing his standpoint in detail. The same could have provided us with fresh insights into the ongoing debates on the utility of Muslim Personal laws in modern India.

The final chapter – chapter seven titled as 'Women's Right to Judicial Discourse and Role of Maulana Thanvi' deals with the issue of the judicial dissolution of Muslim marriages in India and the views of Maulana Thanvi on various rules of divorce among Muslims. The chapter begins with a general introduction of divorce under Islamic law where the author has admitted the rigidity of *Hanafi* law, prevalent in the Indian subcontinent, in the matter of women's right to seek divorce through a *Qadi* or Court. Thereafter, the author has highlighted the difference of opinion among Islamic scholars and judicial interpretation on the effects of wife's apostasy on marital knot. Afterwards, there is a compilation of speeches, and writings of Maulana Thanvi which are valuable source of information for understanding the early scholarly Muslim thought-process on family laws and women rights in matrimonial bond. In continuation to it, the author has succinctly spelt out the rules of dissolution of marriage, as discussed in Maulana Thanvi's famous book *Hilat-al-Najizah*, in different circumstances such as impotency, insanity, disappearance of husband etc. In view of the rigid Hanafi law on divorce, Maulana Thanvi and the author have steadily supported the adoption of eclectic choice as a legitimate means of addressing difficulties faced by women in marriage. In the succeeding discussion, the author has traced the evolution of the Dissolution of Muslim Marriage Act, 1939 (DMMA, 1939). Starting from the role of Maulana Thanvi's *Hilat-al-Najizah* to the famous Kazmi Bill of 1936, the author has done a commendable job in bringing about the Central Legislature debates with important inputs and speeches of its members on the Bill. The narration and construction of DMMA's timeline and its impact is noteworthy and relevant in present day situation. This chapter has also dealt with analogous local laws and comparative DMMA in Pakistan and Bangladesh. Recognizing the importance and need of *Qazi* in Muslim marriages and dissolutions, the chapter ends with Maulana Thanvi's draft Qazi Bill of 1941.

In the closing part of the book, there is an epilogue which presents the author's conclusion. Apart from giving a bird-eye view of his preceding discussions, the author has commented upon the *Shayara Bano* judgment of the Supreme Court.

There is very limited comment on the merits of the judgment, rather the author has proceeded to discuss the validity of triple *talaq* from his own standpoint. The discussion is more about author's own views on triple *talaq* and Uniform Civil Code (UCC), and it has missed deliberations on finer points of the SC judgment and its inconsistencies. It would have been more desirable if the author had started with the SC's ruling first, and his subjective opinion later. At one instance, the judgment is referred as a 'fractured mandate'.[12] While using the phrase, there is a lack of clarity on its context and usage which makes it open to varied interpretation. The usage of the word 'mandate' with respect to a SC judgement should have been avoided due to its inherent political connotation. Moreover, the majority judgment (3:2) of the SC has unambiguously struck down triple *talaq* as unconstitutional so calling it fractured.

At the end it can be said that the book is a significant addition to the existing stock of literature and offers rich insights into the mode and methodology of Muslim Law reforms. The threadbare analysis of the author into the contributions of Maulana Thanvi and Shibli has reinvigorated their relevance in the ongoing personal laws reform debates. The author has not only relied on the primary text authored by Maulana Thanvi and Shibli to explain their outlook on range of Muslim law issues, but has substantially engaged with other sources such as case laws, legislations, Parliamentary debates etc. to highlight the inconsistencies in the principles and practice of Islamic law in India. The author has painstakingly, attached all relevant reference materials and bare Acts as appendices. Even though the attached appendices have made the book bulky, but in view of the nature of the book the appendices were useful piece of information. The book has a very rich and exhaustive bibliography which speak volumes of study and industry put in by the author in the course of writing the book. The printing and page quality is average. The formatting and bulleting of the book is not very consistent and was found to be very cramped which may affect readability in long duration. The book is not a textbook on Islamic law, but it primarily caters to lawmakers, academics, and students pursuing post-graduate studies, doctoral and post-doctoral candidates pursuing research in the area of Islamic law. In the overall analysis of the book, it would introduce its readers to new and uncharted areas of Islamic law and methodology for personal law reforms.

Abortion as a fundamental choice in Z v. State of Bihar[1]

Kaushiki Brahma*

Abstract

There have been rise in maternal deaths because of unsafe pregnancies. In-spite of abortion being legal in India ten women die every year due to unsafe abortions. Abortion is legal before 20 weeks with fulfilment of certain conditions. Due to such draconian law women go abroad for terminations of pregnancies. A petition has been filed before Delhi High Court to increase the gestation period beyond 20 weeks. As it will help for early detection of abnormalities in foetus and abortions of such foetus. The Draft Medical Termination of Pregnancy Bill, 2014 proposed by Union Ministry of Health and Family Welfare is still pending before Parliament which has also recommended to raise gestation period to 24 weeks. The Union Ministry has proposed an amendment through Medical Termination of Pregnancy Amendment Bill, 2019 for proposing changes in present Medical Termination of Pregnancy Act, 1971. Now it is a dire need of amending the age old laws because of fallacies in the laws like maternal deaths, health care measures, medical and technological advancements. Many petitions are filed for court approval for Pregnant women abortion beyond 20 weeks who were impregnated due to assault, rape, foetal abnormalities. There should be a fast track process for such petitions. J. Dipak Misra highlighted in the instant case that India being a signatory to CEDAW in 1993 (Article 11 and 12 of CEDAW deals with protection of right of reproductive choice of a woman) and is under duty to protect the reproductive choices of a woman as her right.

Keywords: Abortion, Reproductive choice, medical termination of pregnancy, CEDAW

Background of the Case

Abortion is fundamental choice of women reproductive rights. In India abortion was legalised in 1971 but still failed to yield the expected outcomes. India follows a liberalised approach of abortion for preventing unwanted pregnancy by protecting women's right of reproductive choice. In 2009, the Supreme Court held in *Suchitra Srivastava v. State*[2] *"it's the best interest of a mentally retarded women for undergoing abortion. The victim was an orphan who was impregnated due to rape. It directed for abortion on the basis of the willingness of the victim to terminate her pregnancy."* The Apex Court headed by J. Misra in *Z v. State of Bihar*[3] relied on

1 2018 (11) SCC 572.

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2 (2009) 3 SCC 1.

3 (2018) 11 SCC 572.

the above mentioned case and rectified the error committed by the High Court of Bihar to prevent the miscarriage of justice by compensating the appellant allegedly under public law remedy for not letting her to exercise her reproductive rights to terminate her pregnancy by preserving the intention behind the Medical Termination of Pregnancy Act, 1971.The United Sates SC in *Roe v.Wade*[4] held *"its women's' right whether she wants to bear the child or not exercising her right to privacy."* Moreover, right to privacy was recognised on 24th August, 2017 by the Supreme Court headed by Chief Justice JS Khehar in *K S Puttuswamy v. Union of India*[5] *"to be vital part of right to life and personal liberty under Article 21 of the Constitution. It also recognised the right of reproductive choice of a woman being a part of personal liberty under Article 21 of the Constitution."*

The Apex Court has laid down the precedent that there is no requirement of consent of husband and father for terminating pregnancy of a woman suffering from mild mental retardation and not mental illness. In the instant case the Apex Court dealt with the necessity of consent of a woman suffering from mild mental retardation and not of guardian by protecting her reproductive choice under Article 21 of the Constitution. The consent of husband and father is not required to exercise right of reproductive choice of a woman suffering from mild mental retardation under Medical Termination of Pregnancy Act.

The factual matrix of the case is that the appellant's name in the instant case was substituted with Z in order to protect her right to privacy as she was a rape victim and a HIV positive patient. Ms Z was a 35 year old destitute lady who was deserted by her husband to stay on the footpath in Phulwasrishar if, Patna. She was brought to Shanti Kutir on 25/01/2017 and medical tests were conducted to detect her pregnancy. After examination by Patna Medical College Hospital (PMCH) it was found that she was 13 weeks and 6 days pregnant. Being a destitute woman, she was willing to terminate the pregnancy as she was impregnated due to rape. On 14/03/2017 the appellant was taken to PMCH for terminating her pregnancy for which her father and brother were asked to give consent in writing. The PMCH authorities did not proceed with the termination even after getting their consent. A FIR was lodged on 18/03/2017 under section 376 of Indian Penal Code, 1860. The authorities of Shanti Kutir approached Superintendent of Patna Medical College and Hospital for terminating appellant's pregnancy as she was already more than 17 weeks pregnant and her husband had filed petition for divorce. She was again taken to PMCH on 3/04/2017 for terminating her pregnancy which was more than 20 weeks. It was found that the appellant was HIV +ve. Being a victim of rape and HIV +ve the appellant was forced to approach High Court as termination was not carried out by PMCH.

The High Court constituted medical board for assessing the physical and mental condition of the appellant and the foetus on 11/04/2017 and report was submitted stating that she suffers from mild mental retardation. On 18/04/2017 the High Court issued directions to trace the husband and father as appellant's husband's name was mentioned wrongly. The High Court being displeasured as the Senior Superintendent of Police, Patna, failed to file counter affidavit stating that it will

4 410 U.S. 113 (1973).

5 (2017) 10 SCC 1.

take another six months for the investigation, proceeded to determine termination of pregnancy of appellant carrying 24 weeks foetus. The husband of the appellant admitted that he had married victim and had two children from the wedlock.

The High Court found that the medical report does not suggest any abnormality and the foetus was not infected with HIV +ve. The High Court advertently opined that under Section 3 of the MTP Act, 1971 pregnancy cannot be terminated after 20 weeks. Therefore, it directed that foetus cannot be aborted as the appellant was 24 weeks pregnant as it would be risky to the life of the victim[6]. The aforesaid order of High Court was decided on 26/04/2017 and was challenged before the Supreme Court on 3/05/2017.

It becomes relevant to keep in mind the following issues which was settled by the Apex Court:

1. Whether the consent of father and husband required in case of a 35-year-old destitute woman suffering from mild mental retardation under Section 3 of the Medical Termination of Pregnancy Act, 1971?

2. Whether the State is liable to compensate Ms. Z for curtailing her right of reproductive choice as a woman under Public Law remedy for negligence on the part of the PMCH?

The aforementioned issues are with regard to Section 3 of the Medical Termination of Pregnancy Act, 1971 which will be critically analysed by the author. Section 3 deals with termination of pregnancy by a registered medical practitioner. It lays down the circumstances on which pregnancy can be terminated as follows:

a. Termination of pregnancy can be done by a registered medical practitioner if does not exceed 12 weeks, or

b. If the length of the pregnancy exceeds 12 weeks but within 20 weeks, the opinion of two registered medical practitioner are required to terminate pregnancy if the life of woman is at risk or of grave injury to her physical or mental health.

The appeal was allowed setting aside the erroneous order of the High Court. The appellant was awarded rupees three lakhs as compensation under the victim compensation scheme. The Apex Court awarded rupees ten lakhs as public law remedy due to negligence of Patna Medical College and Hospital authorities for rejecting her application for not terminating her pregnancy under section 3 of the Medical Termination of Pregnancy Act, 1971.

Judgement & Need of Amendment of MTP Act, 1971

Necessity of consent of husband and father for terminating pregnancy of a woman

The victim in the instant case expressed her consent in 18th week of her pregnancy for terminating her pregnancy. But PMCH called her father for signing

6 Patna High Court, High Court in C.W.J.C. No. 5286 of 2017 decided on 26-4-2017.

the consent form instead of terminating the pregnancy which further delayed the process. The appellants' right to exercise reproductive choice was curtailed J. Misra emphasised on the statement of purpose of the Medical Termination of Pregnancy Act, 1971 by stating that pregnancy can be terminated to prevent wastage of mother's health, strength and life. The Statement and Purpose of Medical Termination of Pregnancy Act, 1971 clears the legislative intent of liberalising the provisions in certain cases for termination of pregnancy, such as prevent health disaster of a mother's life, humanitarian ground pregnancy due to sex crime like rape or intercourse with a lunatic woman and eugenic grounds. The necessity of consent of husband and father for terminating pregnancy of a woman under section 3 of the Medical Termination of Pregnancy Act, 1971 was critically examined by J. Misra stating the approach of High Court was completely erroneous. Under section 3 (4) of Medical Termination of Pregnancy Act, 1971 the consent of guardian is not required in case of a major woman. Hence in the instant case there was no requirement of consent as she was major.

The Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971 states that only opinion of two registered medical practitioners are required for terminating pregnancy which involves grave mental or physical harm to woman along with the consent of the woman. The Explanation I of Section 3 of Medical Termination of Pregnancy Act, 1971 includes the allegation of rape which was urged in this case. It was obliged by the Supreme Court that the appellant has been constrained to suffer grave mental injury because of negligence in carrying out the statutory duty for which

Restrictions on right of reproductive choice of a woman: Is guardians' consent required if the woman is mildly mentally retarded?

The Supreme Court relied on *Suchitra Srivastava v. State*[7] to distinguish between mental illness and mental retardation by stating that a mentally retarded woman can express her willingness to terminate her pregnancy irrespective of not able to understand sexual act. The reproductive choices are to be protected as a right to woman's privacy, dignity and bodily integrity. Such rights are protected by refusing to have sex or having contraceptive methods. The reproductive choice also entitles a woman to give birth. But there is State interest for protecting the life of expected child in certain cases which can be viewed as reasonable restrictions for terminating pregnancy beyond 20 weeks under section 3 of Medical Termination of Pregnancy Act, 1971. But there can be termination of pregnancy on satisfaction of medical practitioner where such continuance of pregnancy resulting from rape would involve risk of life or of grave injury to physical or mental health or when there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. It can also be terminated when it is caused due to rape injuring to mothers' mental health. But in all such cases the pregnant woman's consent is mandatory for terminating the pregnancy.

7 (2009) 3 SCC 1.

8 2(r) 'mental retardation' means a condition of arrested or incomplete development of mind of a person which is specially characterised by sub normality of intelligence.

The Apex Court interpreted the word mental retardation by placing reliance on Section 2(r)[8] of Persons with Disabilities Equal Opportunities, Protection of Rights and Full Participation Act, 1995 which has defined mental illness as mental disorder other than mental retardation[9]. Hence the Medical Termination of Pregnancy Act, 1971 clearly gives right to mentally retarded persons who has attained majority to terminate the pregnancy. Further reliance was placed on *X v. Union of India*[10] wherein the Court held: *"Though the current pregnancy of the petitioner is about 24 weeks and endangers the life and the death of the foetus outside the womb is inevitable, we consider it appropriate to permit the petitioner to undergo termination of her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971. We order accordingly."*

The situation of grave mental injury to appellant could have been avoided by PMCH which negligently curtailed the reproductive choice of the appellant causing mental and physical torture.

Public Law Remedy for Negligence and Carelessness of Patna Medical College and Hospital Authorities

The Supreme Court sought every possible way to provide public law remedy to the appellant as she was mentally torture for not able terminate her pregnancy. It relied on various cases such as *Mehmood Nayyar Azam v. State of Chhattisgarh*[11], where the Court held *"torture in its denotative concept includes mental and psychological harassment. It has the potentiality to cause distress and affects the dignity of a citizen."*

When there was every possibility for the child to suffer from HIV +ve, she had every right to terminate her pregnancy which was curtailed by PMCH by delaying the process. So the principle of State interest to protect the life of the child is to be deemed inapplicable. Therefore, there has to be grant of compensation under public law remedy. It opined to compensate by relying on various cases where compensation was awarded by the State for infringing fundamental right to life in *Chairman, Railway Board v. Chandrima Das*[12] case also the Supreme Court adverted to the public law remedy. In *Rini Johar v. State of Madhya Pradesh* the Supreme Court had referred to the concept of public law remedy and awarded rupees five lacs as compensation to each of the petitioners to be paid by the State.[13]

As the appellant suffered from irreparable damages due to negligence of State authorities not only mentally but also physically being an HIV +ve patient for which she should be compensated in order to protect her life with dignity. As per the directions of the Apex Court she was paid 3,00,000 under Victim Compensation Scheme and 10,00,000 for mental injury as compensation from the State which shall be kept in a fixed deposit in her name.

9 Principle 7 of Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

10 (2016) 14 SCC 382.

11 (2012) 8 SCC 1 48.

12 (2000) 2 SCC 465.

13 (2016) 11 SCC 703.

Reflections on the Judgement

The author would like to conclude by quoting the words of William Goldstone **"Justice Delayed is Justice Denied"** which was compensated by the Supreme Court in the instant case through Public Law Remedy. This case is one of the best examples of interpreting law according to intent which was ignored by High Court, Patna with regard to necessity of consent under Section 3 of the Medical Termination of Pregnancy Act, 1971. As per section 3(4)(a) and (b) there cannot be termination of pregnancy of a woman below 18 years of age or a mentally ill woman without the consent of her guardian. In *Suman Kapur v. Sudhir Kapur*[14], the Supreme Court held *"An abortion by a woman without her husband's consent would amount to mental cruelty and a ground for divorce."* But in *Anil Kumar Malhotra vs Dr. Mangla Dogra*[15], the Supreme Court upheld women's sole and inalienable right to give birth or terminate pregnancy without husband's consent. In this case wife had undergone termination of her pregnancy without husband's consent, due to which he filed a case for damages against her. The court further held that a husband cannot force his wife to continue pregnancy against her will. In the instant case the Supreme Court clarified the intent of Section 3 that there is no requirement of consent of father and husband for a woman suffering from mental retardation not mental illness to terminate her pregnancy for protecting the right of reproductive choices of a woman. Hence the consent of major woman suffering from mild mental retardation is sufficient to terminate the pregnancy. It has further empowered on personal autonomy of a pregnant woman to terminate her pregnancy. The consent of a guardian is restricted to minor or woman suffering from mental illness and not mental retardation. J. Misra highlighted that India being a signatory to CEDAW in 1993 (Article 11 and 12 of CEDAW deals with protection of right of reproductive choice of a woman) and is under duty to protect the reproductive choices of a woman as her right. There were amendments in Medical Termination of Pregnancy Act, 1971 on 18th December 2002 to decentralise the regulations of abortion at the district level to encourage speedy registration of abortion facilities by minimising administrative delays for protecting the right of reproductive choices as a woman. But in the instant case Patna Medical College and Hospital curtailed the right of reproductive choice of the appellant suffering from mental retardation by rejecting her application for terminating her pregnancy.

14 AIR 2009 SC 589.

15 C.A. No. 004705 / 201.

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