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A Case of Gender Discrimination in the Iuformation Technoiogy Enabied Sectors (ITES): Case Study in Bangalore.

Dr. Sapna S.*

ABSTRACT

"Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility."[1]

It is a reality that societal stereotypes do not allow one category of persons to have the same access to opportunities as the other in the work place. The perception of discrimination implicates that, personal traits of the worker, though unconnected with the work place productivity subsume appraisal in the labour market.[2] *One of such personal trait adduced in this frame of reference is "gender". Gender stereotypes pose barriers to the hiring, retention and promotion of women in the work place putting them in a disadvantaged position when compared to men. Apparently, discrimination is made whenever decisions are taken at work place by placing reliance on such unconnected traits.*

Reflections of gender segregations are apparent with women seemingly doing "traditional women jobs" and men doing "traditional men jobs". Gender segregation as one form of sex discrimination is known to actualize serious negative outcomes where women tend to find themselves in low-end, low-

* *Associate Professor & Principal, BILS, Karnataka*

1 Air India v. Nergesh Meerza & Ors Air 1981 SC 1829 (Supreme Court of India).

2 Kennith J. Arrow, *The Theory of Discrimination,* presented at, Discrimination in Labour Market,- Industrial Relations Section, (Princeton University, October 7 and October 8, 1971).*available at,* http://www2.econ.iastate.edu/classes/econ321/rosbnrg/Arrow%20-%20The%20Theory%20of%20Discrimination.pdf, (Last visited on February 5, 2013).

status and low-paying jobs with scarce access to development.[3] *Women who head the occupational hierarchy are imperceptible and under-representation of women in senior position/managerial positions is persistent exhibiting a gendered pattern in work place. This trend is manifest in the ITES industry too with 6 to 7 percent of women in the top level, 12 to 14 percent in the managerial level and the remaining 70 percent concentrated at the entry level. The specific problem of segregation would however not pose a problem were it not for the fact that women are predominantly employed in those jobs which invariably pay less than men.*

This paper seeks to answer the question, albeit the ITES industry attracting women in significant numbers, whether the lack of progress in women's career development is attributable to women's choices or barriers within the organization?

The over-reaching objective of this research paper is centred on the premise that despite the law's stated goal of combating gender stereotypes; the legal framework does nothing to disrupt the underlying social reality upon which gender stereotypes are based. This Paper seeks an inquiry into the pervasiveness of sex segregation in the ITES industry and the kind of remedies that might reduce this segregation.

Kewwords: *gender, discrimination, stereotypes.*

I. Introdnction:

ITES sector became the most potent force in shaping the women's employment in terms of immense opportunities, creating a new wave of women's liberation. It is estimated that, women comprise thirty six percent[4] of the total work force in this sector heralding this industry as one of the largest recruiters of educated women in private sector in India. Studies indicate ITES Sectors prefer women as

3 Oprah Winfrey' OWN network has sued by a former Senior Director for sex and disability discrimination. Carolyn Hommel sued the network for unspecified damages claiming that the company intentionally didn't pay her out vacation time and overlooked her for a job promotion becanse of her pregnancy. She alleged she suffered from acts of "oppression, fraud, or malice" from the defendants, OWN. She claims she has suffered damages from anxiety, worry, embarrassment, humiliation, mental anguish and severe emotional stress. Dominic Patten, *Oprah's OWN Sued For Sex Discrimination By Former Executive,* Deadline Hollywood, (Online, February 1, 2013), *available at,* http://www.deadline.com/2013/02/oprah-winfrey-own-sex-discriminatioa-lawsnit/, (Last visited on Jnly 10, 2013).

4 NASSCOM HR Survey Report 2011, (2011), *available at,*, http://www.bpoindia.org/research/nasscom-hr-survey-report2011.html, (Last visited on August 31, 2011).

they feel that women are better suited for voice-based projects[5] and perhaps, the, the wide range of hours and variable shifts available in call centers has fuelled the entry of more women into the workforce.[6]

To analyze the forces which propelled feminization, in a broader perspective, the general pattern of gender visibility is linked to trade and investment which came to be directed towards economies in which labour costs is relatively low. This process evidenced the tilt towards market regulation rather than statutory regulation as international competitiveness survives on low cost of labour. The conceptualization of 'growing feminization in the labour market' has been hypothesised by *Standing* as being linked to changing nature of labour market, characterized by flexibility and informal employment in the following words[7].

"The global market has been in an era of market regulation and growing market flexibility in which new technologies, new labour control systems and reformed forms of work organization has transformed the pattern of labour force participation through out the world. In the process the turn of the century will mark the end of the century of labouring man in the literal and real sense, in that women will account for as many 'jobs' as men.".

In the given contextual developments, *'women'* became the most obvious choice by the employers to fit into this employment pattern. The employers seemingly cashed on the general feminine attitudinal traits where women were found to *work for less wages* having lesser *"aspiration wages"* as against men who would not be agreeable for the same. This brought about the substitution of women for men.

---

5 A large number of women are joining the IT enabled services sector (Ramani, S. 2000). A large number of companies as GE, American Express, Standard Chartered Bank, Citibank, British Airways, Microsoft, AOL time Warner, HP, Dell Computers, Prudential Insurance, Morgan Stanley, Mark & Spencer have call centres where a sizeable number of women are employed ranging from 35 to 65% (www.express it people.com). GE capital had 40 to 55% women employees in their various centres (Sandhya Sule, 2002). A stndy of an international call centre at Pune (Dutta, 2003) showed that 59% of employees were women. See, Ramani, S, IT Enabled Services: Growing Form of Telework, 35(26), ECONOMIC AND POLITICAL WEEKLY, 2305-2307 (June 24, 2000).

6 Hannif, Zeenobiyah et all., *Working time flexibilities: a paradox in call centers?*, 36(2), National Institute of Labour Studies, 178-193 (January 1, 2010), *available at,* http://www.freepatentsonline.com/article/Australian-Bulletin-Labour/237838392.html, (Last visited on December 5, 2012).

7 Guy Standing, *Global Feminization through Flexible Labour: A Theme Revisited*, 27 (3), World Development, 583-602, (1999), *available at,* http://www.elsevier.com/locate/worlddev, (Last visited on February 20, 2012).

Applying this theorization to ITES sector in the Indian context, it is not hard to analyse contextual developments which similarly brought abont a feminization in this work place. The researcher uses the term "feminization" to refer to the this numerical upward trend is associated with the nature of this job which is characterised by flexibility in timings, a stereotypical form of working, construed as being most appropriate for women.[8] In fact, the companies prefer women to this kind of jobs creating a feminized work place.

There is much data to support the fact that, ITES or the call centre is a gendered work place. It is a women intensive industry with 36% of the work force comprising of women. In the city of Bangalore, there are approximately 3 lakh women working in this sector. Toffler (1980) speaks about the distinct opportunities for women due to technological revolution,[9] and the factors which contribute could be broadly inclusive of- the global expansion of capitalism is largely dependent on the huge influx of female labour participation; secondly, ICT takes away the traditional work place constraints of time and space; thirdly, the flatter organizational structures which focuses on 'team work' is found to accentuate feminization in this industry.

As mentioned above, the ITES industry comes with unique characteristics in its work place which require skills increasingly attributed to women, with a special bias towards social rather than technical skills and competencies.[10]

Another argument is that, though, the ITES industry created nothing short of a revolution in terms of employment avenues it created for women, it also created

---

8 A gendered narrative about work was also apparent in the call centre industry and the demand for women draws from beliefs about what constitutes "ladies work." Previous research indicates that call centres in India prefer hiring young, educated women. According to Pradhan and Abraham, call centres often prefer hiring women as they are seen to be more hard-working, patient, attentive, loyal, less aggressive, and have better interpersonal and analytical skills than men. Under the rubric that call centre employment requires what Hochschild terms "emotional labour," for example, empathizing with customers and soothing tempers, women are stereotyped as best suited for customer service. In contrast, labour defined as aggressive and combative is considered a man's job and, in many cases, comes with a higher salary. These stereotypes are reflected in the occupational segregation interviewees described within the industry. *Supra* note 1, at 46.

9 Alvin Toffler published *The Third Wave* (1980), to herald in the new culture based on information in which he postulated Sexual split. He predicted that women may be more disposed to success in the third wave, dealing better with ambiguity, subtlety, collaboration, and context than Men do. *See*, Toffler, A. THE THIRD WAVE: THE CLASSIC STUDY OF TOMORROW, (1980)

10 S. Durbin, *Gender, Skills and Career in UK Call Centres*, in DEVELOPMENTS IN CALL CENTRE INDUSTRY, 117, 125 (Julia Connell, John Burges ed., 2006).

new industry-specific challenges in terms of work conditions having a particular implieation on women and *one such glaring problem is the issue of gender discrimination in the work place.*

II. Conceptualizations of Sex Discrimination and Organizational Inflnences:

Sex discrimination in the labour market has been described as occurring when one group of employees with education, experience, training and abilities are given an inferior treatment in hiring, occupational access, promotions or wage rates on the basis of personal characteristic like gender or race, which is unrelated to productivity. Wage differentials or lower access to opportunities are common forms of sex discrimination at the work place. To formally classify discrimination, it takes typically three forms; Hiring discrimination (This means preference given to males even though females have equivalent educational qualification); Promotion discrimination (This happens when female with equivalent achievement as a male is denied promotion or has less access to opportunities) or Firing Discrimination (when women are selected because for termination because of their gender rather than inefficiency in productivity).

Albeit the inerease in employment opportunities for women in a new economy specifically in an industry likes the ITES industry, both horizontal and vertical segregation is a seemingly a typical phenomenon that is visible. The segmentation theory contends that, labour is *socially construed* and derivatively, opportunities are connected to the *ascribed* (gender factor) and not the actual eharacteristics of workforce.[11]

The segmentation theory explains the prevalence of gendered classification in the labour market while the feminist theory insists that the "patriarchal forces" which perpetuate the subordination of women in the society, has a *spill-over effect* in the labour market putting women in a relatively disadvantaged position by denial of access to opportunities. The organizational structure and tendencies are such that, there exits both conspicuous and hidden rules around the so called "male" norms in the workplace. This makes it harder for a woman worker to accommodate; a woman would have work more hard than a man to prove her worth, a woman finds herself excluded from male social circles which are in fact very important for career development; or the employer's assumption relating to the woman's family responsibilities puts woman's work in the secondary status. This is the

11 Thus jobs are secondary because they are performed by workers generally considered secondary: jobs are regarded as unskilled because they are feminized and not feminized because they are unskilled. Craig, C., *et al*, LABOUR MARKET STRUCTURE, INDUSTRIAL ORGANISATION AND LOW PAY, (1982).

simplest version. On a more serious note, sex segregation leads to wage differentials, denial of promotions, incentives or denial of access to a woman in her career development. This in away reflects the role of the organization to perpetuate or suppress the gender inequality in the work place. The Studies[12] indicate the organization's role to be bi-fold;

i. Relevant opportunity structures are created by the organizations for individual participants in the labour market.

ii. The allocation of individuals and jobs remain the decision of the organization. This is to a major extent dependent on the stereotypes and the employers tend to earmark some jobs for "men" and one for "women".

In this way, we locate our argument with in the organizational climate to contend that, the organizational practice and structure may be the direct and independent contributor to the negative outcomes of segregation and discrimination.

III. Interpretations on Sex segregation as Gender Discrimination at Workplace.

Notwithstanding this shared knowledge around the dynamics at work, there remain attitudinal differences in interpreting the cause for this discrimination and segregation. Two prominent theories have influenced and interpreted the prevalence of sex segregation at the work place. The conservative doctrine is the *"The lack of interest argument"* which explains the employer's attitudinal perception arguing that segregation at the work place is attributable to women's own choice. According to this perception, discord lies in that, women do not apply for them because, they "lack interest" in lucrative jobs and it is not that, they are "excluded from these jobs". This argument supports the view that due to stereotypes that exist in the society, women prefer to fit into "traditional women jobs" and thus, they cannot be forced to do something they prefer not to do. This perception ousts employer's liability for segregation at work place as they have only respected the pre-existing inclinations of working women.

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12 Thomas Hinz, *"Together Apart? Organizational Sex Segregation After German Unification"*, Centre for Quantitative Methods and Survey Research, (September 2005), *available at*, https://docs.google.com/viewer?a=v&q=cache:YnSKClGUKCoJ:https://kops.ub.uni-konstanz.de/xmlui/bitstream/handle/urn:nbn:de:bsz:352-152406/Hinz_152406.pdf%3Fsequence%3D2+Thomas+Hinz,+%E2%80%9CTogether+Apart%3F+Organizational+Sex+Segregation+After+German+Unifieation%E2%80%9D,&hl=en&gl=in&pid=bl&srcid=ADGEESjDKvReoARXuVGgBR1k0IBDZnZn9i5Tw1UUoW1nfygUhVk1H_zMJVltfPJ8V8X1OfWhsvwrzs9_ATSnm4Z7tO-zUk39Unn7zmRJc32C-gFd6cL3hSCLf_Uj5VcPAfEkgwdKyHe8&sig=AHIEtbQI5mkisV7VoKqHyll3w-HACDE6oQ, (Last visited on February, 2016).

This doctrine was first extended to explain the exclusion of women in blue-collar jobs which were represented in heavy mascunalized terms as "heavy", "dangerous", "dirty" as if to link it with the *manhood* itself. But, in case of white-collar employment, rather than the physical traits to base their conception of feminity, the line of thought, now focused on the *"domesticity"* to justify the *lack-of-interest* doctrine. In fact, the Courts adopted theory of *"secondary wage earner"* to a woman to explain her lack of commitment to wage work as against the domestic work which was considered to take her priority. In totality, this theory advocates the perception that, as men and women are different, they have different physical characteristics and varied domestic experiences whieh dictate their different job interests. Derivatively, women take the choice of "disempowerment" themselves.

This debate prominently figured in a sex discrimination case brought by Equal Employment Opportunities Commission (EEOC) against *Sears, Roebuck and Co*[13] in the US District Court in Chicago tried in 1984-1985. The issue primarily related to the claim of under-representation in high paying commission sales jobs alleging violation of Title VII of the Civil Rights Act, 1964. On behalf of the Company, it was argued that, this under-representation *was not due to discrimination* as claimed by EEOC but *because of women's own job preferences*.[14] The bulk of *Sear's* defense related to the EEOC's failure to establish *Sear's intentional discrimination* (disparate treatment) against women and failure on part of EEOC to produce testimony of discriminated victims.

Two well known Feminist historians Rosalind Rosenberg and Alice Kessler-Harris testified in this behalf as expert witness presenting conflicting interpretations relating to women's relationship with her employment and the employer's role in structuring the pattern of women's employments. In this matter, the Court ruled that the Company had not discriminated against applicants and the said segregation was the result of applicants' own work preferences. This interpretation of the Court was largely shaped by perceptions premised on a shared assumption that women can chose their employment option independent of the employers action.

13 *Sears, Roebuck and Co* is the largest retailer and the nation's largest private sector employment of women. Scott v. Sears, Roebnck & Company, 41 FEP Cases 805 (7th Cir. 1986). (District Court of United States).

14 Womeu were geuerally not interested in commission sales jobs because of the foilowing reasons contended on behalf of *Sears*;[1] Fear or disiike of the competitive, dog-eat-dog atmosphere of most commission sales division [2] discomfort or unfamiliarity with most product lines [3] fear of being unable to eompete and losing their jobs [4] Fear of non-acceptauce by customer in a traditionally male-oriented jobs [5] distaste for the type of selling [6] preferenee for non eommission sales job [7] overall belief that increased earning potential of commission was not worth takiug additional respousibilities.

Another explanation for sex segregation is the *liberal* approach which shares the conservative perception that, women's job preferences are pre-ordained even before they enter the labour market. But the liberals suppress gender and that means, for the liberal approach to work, the woman should present her identity as un-gendered before the law. *Holding that, the liberal theory is an inadequate alternative to conservative theory, there is a parallel perspective which says employers or the organizational attitudes and structures shape employees' work aspirations.*

A deeper analysis reveals that the organizational incentives and disincentives are powerful enough to shape the employees aspirations at work. This new account tracks the gendered attitudes and identities to the organizational structures and *not solely to social forces*. Like all other employees in the work place, women adapt their attitudes and aspirations on the basis of constraints and incentives fixed by the organizations which is not their own making. Derivatively, then if women's work conditions are dependent on organizational practices, law can well bring about some changes in making women realize her aspirations and identities. This new and emerging perspective is important as it identifies the transformative effect of the law in disrupting sex segregation and combating gender discrimination.

IV. The Case of ITES Workplace.

A perusal of the work practices at the ITES work place is required to address segregation in the work place as a Gender-specific discrimination. The very structnral and hierarchical character of an ITES work place tends to bring about the problems for progression in the career. The organizational structure in the ITES is known as "flat structures". From the woman's perspective particularly, more issues like non-existence of formal promotion procedures can create problems. Social competence which comprises of emotional, inter-personal and cognitive skills more associated with women, remains unrecognized and unrewarded. They are formally not appraised for promotions.

The segregation in the work place is characterized at three levels:

a. The Hiring Level:

This is the entry level where applicants are selected either by campus reeruitment or by way of advertisements (online or in news papers). At the entry level, the designation is that of a *"trainee"*. An understanding of the ITES organizational hierarchy and the definitions of the career levels would provide an insight into the hiring and promotion process.

Table- 1: Hierarchal Structure in the ITES workplace: [15]

- Trainee
- Associate / Executive,
- Senior Associate,
- Supervisor/ Assistant Team Leader,
- Team Leader,
- Assistant Manager,
- Manager,
- Project Manager,
- Assistant Vice President,
- Vice President
- CEO

Table-2: Career Level Connotations: [16]

LEVELS	DEFINITIONS.
1. **ENTRY LEVEL**	No supervisory role.
2. **MANAGER LEVEL**	Supervisory role, Mentoring and Training. Designations of Team Leaders (TL) to Managers.
3. **DIRECTOR LEVEL**	Head the Divisions.
4. **TOP LEVEL.**	Assistant Vice President (AVP), Viee President (VP) and CEO.

In fact, at the trainee level, the surveys indieate that there are a significant percentage of women in the labour force in the ITES work place. *No kind of segregation or preference* is visible save in exceptional cases relating to marriage, young children etc., the factors which would not influence the recruitment of a male employee. The organizational practices commonly involve a HR round (one-on-one interview) at the interview[17]. This comprises of a few personal questions

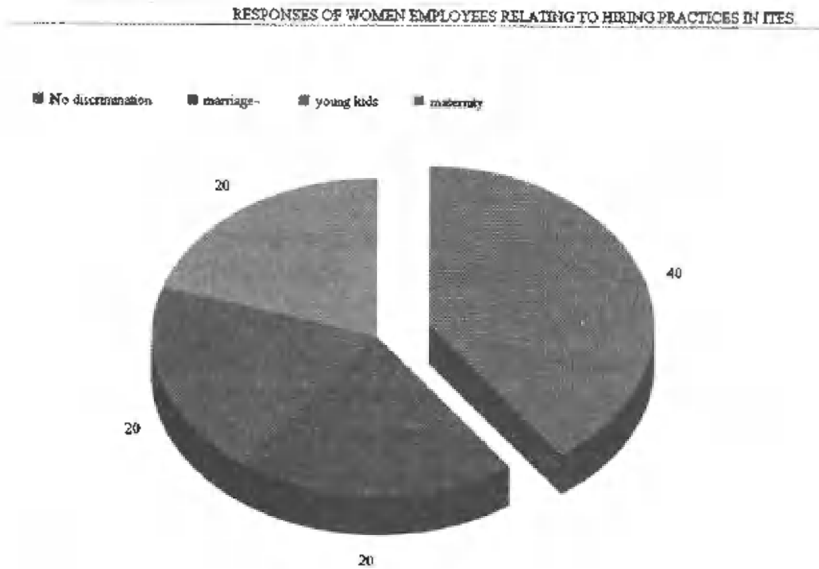
15 Interview with Mr. Aiagappan, Senior Team leader, ITES, (Bangalore, December 11, 2012).

16 *Ibid.*

17 Where the applicant's may be asked if they require any future leave. In case the applieant opens up relatiug to marriage, pregnancy, it could become a decisive factor.

to elicit information relating to the maritai status, number of children etc which could be decisive factor at the time of hiring but otherwise, there is no visible discrimination as such.

CHART-1: Employees' responses relating to the hiring practices in the ITES indnstry.



The above graph is representational of the responses relating to the hiring practices in the ITES industry. [18] The data was collected from 100 respondents and by the respondent using the "participant method". The responses yielded the following deductions;

1. There was no sign of discrimination on the basis of gender at the entry level. In fact, in many big organizations, the policies were gender sensitive where women employees were offered transport facility, break time and flexible options of working providing impetus for women to join. *This meant her chance of recruitment was equal to that of a male applicant.*

2. However, some respondents were of the opinion that, in course of answering personal questions in the interview, relating to marital status (where respondent would be getting married shortly), young children or a woman being in the family way, proved her chances *of recruitment were considerably reduced.*

18 Interview with Ms. Shilpa (name changed on request), Senior HR, (Bangalore. December 20, 2013).

3. The reasons of "marriage" and "young children" do not affect a man's chance of recruitment as much as it does of a woman.

b. The Promotion Level:[19]

From the trainee level, within a period of 1 month, Associate and then to position of Senior Associate happens by default within a period of 1 year.

From Senior Associate, the next level for promotion is Team Leader (TL), Assistant Team Leader (ATL) or Flow-Worker (Supervisor Level) which on an average could take tenure of two years. The promotion to flow-worker is solely on the *basis of scores*. This is a change in designation but not in terms of increase in pay. However, promotion to TM or ATL will see a hike in pay and this is on the basis of

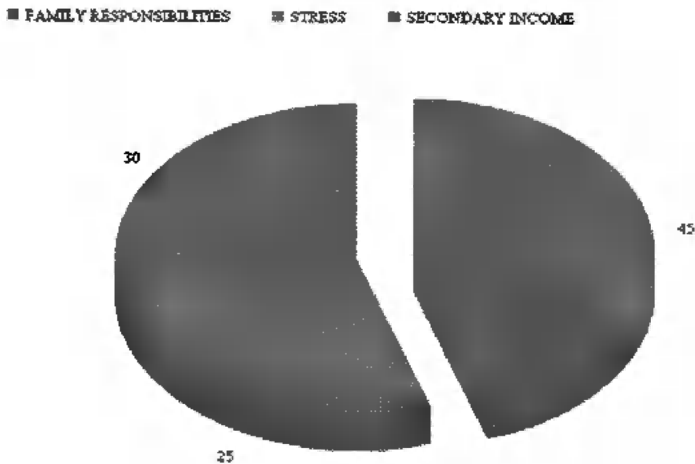
- *Scores;*
- *Leadership skills;*
- *Process know-how;*
- *Tenure;*
- *Manager's views.*

Promotion from TM/ATL to Assistant Manager depends on;

- *Absenteeism of team members*
- *Attrition of team members.*
- *Complaints against manager*
- *Quality Scores.*

19 *Id.*

CHART-2: Employees opinions about the organizational attitudes to promote a woman employee.



The above chart tracks the responses of the women employees in the ITES work place relating to their opinions about the organizational attitudes to promote a woman employee to higher levels.

1. Majority of the women respondents feared the stereotypical assumptions about their "family responsibility" would hinder their chances of promotion. From the employer stand point; this is translated to mean less commitment on part of the woman as she will always prioritize her family commitments. Young children, marriage, pregnancy, could be a few of the illustrations.

2. Stress; The stereotypical assumption that a woman might not be able to handle a higher position as diligently and strongly as a man again is an obstacle which operates in her favour.

3. The lack of access to training and absence of gender role model perpetuate gender inequality at the ITES work place.

4. Secondary Income theory of a woman with a "man" being the bread winner of the family is again a gender-specific assumption which brings a disparate treatment to woman in employment affecting her access to development.

CHART-3: Excerpt from one of the Survey respondeuts.

"I was overlooked for promotion because I said I was pregnant". "During the maternity leave, I was served with the notice for termination".

c. The Termination Level:

In the termination level, there is no visible sign of gender discrimination like, for example "women first poiicy". These decisions are on the basis of *scores* which makes no distinction between a women and a male employee.

d. Effect of Gender Segregation:

In summation, gender segregation breeds;

1. **"Differential wage pay"-** This happens because when women remain concentrated in the low-end job, their access to development is blocked. By the way of illustration, jobs in the nature mortgage coliections, credit card collection are mostly male dominated. The hiring process, right from the time of advertisement is masculanized to extent that, it becomes difficult for a woman even to think of appiying to this job. Important to note, this is a job which carries huge incentives in the form of percentages for every deal they close.

   Even in case of women and men who do the "same kind of job" under the same roof, though the salary is fixed, the incentives are not. Incentives take a heavy reliance on;

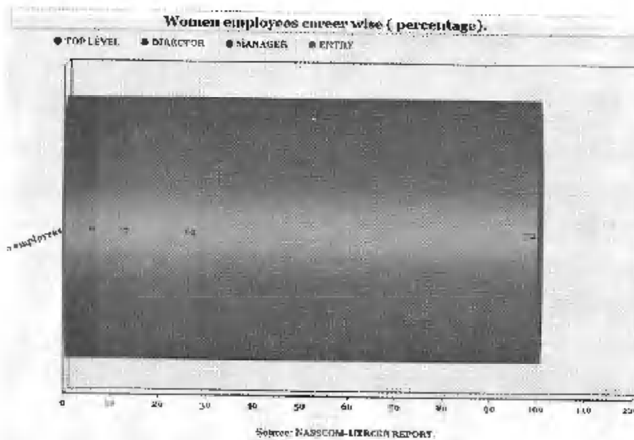
   - *Quality;*
   - *Attendance;*
   - *AHT (Average Handle Time).*
   - *Number of calls.*

CHART-4: Excerpt from one of the survey respondeuts.

Though the last three faetors are transparent, many women complain of manipulation in *Quality Grading.* I was not appraised for the value of the work I put in. In fact, because I preferred not to co-operate or compromise on my values with my TL. "Break times are also taken into count as "schedule adherence" which puts a woman into a disadvantage in cases of pregnancy, periods when she is likely to take more breaks"

2. **Coucentratiou of women In low-end, low-payIng jobs and The Proverbial Glass-Ceiling:** This refers to disproprotionate representation of women in socially skilled yet, iower end routinized jobs as against the higher level jobs. Studies indicate women face glass ceiling in managerial levels in the ITES organization though this industry is a locust of female employment. As the foregoing table indicate, represenation of men in the higher end jobs are extremely high *vis-a-vis* the women.

TABLE-4: Womeu in Organisational HIerarehy:



Source: NASSCOM-MERCER REPORT.

The table is iilustrative of the fact that, women are outnumbered in lower level jobs (call service and programmers) and their presence is hardly visible in higer level jobs (consultants and project managers).

This is a phenomenon which is used in tracking a woman's careeı growth referred to as the *leaking pipeline phenomenon*. The water pipeline anology is nsed to draw a comparison to the organizations which tend to loose a large female talent pool.

Research conducted by PwC commissioned by UK indicates that women are lost in the pipeline by the time they reach their mid-career level irrespective of the fact that, they exists at an equal ratio at the entry levei.[20] This leakage is further illustrated on examination of women in leadership roles.

20 Price Water House Coopers, "*The Leaking Pipeline, Where are our female leaders?*", *available at.* https://docs.google.com/viewer?a=v&q=cache:k0p9Wl_f7LMJ:https://www.pwc.com/en_GX/gx/women-at-pwc/assets/leaking_pipeline.pdf+leaking+pipeline+phenomenon&hl=en&gl=in&pid=bl&srcid=ADGEESggHJSfG0DETag_1MzWn0vjXJ0i97jMWU2ySyYdFC-gipwV4cDdRzfVMMZ-nW7ZDYS_1xflxWrjU399RLmow8RWZ0riwBuruz4kSYqtuztEfqw-dr5jFqOGY1acY7PZu-ZgwLwN&sig=AHIEtbSQr-DrQ4V9k5dW03oJ5sN6KAhmGA, (Last visited on 5 February 2013).

In effect, the issue of segregation at work place depends more on organizational structure and practices and less on individual preferences. In summation, the extent to which an organization's practices foster segregated or integrated workplace is impacted by the statutory frame work which mandates minimization of discrimination or enjoins affirmative action.

V. The Statntory Frame-Work To Prevent Gender Segregatiou.

The Equal Remuneration Act was enacted in the year 1976 [21] to provide for equal remuneration to men and women workers and for the prevention of discrimination, on the ground of sex, aagainst women in the matter of employment and for other connected and incidental matters. This Act was enacted to give effect to Article 39 of the Constitution and Equal Remuneration Convention, 1951 (adopted by International Labour Organization). The Article envisages that, the State shall direct its policy among other things towards securing that there is equal pay for equal work for both men and women. The Statement of Objects and Reasons state that there shall be no discrimination against recruitment of women and provides for setting up of Advisory Committees.

In order to grant relief under section 4 of the said Act,[22] the employees should establish that the remuneration paid by the employer, whether payable in cash or kind, is being paid at rates less favorable than those at which remuneration is paid by him to the empioyees of the opposite sex in his establishment for performing the same work or work of a similar nature.

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21 Act 25 of 1976 as amended by Act 49 of 1987.

22 Section 4, Equal Remuneration Act, 1976:. Duty of employer to pay equal remuneration to men and women workers for same work or work of a similar nature—(1) No employer shall pay to auy worker, employed by him in an establishment or employment, remuneration, whether payable in cash or in kind, at rates less favourable than those at which remuneration is paid by him to the workers of the opposite sex in such establishment or employment for per- forming the same work or work of a similar nature. (2) No employer shall, for the purpose of complying with the provisions of sub-section (1), reduce the rate of remuneration of auy worker. (3) Where, in an establishment or employment, the rates of remuneration payable before the commencement of this Act for men and women workers for the same work or work of a similar nature are different only on the gronnd of sex, then the higher (in cases where there are only two rates), or as the case may be, the highest (in cases where there are more than two rates), of such rates shall be the rate at which remuneration shall be payable, on and from such commencement, to such men and women workers:
Provided that nothing in this sub- section 'shall be deemed to entitle a worker to the revision of the rate of remuneration payable to him or her with reference to the service rendered hy him or her before the commencement of this Act." 670 Section 5 of the Act prohibits any kind ef discrimination being made while recruiting meu and women workers.

In *Mackinnon Mackenzie & Co. Ltd. v. Audrey D'costa & Anr*[23], it was observed, whether a particular work is "same or similar" in nature as another work can be determined in ascertaining

- Whether any differences are of practical importance,
- The duties actually performed not those theoretically possible.
- Where however both men and women work at inconvenient times, there is no requirement that all those who work e.g. at night shall be paid the same basic rate as all those who work normal day shifts. Thus a woman who works days cannot claim equality with a man on higher basic rate for working nights if in fact there are womeu working nights on that rate too, and the applicant herself would be entitled to that rate if she changed shifts.

In *Air India Cabin Crew Association v. Yeshawinee Merchant & Ors*[24],

The present petitions was filed by respondents Air India Air hostesses Association in the High Court of Bombay against the age of retirement at 50 years as against the 58 years for males. It was held, it is discrimination against them on the "basis on sex" which is violative of Articles 14,15 & 16 of the Constitution of India as also Section 5 of the Equal Remuneration Act, 1976[25] and contrary to the mandatory directions issued by the Central Government under Section 34 of the Air Corporations Act, 1953(for short Act of 1953).

The decisions aforesaid mentioned has relevance only in respect of a State. Nevertheless, in the context of discrimination at work place in the Equal Remuneration Act, 1976, the term "employer" has the meaning assigned to it under clause (f) of section 2 of Payment of Gratuity Act, 1972.

Clause (f) of section 2 of Payment of Gratuity Act, 1972, defines employer as...the person, who, or the authority which, has the ultimate control over the affairs of the establishment, factory, mine, oilfieid, plantation, port, railway company

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23 Mackinnon Mackenzie & Co. Ltd. v. Audrey D'costa & Aur, AIR 1987 SC 1281 (Supreme Court of India).

24 Air India Cabin Crew Association v. Yeshawiuee Merchant & Ors [2003] INSC 291 (Supreme Court of India).

25 Section 5 after its amendment by Act No.49 of 1987 reads as under: - "5. No discrimination to be made while recruiting men and women workers. - Ou and from the commeocement of this Act, no employer shall, while making recruitment for the same work of a similar nature, [or in any condition of service subseqnent to recruitment such as promotious, training or transfer] make any discrimination against women except where the employment of women in such work is probibited or restricted by or under any law for the time being in force.

or shop, and where the said affairs are entrusted to any other person, whether called a manager, managing director or by any other name, such person. Therefore, in the context of discrimination at work place, according to this Act, private employers would be brought within the remit of Equal Remuneration Act, 1976 where the Act enjoins a duty not to discriminate between male and female employees in terms of pay, during recruitment and at the time of extending employment henefits. Non-compliance of the said provisions will attract imprisonment as well as fine.[26] Section 11 of the said Act deals with non-compliances by Companies and in which case, the director, manager, secretary or other officer of the Company shall become liable to be proceeded against and punished accordingly.

VI. Short Comings:

1. Restrictive Scope of the Principle of "samc work" or work of a "similar nature", as set onl in Section 4 of lhe ERA, 1975.

The scope of section 4 of the Equal Remuneration Act 1976, which requires employers to pay equal remuneration to men and women for the "same work" or work of a "similar nature", is relatively more restrictive in nature. The Convention speaks about the principle of equal remuneration for men and women for work of equal value, for the reason that the concept of "work of equal valne" goes beyond "similar work" and encompasses work that is of an entirely different nature, but which is nevertheless of equal value.

Applying this to the ITES industry, as is evident from the data collected the structure of the ITES work place is characterised by a peculiar set of designations. Even if a woman aggrieved were to file a complaint alleging segregation and discrimination, producing proof would be extremely onerous. The burden is very heavy on the woman to prove different designation mean same work or doing work of a similar nature.[27]

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26 Section 10, EQUAL REMUNERATION ACT, 1976

27 In its report, the Government states that replacing the notion of "work of a similar nature" in section 4 with "work of equal value" was not cousidered uecessary in the Indian context, "especially since the term 'work of equal value' has not been quantified". The Committee notes that the importance of the coucept of work of equal value lies in its requirements that the content of the work performed is the focus for comparing the remuneration of men and women, and that the scope of eomparison is as wide as possible. Equal Remuueration Convention, *Committee of Experts on the Application of Conventions and Recommendations*, (1990), *available at*, http://www.ilo.org/wemsp5/groups/pnblie/@ed_norm/@relconf/documents/meetingdocument/wcms_151556.pdf,(Last visited ou 6 February, 2013).

Job evaluation is concerned with content of the joh and not with the characteristics or the performance of the person doing the job. To assess "men" and "women" job fairly, it is imperative that job evaluation must be free from gender bias; otherwise, key requirements of women's jobs are either disregarded or scored lower than men's jobs. Usually a Job Evaluation Committee is established at work place to carry out a job evaluation. The Committee should comprise of equal number of men and women and trained in relevant aspects, including technical aspects. Analytical job evaluation method is most appropriate to identify and redress sex discrimination in remuneration. The concept of "comparable worth" is found to be appropriate to be introduced in the Equal Remuneration Act, 1976. This concept can be defined as "work in which the level of skill, effort and responsibility required are equal worth to the employer regardless of whether the work involves similar or different nature.[28] A controversy will however still remain as regards the definition of what constitutes "worth", whether, it is skill, effort or responsibility?

2. Enforcement Issucs:

As is the case with most enforcement agencies, the Department of Labour Welfare is not without its share of constraints. The implementation of these provisions should happen mainly through Labour Inspectors and Section 9 subsection (1) and (3) lay down the functions of the Labour Inspectors. Section 9 Inspectors.[29]

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28 N.Aggarwal, WOMEN AND THE LAW, 135 (2002).

29 Sectiou 9 EQUAL REMUNERATION ACT, 1976, Inspectors. - (1) The appropriate Government may, by notificatiou, appoint such persons as it think fit lo be Inspectors for the purpose of making an investigation as to whether the provisions of this Act, or the rules made thereunder, are being complied with by employers, and may define the local limits withiu which an Iuspector may make such iuvestigatiou.

Sub-seetion (3) An Inspector may, at any place withiu the local limits of his jurisdiction, —

(a) enter, at any reasonahie time with such assistance as he thinks fit, any building, factory, premises or vessel:

(b) require any employer to produce any register, mister-roll or other doeumeuts relating lo the employment of workers, and examine such documents;

(c) take on the spot or otherwise, the evidence of any person for lhe purpose of ascertaining whether the provisions of this Act are being, or have been, complied with:

(d) examine the employer, his agent or servant or any other person found in eharge of the establishmeut or any premises connected therewith or any person whom the Inspector has reasonable cause to believe to be, or to have been a worker iu the establishment;

(e) make copies, or take extracts from, any register or other document maiutained in relation to the establishment under this Act.

Accepting that the organisation is under-staffed, still, there is always a scope for optimizing the workings of the existing manpower to achieve better implementation of existing provisions designed to protect the discrimination of women. The quantity of officers is one angle to it, but the efficiency of existing machinery definitely can be improved upon to compliment the potential it is capable of achieving. However, since 1987, the Equal Remuneration Act, 1976, has provided for the involvement of social organizations in enforcement though, there is a need for the Government to look at the role of independent institutions in a far more pragmatic way.

Furthermore, labour officers often find it difficult to detect violations of the equal Remuneration Act, 1976 and particularly to deal with issues that are connected to wage differentials.

The difficulty in blaming implementation/enforcement for discrimination to women in the BPO industry is that it forces us to also analyze the resource constraints, the constrained manpower and related problems that affect all enforcement/ implementation agencies of the government in this country. Thus, what is needed is to strengthen the enforcement machinery by recruiting more number of enforcement personnel in order that they can carry out their function under the relevant Act efficiently.

This apart, the advisory Committees envisaged under the Act should perform the role of a watch dog. It should be vested with some authority and powers to question the discrimination and disparity in case of women employees.

Appointment of Female labour officers is a positive direction towards sensitization of gender issues in creating an empathetic environment where women employees do not feel reluctant to interact.

3. Low level of violations detected:

Low level of violations detected cannot be taken as indicating that such violations do not occur; it therefore hopes that measures to strengthen these authorities would be considered. The participation of women officers in the enforcement of the Equal Remuneration Act in practice becomes most apt to address gender-specific discrimination in the ITES work place.

According to Labour Department data, there were only 42 prosecutions under the legislation in the entire State in 2010.

Of these, 19 were convicted and a fines totalling Rs. 84,000 collected.

In 2011, there were 43 cases, 23 convictions and Rs. 80,400 collected as fine.

Officials say that while these were cases filed during inspections, women voluntarily making claims under this law are few.

Source: Interview with Smt.Anuradha, Deputy Labour Commissioner, (Bangalore June 25, 2013).

VI. Conclusion:

Although Liberalization, Privatization and Globalization have paved way towards an open economy, it also has adverse implications specifically for women. Globalization, flexibilization and technological changes have meant erosion of social security networks, rampant gender discrimination and sex-segregation leading to deteriorating work conditions.

Addressing the question: Whether the current Legal framework is rightly based to address the issue of 'non-apparent discrimination' prevalent in the ITES sector which has a leaning towards gender neutrality in its policies?

This Paper finds that, gendered occupational segregation persists in the ITES industry as gathered from the empirical research conducted in the city of Bangalore. The many forms of this discrimination takes effect oo wage differentials, access to future development in career etc. thereby resulting in disparate treatment of women at work place only on the basis of her "gender". The existence of the paradoxical glass ceiling is but evident going by the official data provided by NASSCOM. An Equal Remuneration Act will not be a panacea for all the gender-related problems in ITES industry not to mention its restrictive scope.

Further, to address the gender issues in the ITES industry, concerted effort towards mere representations would not suffice. What is required is the effective policies and affirmative action on part of the organization which has the potential to combat gender segregation. Policies need to be aimed at integrations at the managerial levels and also correct the prevalence of historical inequalities to prevent other forms of work place gender discrimination.

The need of the hour is to put in place the *Best Measures for Gender Inclusivity;*[30]

1. Mentoring.
2. Competency Measure.
3. Exclusive Training To Women Employees.
4. Seminars and Inclusivity Programmes.

30 MERCER-NASSCOM-Gender Inclusivity Report, *supra.*

Analytical Study of International Terrorism: A Research Problem

Komal Audichya*

ABSTRACT

Terrorism, the "cancer of the modern world", is a real and serious threat not only to the very existence of a particular individual but to the entire nation by sabotaging its democracy, eroding its development, economic and political stability. With increased information technology and globalization the international terrorism is fast emerging as the major threat to the security scenario every nation state. Report by Global Terrorism Index shows fivefold increase the number of deaths from terrorism since 2000 and has become the major national security risk for most of the countries. Thousands of civilians have been killed, sexually abused, maimed and displaced by terrorists from Syria to Iraq to Libya to Mali, from Afghanistan to Pakistan to Somalia to Kenya to Nigeria, from USA to France to Britain, almost every country exposed to specter of terrorist violence. Since it is not confined to the boundaries of the State but is so wide spread, it can be defeated only through multilateral and multifaceted strategy. The UN Security Council, having primary responsibility to maintain international peace and security, has repeatedly failed to adequately deal with threats to peace and security. The most important factor in its failure is the term International terrorism has not been defined so far yet. Only a universally accepted definition will depict the common will of international community trying to combat international terrorism. This paper will throw light on why it has been difficult to define the concept of international terrorism and how it is rendering the United Nations' efforts to combat it ineffective.

Key words : *international terrorism, definition, difficult, ineffective*

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The Problem

The search for legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed.[1]

Although often terrorism is intrastate, it is most of the times international in character: by crossing borders (as in Kashmir), by the nationality of participant and/or victim (as in September 11), or by target despite being geographically intra-state (for example attacks on foreign visitors in Bali by Indonesia based terrorists). Acts may also be called international in character when they try to influence foreign governments and when they involve the interests of more than one state.[2]

International Terrorism is not a new phenomenon but it has emerged as the biggest threat to the nations of the world. Terror attacks, diplomatic crisis and armed conflicts are becoming normal in international relations. International terrorism is a result of lawlessness, where people opt for violent destructive acts to draw attention to their grievances, for which they feel the system does not offer any remedy or solution. The worst international terrorist attack ever has been 9/11 which changed the perception that terrorism affects only individual states and not all the states and people realized that world had become one big terrorist threat. The most striking trend was that terrorism had become bloodier, reflecting the changing motivation of the terrorists that is to kill as many people as possible. In the 1970s the bloodiest terrorist attacks had casualties in the ens, in the 1980s, casualties from the worst such attacks were in the hundreds and by the 1990s attacks became more recurrent of the same enormity. The 9/11 terrorist attacks on US shocked all the nations and left fatalities in thousands .The international law was left dumbfounded, could not give a name to these events, which did not come under any of its established categories. The law had been seriously challenged by the forcible impingement of 11 September, and a whole new law was emerging. The lethality of such attacks has increased with time, as seen in Syria and Iraq, the humanity is seeing a new facet of terrorism. The states of the world, individually as well as within the framework of international organizations, have continued with the various efforts to combat terrorism.

1 Geoffrey Levitt, Is "Terrorism" Worth Defining?,*13 OHIO N.U.L. Rev.97* 1986, p.97

2 Referred in: Renven Young, Defining Terrorism: The Evolution Of Terrorism As A Legal Concept In International Law And Its Influence On Definitions In Democratic Legislation, *B.C. Int'l & Comp. L. Rev.*29,2006, p.31

But the dilemma is that there is no internationally accepted definition of terrorism and states continue to disagree about such a definition. Under national laws also many countries have defined certain acts under criminal law but have not categorized them under the term terrorism. Since 9/11, many States have abandoned this approach. As far as international law is concerned, the United Nations is the main producer of anti-terrorist legislation. The United Nations attempts to define the term floundered mainly due to differences of opinion between various members about the use of violence in the context of conflicts over national liberation and self-determination.

All efforts of the United Nations to deal with the problem of terrorism have been impeded by the divergent opinion whether the concept of terrorism should be defined or not. "In particular, what use of force, by whom and in what circumstances, was to be considered as 'terrorism', thus triggering certain legal consequences. On the other side were those who responded that agreement upon definition was doomed to be failure, and that it was better to proceed pragmatically with building up agreed norms that were relevant to different aspects of the overall problem."[3] But even the normative responses can be efficacious only when there could be consensus as to what conduct has to be prohibited. Although the United Nations has responded pragmatically to the problem as to what constitutes terrorism, this approach is facing many hurdles now. When under criminal law every crime has been defined in spite of the complexity of the act to be defined, then why terrorism can't be defined. It has become absolutely necessary to control this irrepressible threat but since the act itself is not defined, the States are confused "whether normative community responses are or are not to be invoked on a given occasion, if it is unclear whether the triggering conduct is or is not terrorism."[4]Analysing the different definitions of terrorism, importance of defining terrorism and the obstacles in pragmatic approach to it, the need of the hour is to define *Terrorism.*

QUESTION OF DEFINITION

Today it has become imperative to define 'terrorism' to protect the state and peaceful politics, to distinguish between political and private violence, and to ensure International peace and security. One of the challenges of defining this term revolves around the question of what *is* terrorism. One identified problem

3 Rosalyn Higgins, The General International Law of Terrorism cited in *Terrorism and international law,* Edited by Rosalyn Higgins and Maurice Flory (Routledge Publishers, 1997) p.14

4 *Ibid* at 3

that has contributed to imprecision of the term is that terrorism is still ill-defined. That is primarily due to disparate political considerations impinging upon less partisan efforts in the exercise of conceptualizing what terrorism is predicated upon. Thus, we witness a scenario wherein there are ubiquitous definitions of terrorism, many of which are political or even legal in nature.[5]

The enormous efforts and time have been used to define terrorism but could not reach any consensus. "It is notoriously difficult to define terrorism."[6] It is an important and an unresolved issue that requires immediate attention. Whether one is skeptical of definitions or regret that the term was 'ever inflicted upon us'; the term has now legal consequences and cannot be ignored, as merely of academic interest, or washed away. Defining terrorism would help to confine the term and prevent its abuse.

PROBLEMS CREATED BY VAGUE DEFINITION

The absence of definition enables states to unilaterally and subjectively determine what constitutes terrorist activity and to take advantage of public panic and anxiety engendered by the designation of conduct as terroristic to pursue arbitrary and excessive counter terrorism responses.[7]*Terrorism represents a very real and serious danger to not only a particular individual or community but the entire life of the nation and the rule of law itself.*[8]

The Snpreme Court of India emphasized this in Madau SIngh case:[9]

Right to life is the most precious fundamental right guaranteed under Article 21 of the Constitution of India. Unfortunately, the right to life has been exposed to serious threats and risks from terrorists. Life, liberty and human rights need to be protected and this is a constitutional mandate. Aftermath of several terrorist attacks all over the world and particularly in India has created an atmosphere of panic and fear.

The lack of agreement on a definition of terrorism has been a major obstacle to meaningful international countermeasures.[10] The definition is of major significance

5 Richard J. Chasdi, *Serenade of Suffering: A portrait of Middle East Terrorism, 1968-1993*, (Lexington Books, 2001), p.3.

6 Sydney D. Bailey, *The UN Security Council and Human Rights*,(Palgrave MacMillan, 1994), p.90

7 Ben Saui, *Defining Terrorism in International Law*(Oxford University Press, 2006), p.5.

8 Dr. Justice AjitPasayat, Terrorism and The Threat to the Rule of law in India, Available at: http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=18653

9 Madan Singh vs. State of Bihar,AIR 2004SC 3317

10 *Supra* Note 7.

for anti-terrorist policy as it relates to the identification and punishment of terrorist activities and the ambiguity of this result in disagreements among states when they have to take common legal measures to combat terrorism. The diversity of definitions on the international level conforms to variance of domestic definitions, which prescribe for individual elements of the definition. As such each state, in passing legislation on the matter, defines terrorism according to its own will. Due to transnationality of the phenomenon, affected states are constrained to cooperate in suppressing it. *Cassese* writes, "however imperfect and incomplete, a common working definition is necessary so that all states concerned may agree on the target of their repressive action: how can states work together for the arrest, detention or extradition of alleged terrorists, if they do not move from the same notion?"[11] *The common definition will also help to restrict the scope of UN Security Council resolutions* after 11 September 2001 which has sometimes allowed the States to take exorbitant counter-terrorism measures.

We have number of enactments restricting and repressing terrorism but none of them have met the real need of humanity. Is it possible to combat terrorism without defining it? It has to be defined as it has strong political implication. The states act when something is being considered terrorism or someone is being considered terrorist. Even the Security Council wants them to act, though politically, then only for example, resolution 1373(2001)[12] states that "All States shall prevent and suppress the financing of terrorist acts, deny safe haven to those who finance, plan, support or commit terrorist acts, shall prevent the movement of terrorists or terrorist groups by effective border controls, criminalize active and passive assistance for terrorism in domestic law and bring violators to justice etc". The term has political importance because the state implicated in terrorism may have sanction against it and get politically insulated and economically damaged. So the term must be defined and must be accepted by all the states. Moreover some states intentionally abuse the term to serve their own economic interests or stifle their political opponents.[13] Even when the dissent is legitimate through peaceful and lawful exercise of their rights, it is labeled as subversion or terrorism. The problems created by this lack of definition were graphically described in

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11 A. Cassese, The Multifaceted Criminal Notion of Terrorism in International Law, *Journal of International Criminal Justice*, Vol.4, Issue 5 (November 2006) at 934.

12 SC Res. 1373(2001) 28 September 2001.

13 Human Rights Watch, "Opportunism in the Face of tragedy: Repression in the name of anti-terrorism," has published a list of states e.g. China, Egypt, India, Jordan, Israel, Syria etc. and given the details in which these states abused the term terrorism for purposes that have no relation to terrorism. Available at: http://www.hrw.org/campaigns/september11/opportunismwatch.htm(last accessed on 10th Oct. 2015).

2002 report of the Special Representative of the Secretary-General on human rights defenders: ...*there is real danger that, in the wake of terrorist attacks of 11 September 2001, somegovernments may be using the global war on terrorism as a pretext to infringe human rights and to clamp down on human rights defenders.*[14]

The commonly accepted definition would give other states legal as well as political ground to censure, force these states to react politically and thus hold them accountable for taking any aetion in name of combating terrorism.

The international community has never succeeded in developing an accepted comprehensive definition of terrorism. *Angus Martyn* in a briefing paper for the Australian Parliament has stated[15] that mostly international law related with international terrorism puts emphasis on the duties of states to prevent and punish terrorism because International law has conventionally been determining the duties and rights of states in their relations with each other. Terrorism is considered a criminal act under international law, but most of the time terrorists get punished for that act under the domestic law of the country. Hence "The mass-murders committed on 11 September by the hijackers probably constituted a crime against humanity under Article 7(a) of the Rome Statute of the International Criminal Court (ICC). However as the ICC only has jurisdiction over crimes committed *after* tbe Rome Statute comes into force-it is still seventeen ratifications short of the sixty required - the ICC has no immediate relevance to the current situation."[16]

Terrorism is killing innocent people for political considerations. As we know that political crime is an exception to extradition and the political motivation is the important constituent of the definition of terrorism. So we have to distinguish between political crime and Ierrorism and to eliminate any kind of ambiguity, define terrorism expressly.

Agreement on the matter requires dne regard for the purposes of the exercise, a question arising on two separate planes, the political and the legal. The need for

14 Source:http://daccess-dds-ny.nn.org/doc/UNDOC/GEN/G02/111/22/PDF/G0211122.pdf?OpenElement (last accessed on 10th Oct. 2015).

15 Angus Martyn, The Right of Self-Defence under International Law - the Response to the Terrorist Attacks of11 September, Australian Law and Bills Digest Group, Parliament of Australia Web Site, 12 February,2002.http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/PublicatiosArchive(last accessed on 14thOctober 2015)

16 *Ibid.* See also, there was some debate about whether to include 'terrorism' as a crime under the Rome Statute ,but again there was a lack of agreement over its definition, so it was not included in the Statnte's finai form. The text of the Rome Statute is at http://www.un.org/law/icc/statute/romefra.htm.

this distinction has not been adequately observed. Moreover the definition of terrorism, whether on one plane or the other, has not been separated from the contentious political issues mentioned, which adhere to the question so strongly that often a reference to the need for defining terrorism is, at bottom, no more than an expression of support for a certain position on those issues.[17] We can go through a brief aeeount of the literature on the definition of terrorism which can put light on this issue and can serve as inspiration for a definition at legal level.

TERRORISM: THE CONCEPT

Terrorism is the worst form of political violence and abuse of human rights which has been used by both states and non-state organizations and groups to support various causes. It emanates from various sources such as individuals, political, religious, fundamentalist groups and sometimes even states and poses grave danger to world peace. Since formulating a strategy requires understanding of the enemy, we must have a practical and functional understanding as to what constitutes terrorism. But there is confusion and ambiguity as thereis no official definition of terrorism agreed on throughout the world. Some definitions rely heavily on three broad criteria- target, weapon and perpetrator and other definitions put emphasis on purpose or motive to regard certain actions as terrorism.

Expressions such as *terror, terrorize, terrible* or *terrorism* derive from the Latin verb *terrere* meaning to tremble or to cause to tremble. Etymologists claim that English words like *terrorism, terrorist* and*terrorise*eame into usage only after the French revolution (1793-1798) when words like, *terrorisme, terroriste, terroriser* had developed.[18] Historically there has been no consensus about the relationship between terror and terrorism. The most widely held views are that terror can occur without terrorism but terrorism cannot occur without the element of terror.[19] Terror forms an element of numerous forms of ordinary crime but terrorism, is an act, which goes beyond the affected victim. If terror is a natural phenomenon, "terrorism" is the conscious exploitation of it.[20] The basic mechanism of terror was captured in an ancient Chinese proverb: "Kill one, frighten ten thousand." This means that for a terrorist, an act of violence is aimed not just at the destruction caused, but in the message of terror being driven home. As Brian

17 Roberto Lavalle,"A Politicized and Poorly Conceived Notion Crying Out for Clarification: The Alleged Need for a Universally Agreed Definition of Terrorism," p.90 Available at:http://www.zaoerv.de/67_2007/67_2007_1_a_89_117.pdf

18 Paul Wilkinson, *Political terrorism*,(Macmillan London,1974), p.9.

19 John Richard Thackrah, *Encyclopedia of Terrorism and political violence*, (Routledge&Kegau Paul London, 1987), p.256.

20 *Ibid.* p.257.

Jenkins puts it, "the terrorist wants a lot of people watching than a lot of people dead."

DIFFICULTIES IN DEFINING

The difficulty in defining this word has been expressed by *Judge Baxter* of International Court of Justice, "We have cause to regret that a legal concept of terrorism was ever inflicted upon us. The term is imprecise: it is ambiguous; and, above all, it serves no operative legal purpose."[21]

Rosalyn Higgins, former judge at the International Court of Justice, explained "Terrorism is aterm without any legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals widely disapproved of and in which wither the methods used are unlawful, or the targets protected or both."[22]

Even the endeavor to define terrorism gets entangled into an ideological debate over political aims. Earlier being a tool in the hands of individuals as in the time of Assassins and then changing to become a part of State and then a Non-State phenomenon. It shows that how the political goals were diluted and that blurred the true objective and motive behind terrorism.

The political value of the concept of terrorism isprevailing over its legal one. Left to its political meaning, terrorism easily falls prey to change that suits the interests of particular states at particular times. The Taliban and Osama bin Laden were once called freedom fighters (Mujahideen) and backed by the CIA when they were resisting the Soviet occupation of Afghanistan. Now they are on top of the international terrorist lists. Today, the United Nations views Palestinians as freedom fighters, struggling against the unlawful occupation of their land by Israel, and engaged in a long-established legitimate resistance, yet Israel regards them as terrorists. Israel also brands the Hizballah of Lebanon as a terrorist group, whereas most of the international community regards it as a legitimate resistance gronp, fighting Israel's occupation of Southern Lebanon. In fact, the successful ousting of Israeli forces from most of the South by the Hizhallah in 2000 made Lebanon the only Arab country to actually defeat the Israeli army. "The repercussion of

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18. *Ibid* Part I.
19. *Ibid* Part II.
20. WTO Panel and Appellate Body report on European Communities — Measures Affecting Asbestos and Products Containing Asbestos (WT/DS135/AB/R), 8.99.
21 Late R Baxter Professor of International Law (Harvard), Judge of the International Court of Justice, "A skeptical look at the concept of terrorism" *Akron Law Review* 7 (1974) 380.
22 *Supra* Note 3 at p. 28

the current preponderance of the political over the legal value of terrorism is costly, leaving the war against terrorism selective, incomplete and ineffective." [23]

The quandary that confronts defining terrorism is political in nature. Precisely because the political definition of terrorism prevails over the legal one, it results in the designation of the likes of Taliban to change from that of freedom fighters to that of most wanted international terrorists today. This lack of international political consensus also produces massive disparity amongst States and other international bodies as to "what" constitutes terrorism. So while the UN may call the Palestinians freedom fighters waging a legitimate resistanee against unlawful occupation of their land, Israel considers them to be terrorists. This excessive importance that political value of terrorism enjoys over the legal has had dire consequences. The most serious of them being that it has rendered the war against terrorism excessively selective and inadequate.

These political and emotional aspects of the term "terrorism" create obstacles in its use in legal discourse. In this sense, Saul explains that despite the shifting and contested meaning of "terrorism" over time, the peculiar semantic power of the term, beyond its literal signification, is its capacity to stigmatize, delegitimize, denigrate, and dehumanize those at whom it is directed, including political opponents. The term is ideologically and politically loaded; pejorative; implies moral, social, and value judgment; and is "slippery and much-abused."In the absence of a definition of terrorism, the struggle over the representation of a violent act is a struggle over its legitimacy. The more confused a concept, the more it lends itself to opportunistic appropriation.[24]The ontology of "terrorism" needs to be understood only by transcending its blatant, literal meaning. It contains several folds that have political, social as well as moral facets associated to them. The implicit political and ideological meaning goes beyond mere unleashing of terror and it therefore becomes a "slippery and much abused" term. In the absence of any universally agreed upon definition, the struggle for defining terrorism is fought on ideological grounds as well because it is as much a struggle for its legitimacy. The opportunistic appropriation of "terrorism" is a result of both, the highly warped, problematic and ideological nature of the term, which creates a climate of confusion and chaos on an international level which in itself acts as the second impediment.

23 See, Sami Zeidau, Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism,*Cornell International Law Journal*,Vol.36, (2004), pp. 491-492.

24 B, Saul 2006 *Defining Terrorism in International Law*, (Oxford: Oxford University Press 2006),p.3

The definition of terrorism is inherently contentious as the trouble is consensus on determining when the use of violence (directed at whom, by whom, for what ends) is legitimate. It is common for state and non-state groups to use violence for the achievement of political ends. Here the question is whether states involved in such violent activities should be given the status of terrorist? If we refute it then it becomes useful for the states committing terrorist acts to be let off in different situations.

Further from what angle should terrorism be defined? Because of the inherent difficulties discussed above, the search for an appropriate definition of terrorism as an international crime continues. There are not just numerous definitions but there is plethora of definitions on terrorism.[25]But few of them are of sufficient legal scholarship to be useful in international law, and most of these, which are legally useful, lack the necessary ambiguity for political acceptance.[26] Therefore the search for an apt definition of terrorism as an international crime continues. However the word terrorism can be defined, but it must be dealt with prudence. To make laws on terrorism one requires a legal definition. It will be easy to legislate against terrorism once we get clear definition of it. Various definitions given by different authors are reflection of their perception of the problem. Individnal researchers have proposed many definitions of terrorism but there is no definition of terrorism generally approved by an international organisation such as the United Nations or the European Union. It would thus be helpful to attempt to provide such a definition, taking as a basis the few texts that have tried to define.

TEXTUAL DEFINITION

Oxford dictionary: use of terror especially for politieal purposes. This meaning from the dictionary is hardly explanatory. From this we understand that terror has something do with power. That, that power is used to instill fear in minds of people. All this is ultimately used for a political end.

A terrorist is a terrorist, just as a criminal is a criminal. A terrorist is simply 'a person who uses violence and intimidation in pursuit of political aims[27], and

25 For example, John Richard Thackrah gives as many as 68 definitions, Supra Note 12 at p. 58-63; Similarly, a Dutch study mentions as many as thirty-five definitions of terrorism: A new guide to Actors, Authors, Concepts, Data Bases, Theories and Literature, (Amsterdam: North Holland,1988), pp.32-38

26 Cindy C. Combs, *Terrorism in the Twenty First Century,* (Prentice Hal, New Jersey, 1997), pp.6-7.

27 Paul Wilkinson, Political terrorism, (The Macmillan press Ltd, London, 1976), p.9.

terrorism is 'the use of violence and threats to intimidate or coerce for especially political purposes.[28]

There are 109 definitions of terrorism provided between 1936 and 1981 as pointed out by

Walter Lacquer, a well-established expert on international law. He views it as the "use ofthreat of violence, a method of combat or a strategy not an ideology to achieve certain goals that its aim is to induce a state of fear in the victim, that it is ruthless and does not conform to humanitarian norms and that publicity is an essential factor in terrorist strategy".[29] Terrorism is essentially aimed at an audience. Terrorist acts are often intentionally spectacular, designed to shock and influence a wide audience, beyond the victims of the violence itself. The point is to use the psychological impact of violence or of the threat of violence to bring political change. As the terrorism expert Brian Jenkins bluntly put it in 1974, "Terrorism is theatre". According to former Prime Minister *Benjamin Netanyahu* the terrorist acts are definitely not senseless. Terrorism is carried out with a purpose, cold-bloodedly and with calculated fashion. The goals may change from place to place and the fight to remedy wrongs which are supposedly – social, religious, national, and racial. And for all these problems the only solution set is to demolish the whole strueture of the society.[30]

*Alex Schmid*offered a typology by focusing on the frequencies of definitional Elements in109 definitions of terrorism:[31]

	Elements	Frequency (%)
1.	Violence, Force	83.5
2.	Political	65
3.	Fear, terror emphasized	51
4.	Threat	47
5.	(Psychological) effects and (anticipated) reactions	41.5
6.	Victim-target Differentiation	37.5

28 Joseph S. Truman, *Communicating Terror The Rhetorical Dimension of Terrorism*, (Sage Publications, California, 2003), p.2

29 Walter Laquer, *The Age of Terrorism* (2nd ed.),(Boston: Little & Brown,1987), p. 143

30 See Edit.by BenjâmînNetanyâhû,*International Terrorism: Challenge and Response*:[the Jerusalem Conference on International Terrorism], (Transaction Publishers, 1981), p.6.

31 Source; Alex P. Schmid, Albert J. Jongman et al., *Political Terrorism; A New Guide to Actors, Authors,Concepts, Data Bases, Theories and Literature,* (New Brunswick. Transactiou Books 1988), p.5-6.

7.	Purposive, planned, systematic, organised action	32
8.	Method of Combat, Strategy, tactic	30.5
9.	Extra normality, in breach of accepted rules, without Humanitarian constraints	30
10.	Coercion, extortion, induction of compliance	28
11.	Publicity aspects	21.5
12.	Arbitrariness; impersonal, random character; indiscrimination	21
13.	Civilians, non-combatants, neutrals, outsiders as victims	17.5
14.	Intimidation	17
15.	Innocence if victims emphasized	15.5
16.	Group, Movement, organisation as perpetrator	14
17.	Symbolic aspect, demonstration to others	13.5
18.	Incalculability, unpredictability, unexpectedness of occurrence of violence	9
19.	Clandestine, covert nature	9
20.	Repetitiveness; serial or campaign character of violence	7
21.	Criminal	6
22.	Demands made on third parties	4

As shown above, the highest frequency is related to 'violence and force' and then to 'political' and followed by 'fear and terror'. The political aspect of the concept was emphasized. In recent study, Leonard Weinberg, Ami Pedahzur and Sivan Hirsch-Hoefler examine 73 definitions of terrorism from 55 artieles in three leading academic journals on the topic, and came to the conclusion that "terrorism is a politically motivated tactic involving the threat or use of force or violence in which the pursuit of publicity plays a significant role."[32]

According to *Bowyer J. Bell*, *"terrorism is a weapon of the weak, but it is a very powerfulweapon"*[33]. He treated terrorism as an effective instrument for

32 Leonard Weinberg, Ami Pedahzur & Sivan Hirsch-Hoefler, The Challenges of Conceptualizing Terrorism, *Terrorism and Political Violence*, Vol. 16, No. 4, (2004), p. 786.

33 Kent Layne Oots, *A Political Organization Approach to Transnational Terrorism*,(Connecticut: Green Word Press, 1986), p.5.

whom military conflict isimpractical. As war, especially fully fledged or total war becomes politically costlier and economically prohibitive, terrorism serves as the intermediary instrument for the purpose of defined political objectives. Hence, weaker states tend to support or sponsor terrorist groups in furtherance of their objectives: for example, Syrian support for Hezbollah in Lebanon. Adopting a similar approach *David Franklin* argued that while the military action is aimed at physical destruction, terrorism aims at psychological consequences and creating fear is the ultimate purpose of terrorism[34]. While Brian Michael Jenkins viewed terrorism as new form of warfare, *Antal Deutsch* perceived it a slow cost type of warfare between major powers[35].

Boaz Ganor, from the Institute of Counter-Terrorism (ICT) has proposed his perspectivetowards the definition of terrorism, by stating that terrorism is the intentional use of, or threat to use violence against civilians or against civilian targets, in order to attain political, ideological and religious aims'"[36]

Different authors have provided different aspects of definition of terrorism. *Bruce Hoffman's* definition seems to be more appropriate although inherently political, "We may therefore now attempt to define terrorism as the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change. All terrorist acts involve violence or the threat of violence[...]It is meant to instill fear within, and thereby intimidate, a wider 'target audience' that might include a rival ethnic or religious group, an entire country, a national government or political party, or public opinion in general.[37]

Largely as a result of those political considerations a comprehensive, meticulous, and widely shared definition of terrorism could not be achieved. This lack of consensus on so fundamental an issue makes it relatively easy to forgo rigorous attempts to define terrorism and fall back on shopworn approaches that focus exclusively on "terrorist thinking" and the physical devastation that terrorist attacks cause.[38] 'Terrorism' is not just a legal issue but has political considerations also. It is this side political side of the concept that the definition has not reached any consensus over decades. Every state has different background and hence the

34 *Ibid.*

35 *Ibid*

36 Boaz Ganor, ICT Executive Director, Defining Terrorism- Is One Man's Terrorist Another Man's Freedom Fighter?, Police Practice and Research, 2002, Vol. 3, No. 4, p.288 Available at:http://www.rageuniversity.org/PRISONESCAPE/ANTI-TERROR%20LAWS/One-Mans-Terrorist.pdf (last accessed on 14th Nov., 2015).

37 Bruce Hoffman,*Inside terrorism*, 2 ed., (Columbia University Press, 2006), p. 41.

38 See, Richard J. Chasdi,*Serenade of Suffering: A portrait of Middle East Terrorism, 1968-1993*, (Lexington Books, 2001), p.3.

different philosophy of the term. But the States will have to forgo their own national interests otherwise how can we respond to or combat it without defining the term. If all the enlightened countries do not change their priorities, and do not disenable their political and economic interest, it will not be feasible to wage an effective war against terrorism. We must be very careful while defining it. When asked to define "terrorism," Sir Jeremy Greenstock, the British diplomat responsible for leading UN efforts to fight terrorism, replied: "What looks, smells, and kills like terrorism is terrorism." It is not that simple and in fact it can be very dangerous as the term then could be abused by the vested interests. Neither can we be content with notorious paraphrase of U.S. Supreme Court Justice Potter Stewart's statementon pornography: *When one sees terrorism, one recognizes it.*[39]

INTERNATIONAL REGIME

Terrorism is not a new phenomenon and the twentieth century has added new patterns to terrorism. International terrorism has emerged as the biggest threat to the nations of the world. Terror attacks, diplomatic crises and armed conflict are becoming normal in international relations. International terrorism is a result of lawlessness, where people opt for violent destructive acts to draw attention to their grievances, for which they feel the system does not offer any remedy or solution. We have many treaties and other international mechanism to deal with terrorism, but their effectiveness is far from satisfactory. Innumerable state sponsored terrorism groups have mushroomed in different parts of the world. The government of various countries is unable to provide basic security guarantee to their citizens. There are various legal measures, which have been enacted to deal with this problem but the menace still exists. The States of the world, individually as well as within the framework of international organisations, continue with various attempts to combat this menace.

INTERNATIONAL CONVENTIONS

Even in today's vastly improved climate at the United Nations, the definition of terrorism would still present enormous problems. Even though there would now be a greater consensus between the West and Eastern Europe as to what constituted terrorism, the gap of perception between the first and third worlds has perhaps not narrowed so much. Furthermore, the difficulties of definition are objective and not subjective. The technical problems of definition are prodigious.[40]

39 Paraphrasing Judge Potter Stewart who once used the words "I know it when I see it" to define pornography. United States Snpreme Court Judgment, 22 June 1964, Jacobellis v. Ohio. – 378 US 184 (1964), p. 197.

40 *Supra* Note 3 at p.14.

The League of Nations in the 1937 Convention had proposed a definition: "Ail criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public".[41] However, besides India no other country ratified it though signed by twenty states and the convention never came into force. In the same conference another resolution was passed, for the creation of an International Criminal Court. The attempt by League of Nations at codification and progressive development of specific norms to combat international terrorism underlined both the doctrinal as well as the poiitical difficulties. At the doctrinal ievel, several states viewed any development of international criminal jurisdiction as an infringement on their "exclusive and absolute" jurisdiction over crimes, which represent a combination of the principle of territoriality and nationality and the protective principle. The protagonists of international criminal jurisdiction, on their part, differed on its modalities. One argument was that without a substantive "international criminal law" relating to terrorism one could not conceive of an international enforcement mechanism for suppression of terrorism in general and of an international criminal court in particular. The counter argument, however, was that the best way to develop the law was by establishing at least a tribunal which would be instrumental in evolving the law.[42]

Had the 1937 experiment of twin convocations succeeded, it would have resolved this doctrinal debate to a great extent. All that international law has been able to achieve over the years relates to the efforts a) to identify certain acts or categories of acts of international terrorism whose victims are innocent human beings.; b) to evolve a concept of coordinate criminal jurisdictions of states by identifying and / or recognizing a state's right to exercise its criminal jurisdiction (namely, the territoriality principle, the nationality principle, the protective principle, the passive personality principie and universality principle); and c) to promote bilateral and multilateral cooperation by taking some steps towards an obligation to extradite or prosecute in cases of competing claims to jurisdiction , as well as an obligation to assist each other in prosecution proceedings.[43]

It is somewhat paradoxical that the international community was attempting to suppress terrorism but could not agree on its meaning, mainly because of political difficulties. In 1996, the Assembly established a new committee, Ad Hoc

41 Article 2 enumerated a number of such acts, first and foremost "any willful act causing death or grievous bedily barm."

42 V S Mani, International Terrorism and the Quest for legal Controls, *International Studies 40(1)*,(Sage Publications India Pvt. Ltd. New Delhi, 2003), p. 42-43

43 *Ibid* at p.43

Committee, to deal with terrorism, Thisbody meets annually, and its work being pursued each year through a working group of the Assembly's Sixth Committee.[44] It has been pursuing the terrorism issue consistently but the work of this body is bogged down by the OIC[45] proposal.[46]

The 11 September events did not bring any change as far as the consensus on defining the term was concerned. The Security Council, in its Resolution 1368 of 12 September 2001, called on the international community to 'redouble their efforts to prevent and suppress terrorist acts'. Later on, in Resolution 1373 of 28 September 2001, which established theCounter-Terrorism Committee, the Council decided upon appropriate actions to be taken byStates. States shall '[p]revent and suppress the financing of terrorist acts' and '[t]ake the necessary steps to prevent the commission of terrorist acts'.However, the Council could not set out as to what it meant by 'terrorism', leaving the ehaos as same because the State was left with the option of interpreting the term as per its legal order. The States take to domestic legal definitions of terrorism.

On 8th Oct., 2004 Security Council adopted Resolution 1566 which surprisingly provides a definition directly relating to terrorism:

"Recalis that criminal acts, ineluding against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not

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44 In recent years, within the framework of Assembly's Ad Hoc Committee (on terrorism) as well as the Working Group of the Sixth Committee, the work has been done on three specific counter-terrorism instrnments: the 1997 International Convention for the Suppression of Terrorist Bombings, the 1999 International Conventionfor the Suppression of the Financing of Terrorism and the International Convention for the Suppression of Actsof Nuclear Terrorism.

45 The Organization of the Islamic Conference adopted a convention in 1999 which defines terrorism, "as any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry ont an individnal or collective criminal pian with the aim of terrorizing people or threatening to harm them or imperiling their lives, honor, freedoms, security or rights or exposing the environment or any facility or pnblic or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States".

46 *Supra* Note 17 at p.94

prevented, to ensure that such acts are punished by penalties consistent with their grave nature."

This sentence suggests that civilians are not the principal victims of terrorism. But everyone knows that quite the contrary is the case. The sentence also suggests that "criminal acts" against the military are as rule acts of terrorism. But this is equally wrong: the majority of acts of violence against the military that can be deemed criminal take place in armed conflicts, in which context they are generally not acts of terrorism. The reference, to intimidation applies, literally, only to "a population", not to "the general public", to "a group of persons" or to "particular persons". Since, however, this limitation makes no sense whatsoever, paragraph 3 should be deemed not to contain it. Moreover the definition is too broad to be called a specific definition on terrorism.

In the December 2004 report entitled "A more Secure World: Our Shared Responsibility", prepared by a "High-Level Panel" of persons convened by the Secretary-General defines terrorism as:[47] "*any action, in addition to actions already specified by the existingconventions on aspects of terrorism, the Geneva Conventions and Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.*"

The definition very clearly and adequately does not allow for the freedom-fighter exception. The report also urges the UN, with the Secretary-General taking a leading role, to promote a comprehensive strategy against terrorism and suggests, albeit in very general terms, the aspects that should be covered by that strategy.[48]The reference, in the panel's definition of terrorism, to "civilians or noncombatants" is peculiar. Since civilians may be (and indeed almost always are) noncombatants, the categories "civilians" and "non-combatants" are not mutually exclusive, for which reason logic required inserting "other" just before "noncombatants". More important, since it is only in situations of armed conflict that the distinction between combatants and non-combatants is entirely meaningful, the reference to "civilians or non-combatants" seems to imply that terrorism is

47 See Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, subpara. (d) of para.164

48 Reforming the United Nations for Peace and Security Proceedings of a Workshop to Analyze the Report of the High-level Panel on Threats, Challenges, and Change Yale Center for the Study of Globalization New Haven,Connecticut March, 2005 http://www.ycsg.yale.edu/core/forms/Reforming_un.pdf

particularly worthy of attention when it occurs in such situations. This appears to reflect an unbalanced view, since terrorism occurring in peacetime is at least as serious a cause for concern as terrorism arising in situations of armed conflict. Moreover the reference in question seems to disregard the fact that military personnel can be targeted by terrorists just as much as civilians.[49]

At 2005 September Summit[50] negotiations were held by world leaders who unequivocally condemned terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes. What blocked consensus was disagreement of a political nature arising in connection with the draft convention on definition of terrorism, as certain terrorism acts were not being covered by any of the UN counter-terrorism treaties.

The UN Member States still do not have an agreed-upon definition of terrorism, which is a major impediment to international countermeasures against terrorism. There is necessity of Terminology consensus a single comprehensive convention on terrorism, in place of the present 14 conventions and protocols.

The United Nations has since then adopted different conventions dealing with terrorism. In the absence of an umbrella act or legislation against terrorism, we have a host of conventions, covering a range of terrorist attacks. The conventions that the UN sponsors have the weight of primary sources[51] of international law once they enter into force. The sectoral approach adopted by United Nations has fourteen conventions directly pertaining to the subject international terrorism but not having single comprehensive definition of terrorism.

Main International Conventions

*Here is a summary of the 14 major legal instruments and additional amendments dealing with terrorism*aimed at identifying offences seen as belonging to the activities of terroristsand dealing with specific categories thereof.

i. 1963 Convention on Offences and Certain other Acts Committed on Board

Aircraft (Aircraftconvention)

ii. 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Unlawful Seizure Convention)

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49 *Supra* Note 15 at p. 104,105

50 Resolution 60/1, 2005 World Summit Outcome document's section on terrorism is in paras. 81 to 91, inclusive.

51 Article 18 of the Statute of International Court of Justice

iii. 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (civil Aviation Convention)

iv. 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (Diplomatic Agents Convention)

v. 1979 International Convention Against the Taking of Hostages (Hostages Convention)

vi. 1980 Convention on the Physical Protection of Nuclear Material (nuclear Materials Convention)

vii. 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Extends and Supplements the Montreal Convention on Air Safety) (Airportprotocol)

viii. 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Maritime Convention)

ix. 2005 Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf

x. 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection (Plastic Explosives Convention)

xi. 1997 International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention)

xii. 1999 International Convention for the Suppression of the Financing of Terrorism (terrorist Financing Convention)

xiii. 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (Mnclearterrorism Convention)

xiv. 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (New Civil Aviation Convention)

All these conventions were successfully concluded because they are imprecise and vague. As a result they could be interpreted and is often interpreted differently. The large measnre of discretion "weakens the texts' utility in terms of global security, which could be enhanced through setting out overriding imperatives."[52]They have certain common features:(a) all have adopted a definition of terrorism which does not describe what constitutes the act but describe certain types of terrorist acts. They reflect a consensus that there are some acts that are such a serious threat to the interests of all but without reference to the motives, political or ideological, of the act of the perpetrator. (b) The question of the State itself as terrorist actor is not considered and they all concentrate on actions by non-State actors (individuals and organisations).

Suggestions

Even after committing to the international conventions on terrorism the states have not stopped sponsoring arms, finance or assisting terrorist gronps. For example; in the Indian State of Jammu and Kashmir by Pakistan and jihadi groups and in the past even the LTTE received political, financial, logistical and even military support from India.What are the obstacles which are preventing the states from co-operating in taking measures against the acts of terrorism? The ambiguity of the definition of terrorism has not been tackled even by the main producer of anti-terrorist legislation, the United Nations. The international community has adopted a number of international treaties thatare intended to combat certain types of terrorism, such as the hijacking of aircraft but there has been no agreement on a definition of terrorism.[53] However, as such, much is at stake in the definition of terrorism.[54]

To combat terrorism without defining it does carry certain drawbacks. It gives rise to uncertainty and leaves States the possibility of making unilateral interpretations of the term for their own interests. The term has also considerable consequences relating to co-operation betweenstates, such as intelligence sharing, mutual legal assistance, asset freezing and extradition.

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52 Michael Dartnell, A legal inter-network for terrorism:Issues of globalization, fragmentation and legitimaey, *The Future of Terrorism,* Max Taylor & John Horgan (ed.), (London: Frank Cass &Co. Ltd., 2000), p. 204

53 The Rome Statute of the International Criminal Conrt does not eontain express reference to acts of terrorism,despite a number of proposals in earlier drafts. However the Statute does apply to and define a number of crimes including crimes against humanity and other offences that can include acts of terrorism. Terrorist acts can, in certain eircumstances, constitute crimes against humanity. For details and further references, see A. Cassese, *Internationalcriminal law* (Oxford, 2003), pp. 120-132.

54 S. Marks, A. Clapham, *International Human Rights Lexicon,* (Oxford,2005),p.345 55 A/44/456/Add.1,10Oct. 1989

Terrorism is a politically motivated violence which is different from other forms of social violence. So it is very difficult for the states having divergent views to agree on a common definition. The states or individuals have used violent means to attain political objectives. Even if they had legitimate cause, the acts of terrorism can never be justified.

Mexico once used the occasion to point out: *The basic problem which has arisen in tacklingthe question of terrorism is the lack of single criterion determining the fundamental component elements of the definition of the term. Only the adoption of such a criterion would make it possible to establish mechanisms to help eliminate the practice of terrorism.*[55]

The international organisations are aware of the definition issue but they are not keen to ereate universally accepted definition. They condemn terrorism but are not agreeing on legal definition of terrorism. As seen above the pragmatie approach also needs universal acceptance of the term otherwise many obstacles are there in combating terrorism.

There is urgent necessity of a definition as well as its acceptance by the States. They will have to give up their political or economic preferences. The definition of terrorism intended for exclusively legal purposes wonld beparticularly difficult to work out but without such a unified stand by allnations, the propensityof these terrorist attacks will be insignificant comparedto the attacks yet to come.

Currently Member States are negotiating an additional international treaty, a draft comprehensive convention on international terrorism[56]. This convention would complement the existing framework of international anti-terrorism instruments and would build on key guiding principles already present in recent anti-terrorist conventions: the importance of criminalization of terrorist offences, making them

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55 A/44/456/Add.I,10Oct. 1989

56 Draft Comprehensive Convention against International Terrorism, A/59/894, AppendixII
The definition of the crime of terrorism, which has been on the negotiating table since 2002 reads as follows:
"1. Any person eommits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:

(a) Death or serions bodily injury to any person; or
(b) Serious damage to public or private property, including a place of public use, a State or government faeility, a public transportation system, an infrastrncture faeility or the environment; or
(c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economie loss, when the purpose of the eonduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

punishable by law and calling for prosecution or extradition of the perpetrators; the need to eliminate legislation which establishes exceptions to such criminalization on political, philosophical, ideological, racial, ethnic, religious or similar grounds; a strong call for Member States to take action to prevent terrorist acts; and emphasis on the need for Member States to cooperate, exchange information and provide each other with the greatest measure of assistance in connection with the prevention, investigation and prosecution of terrorist acts.

There must be consensus on a definition of terrorism so that comprehensive convention on terrorism get adopted by UN member but the negotiations of the Comprehensive Conventionhave not progressed still after nearly a dozen years of discussions at the UN. In fact PM Modi while speaking at 69th session of UN General Assembly urged the member states to adopt the comprehensive convention on international terrorism and asked pertinently "Are we really making concerted *international efforts to fight these forces, or are we still hobbled by our politics,* our divisions, our discrimination between countries, distinction between good and bad terrorists." The failure to adopt this convention is helping the terrorists who are continuing to commit this heinous crime. This convention will give strength to the measures to prosecute terrorists and confront terrorism.A single comprehensive convention on terrorism, in place of present 14 conventions, is the present requirement. But lack of definition of terrorism has presented more difficulties when terrorism is described as a threat to international peace and security. The states will have to change their positions and give up the differences over issues and make this comprehensive convention on international terrorism as well as fight against international terrorism a reality.

Development Indnced Displacemcnt: Judicial Trends in India

Annrag Deep*

Introdnction

Development is a natural desire of human being. One of the natural consequences of various developmental projects is displacement especially in developing countries. Government plans without proper homework, no or impaired futuristic vision, vested interest, lack of hnman rights concern etc are some of the major reasons of current discourse on development *vis a vis* displacement. Construction of big dams, removal of slums , pavement dwellers for housing and infrastructure projects, relocation of factories on judicial orders etc are instances of development induced displacements. All over the world it has disturbed this planet ie earth and affected living and non living things. Living things include human being, and non human being viz animals, plants. Though life of both is precious, human life has always been given priority over non human living creatures. It needs no deductive genus to explore the reasons of this discrimination. It is motivated by irrational selfish attitude of mankind who has himself promulgated that it is superior to all and inferior to none. It is why right to life of a human in contrast of other creatures, living or non living, has been accorded the status of most important right in every legal system, be it national or international. Therefore, anything that makes the life of a person comfortable gets precedence over other things. There are arbitrary arrangements and understanding of hierarchy between living and non living things as well as between human beings and other living beings(animals and plants). Similarly in making policies regarding developmental projects, consciously or unconsciously there seems to be a hierarchy between 'haves' and 'have nots'. In the deliberations of development and displacement while the principles and provisions of law do not make any discrimination, the administrative policies and practices indicate that the victims of displacement met with unfair treatment. Various rights of people displaced due to development have been denied. Their right to life which is a fundamental right under Article 21 of the constitution of

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India has also been violated. Surprisingly the present and future of living things especially human being which commands its supremacy over rests on the existence of non living entities viz air, water, land etc. Though development is a mark of progressive society, apart from displaced people, their culture, custom, air, water and land is in great danger because of blind development of various projects. The issue has been addressed at political, social and legal level. This paper will address issues involved in development and displacement with reference to judicial attitude in India.

Development—meaning and nature

Development is 'the process in which someone or something grows or changes and becomes more advance'.[1] Development is synonym of improvement. It is a normative concept, which necessarily involves a value judgement as per positivist.[2] United Nations has expressed its concern[3] and came with the idea of development as 'improving people's well-being'. In 1965 UN Development Programme(UNDP) came in existence. Human rights-based concept of the 'right to development' was advanced by the UN. In a broader sense the notion of human development incorporates all aspects of individuals' well-being, from their health status to their economic and political freedom. According to the Human Development Report 1996, of UNDP, "human development is the end—economic growth a means" In 2000, world leaders committed their nations to achieving eight Millennium Development Goals (MDGs) by 2015. These goals ranged between halving extreme poverty to halting the spread of HIV/AIDS and providing universal primary education. Is the goal merely to increase national wealth, or is it something more subtle? Improving the well-being of the majority of the population? Ensuring people's freedom? Increasing their economic security?[4] UN has now targeted new development goals in the future with the central objective of eradicating extreme poverty from the face of earth by 2030.

Natnre of development

Western and Indian model of development

According to the Brundtland Commission's report development must satisfy "the needs of current generations without compromising the ability of future generations to meet their own needs." The concept supports strong economic and social development, in particular for people with a low standard of living. At the same

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1 http://dictionary.cambridge.org/dictionary/english/development.

2 Dudley, *The Meaning of Development*, Institute of Development Studies 1969 https://www.ids.ac.uk/files/dmfile/the meaning of development. pdf

3 http://www.palgrave-journals.com/development/journal/v57/n1/full/dev201431a.html

4 http://www.worldbank.org/depweb/beyond/beyondco/beg_01.pdf.

time it underlines the importance of protecting the natural resource base and the environment. Economic and social well-being cannot be improved with measures that destroy the environment. Intergenerational solidarity is also crucial: all development has to take into aecount its impact on the opportunities for future generations. Western thought, however, was initially different from Indian thought. West always believed in struggle for existence, survival of fittest—*jiski lathi uskee bhains* or fish justice. Indian culture not only loved nature but also prayed plants and trees viz. tulsi, peepal. The religious functions include praying snakes, rats. We believed in *vasudhaiv kutumbakam, aatamvrat sarv bhuteshu*. Indians believed in coexistence- *om sah na vavtu*. Among Hindus (and in other religions also) religious value has been accorded to envilonment which makes right to environment a part of religious rights.

Dilemma

There is a close relation between the protection of environment, human rights and development. The developed countries have acquired their present socio-economic status by damaging biodiversity, polluting environment, violating human rights but, the modern developing world has the challenge to achieve the status acquired by developed societies along with the protection accorded to people in general and displaced people in particular *vis a vis* development and environment. Competitiveness in acquiring more and more materialistic benefits and ever increasing industrial and technological advancements have led the people adopting more and more corrupt means. Basic human values are, therefore, fast deteriorating. This further led to neglect and over-exploitation of our environment. Violations of norms of environmental norms have become the natural outcome of socio-economic development in a society. It can, therefore, be said that issues in displacement and development are 'intelleetually difficult, conceptually confusing, and sometimes confused'.

Constitntion

The constitution of India makes express provisions regarding environment. 'Direetive Principles of State Policy' ie Part IV of the constitution of India under Art 48A deals with 'Protection and improvement of environment and safeguarding of forests and wild life. It runs as 'The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.' It is, therefore, duty of State to preserve and protect environment. Initially this provision was not present in our constitution but the need of such provision was felt during 70s. Therefore, Art 48A has been inserted by the Constitution (Forty-second Amendment) Act, 1976. Similarly Art 51A (g)of Part IVA, Fundamental

Duties Says 'It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

Right to land and property was initially placed in fundamental rights under art 19. Development and environmental protection both initially did not find place in fundamental rights. When parliament experieneed that art 19 is acting as a barrier to development art 19(1)(f) was dragged out of part III. On the other hand environmental rights(right to poilution free air, clean water and right against noise pollution etc) was dragged by courts in part III. It was a balancing aet. Holders of land lost their fundamental rights to property but right to environment and right to jungle ete was recognized.

Right to Development

Right to development is third generation of rights.[5] In the case of *Islamic Academy of Education* v. *State of Karnataka*[6] (2003) the Supreme Court of India observed that right to development finds place in WTO and GATT. It takes into consideration globalisation and opening up of economy. The right of development from the human rights point of view must be construed liberally.[7] The Supreme Court of India added: [8]

5 The human rights are ciassified as first, second and third generations of right. It was initially proposed by Czech jurist Karel Vasak in 1979 at the International Institute of Human Rights in Strasbourg. He used the term in 1977. Vasak's theories have primarily taken root in European law. Karel Vasak, "Hunan Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law lo the Universal Declaralion of Human Rights", *UNESCO Courier* 30:11, Paris: Uuited Nations Educationai, Scientific, and Culturai Organization, 1977. A few books and experts give this credit of classifying human rights into three generations lo Prof. Louis B Sohn in 'the New International Law: Protection of Rights of Individuai than States' *Ame. U. L. Review* pl

6 AIR2003SC3724,2003(2)Suppl.SCR474,2003(6)SCC697,2003(6)SCALE325,2003(7)JT1, DATE OF JUDGMENT: 14/08/2003. http://www.judis.nic.in/supremecourt/helddis.aspx.; [2004]1 mefui 67-144, It was a five judge beuch of V. N. KHARE CJI & S. N. VARIAVA & K. G BALAKRISHNAN & ARIJIT PASAYAT & S.B. SINHA. Two separate judgments have been delivered by V. N. KHARE, CJI and S.B.Sinha, J. V.N. Khare, CJI delivered for himself and for Variava, Balakrishnan and Pasayat, JJ.Writ Petition (civil) 350 of 1993(With S.L.P.(Civil) Nos. 11286/2003, 11391/2003, 11189-11195/2003,W.P(Civil) Nos. 355/1993, 174/2003, T.P.(Civil) No. 286-288/2003, S.L.P.(Civil) Nos. 3465-3466/2003, 3942-3943/2003, 4002-4003/2003,9253-9254/2003, 10561/2003, W.P.(Civil) Nos. 261/2003, 275/2003,280/2003, 289/2003)

7 Para 189 and para 204.

8 Para 196.

Human development as a human right has a direct nexus with the increase in capabilities of human beings as also the range of things they can do. Human development is eventually in the interest of society and on a larger canvas, it is in the national interest also. As a human right, human development finds its echo in several areas as for example in excellence in professional education, be it the study of medicine, engineering or law. Progress and development in these fields will not only give a boost to the economy of the country but also result in better living conditions for the people of India.

Human Rights and right to development, therefore, are a matter of intergenerational equity.

Intergenerational equity

In *Glanrock Estates* v. *State of Tamil Nadu*[9] the Supreme Court of India under para 8 opined :

[....] [F]orests in India [are] an important part of the environment. They constitute [a] national asset. The Forest Bench of the Apex court in the case of *T.N. Godavarman* v. *Union of India*[10] held that "intergenerational equity" is part of Article 21 of the Constitution.

a) The court answered the question '*What is inter-generational equity?*' as under:

The present generation is answerable to the next generation by giving to the next generation a good environment. We are answerable to the next generation and if deforestation takes place rampantly then inter-generational equity would stand violated.

The doctrine of sustainable development also forms part of Article 21 of the Constitution.[11] The "precautionary principle" and the "polluter pays principle" flow from the core value in Article 21.

We need to explore the legal relation between development, displacement, environment, and inter-generational equity. Analysis of a decided cases of the Supreme Court of India where this above relation has been acknowledged and

9 Decided on September 2010, Writ Petition (Civil) Nos. 242 of 1988 and 408 of 2003.

10 (1997) 2 SCC 267: Writ Petition No. 202 of 1995.

11 Art 21-No person shall be deprived of his life or personal liberty except according to procedure established by law.

discussed also needs to be made. One important case is *Maharashtra Land Development Corporation* v. *State Of Maharashtra*[12] Civil appellate

jurisdiction, civil appeal nos. 2147-2148 of 2004. a double bench of justice Anil R. Dave and Dr. Mukundakam Sharma decided this case on November 11, 2010.

(2010). The Supreme Court of India itself observed in para 27 and 28 as under:

27...Therefore, this case is one that must seek to attain a fine balance between the process of development on the one hand, and the ecological imperative of preserving the environment on the other. This Court has for long been an outspoken critic of attempts to degrade the environment, and a vocal supporter of sustainable development.

28... Since Independence, India has travelled a long way on the path of progress and industrialization to achieve a better quality of life. A developing country like ours cannot afford to ignore the growing needs of teeming millions, but this development shall have to resonate with the preservation of the environment. Mahatma Gandhi once said that earth provides enough to satisfy every man's need but not every man's greed. It is the greed of the mankind which has brought environment degradation and pollution. Preservation of the eco-system is an immutable duty under the Constitution - a fine balance must be struck between environmental protection and development. Many regions in India are biodiversity 'hotspots', known to host a staggering variety of flora and fauna. However, they are under the constant threat of environmental degradation and rapid depletion of natural resources, due to various factors, including the desire to earn quick money. Consequently, a major challenge in this backdrop is to arrive at a successful model of sustainable development - one that aims to preserve the rich ecosystem, while addressing the economic needs of the people in the region.

Analysis of *Maharastra land development* case

The analysis of above statement may be made under three heads, viz Conflicting Judicial Claims, *Mantra* for Resolving the conflict and acknowledgement of biodiversity which is as under:

12 Civil appellate jurisdiction, civil appeal nos. 2147-2148 of 2004. a double bench of justice Anil R. Dave and Dr. Mukundakam Sharma decided this case on November 11, 2010.

A. **Conflicting Jndicial Ciaims**

1. **The nnavoidable process of development –**

A developing country like ours cannot afford to ignore the growing needs of teeming millions. Therefore, since independence, India has travelled a long way on the path of progress and industrialization to achieve a better quality of life. This progress cannot be mere material growth. Mahatma Gandhi once said that earth provides enough to satisfy every man's need but not every man's greed.

2. The ecologieal imperative of preserving the environment - It is the greed of the mankind which has brought environment degradation and pollution. Preservation of the eco-system is an immutable duty under the Constitution.

B. *Mantra* for Resolving the conflict- Development must resonate with the preservation of the environment. A fine balance, therefore, must be struck between environmental protection and development.

Role of the Supreme Court of Iudia ean be summarized as

i. Outspoken critic of attempts to degrade the environment, and

ii. A vocal supporter of sustainable development.[13]

C. **Acknowledgement of biodiversity** –

Various areas in our country are biodiversity 'hotspots'. They host a staggering variety of flora and fauna[14]. However, these biodiversity 'hotspots' are under danger because of the constant threat of

i. environmental degradation and

ii. rapid depletion of natural resources,

This model must aim two things at a time :

i. preserve the rich ecosystem,

ii. address the economic needs of the people in the region.

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13 Para 28.

14 Flora-the plants of a particular area, type of environment or period of time *alpine flora, rare species of flora and fauna* (= plants and animals)
Fauna-all the animals living in an area or in a particnlar period of history *the local flora and fauna* (= plants and animals), (*technical*) *land and marine faunas*© Oxford University Press, 2010

This rich eco system and to preserve it for next generation is an area of Human Rights. On the other hand economic needs are matter of development. Therefore, an inter-relation between the two is very significant.

Biodiversity argument was not given much weight by the Supreme Court in Sardar Sarovar Project (SSP) case in 2000 where the majority in Sardar Sarovar Project case observed that the project will help bio diversity:[15]

The ecology of water scarcity areas is under stress and transfer of Narmada water to these areas will lead to sustainable agriculture and spread of green cover. There will also be improvement of fodder availability *which will reduce pressure on biodiversity and vegetation*. The SSP by generating clean eco-friendly hydropower will save the air pollution which would otherwise take place by thermal generation power of similar capacity. [Emphasis added]

In the case of *Bombay Dyeing & Mfg. Co. Ltd* V *Bombay Environmental Action Group*[16] the court observed:[17]

It is often felt that in the process of encouraging development the environment gets sidelined. However, with major threats to the environment, such as *climate change*, depletion of natural resources, the entrophication of environment systems and *biodiversity* and global warming, the need to protect the environment has become a priority. At the same time, it is also necessary to promote development. The harmonization of the two needs has led to the concept of sustainable development, so much so that it has become the most significant and focal point of environmental legislation (Emphasis Supplied)

Displacement

Though UN has made efforts to address the issue of development induced displacement on various occasions, one of the most significant document is 'United Nations Basic Principles and Guidelines on Development-based Evictions and Displacement 2007.' It also established the Global Programme on Forced Displacement (GPFD) in 2009 to enhance the global development response to forced displacement through economically and socially sustainable solutions. For

15 Narmada Bachao Andolan v Union of India. Decided by 3:1 on October 18, 2000.

16 2006 AIR 1489, 2006 (2) SCR 920, 2006 (3) SCC 434, 2006 (3) SCALE1, 2006 (3) JT 235: Appeal (civil) 1519 of 2006, Date Of Judgment: 07/03/2006: The double bench consisted of Justice S.B. Sinha & P.P. Naolekar and judgement delivered by Justice S.B. Sinha. The Court discussed the issue under title 'Sustainable Development And Planned Development Vis-@-Vis Article 21 Of The Constitution Of India.'

17 Narmada Bachao Andolan v Union of India. Decided by 3:1 on October 18, 2000.

the purposes of this program, forced displacement refers to the situation of persons who are forced to leave or flee their homes due to conflict, violence and human rights violations.

Persons displaced due to various reasons including development have to face two primary questions, what are their rights and where to go for remedy?

Though among intellectuals there is a popnlar perception that everything that concerns displaced persons is a part of first the finding of majority in *Sardar Sarovar Project (SSP) case*[18] was different that 'the displacement of the tribals and other persons would not per se result in the violation of their fundamental or other rights.' Despite these observations it is important to note that the rights of a displaced person can be claimed under art 32 and 226 either because of fundamental right to life, livelihood is involved or public interest is involved. In second ie public interest case one need not to argue even fundamental rights.

Locus standai: Who can approach?

In last 66 years of the constitution, Article 32 witnessed two radical changes through various judgements especially three constitution bench decision. *SP Gupta case* (1981), *Mohd. Aslam alias Bhure* v. *Union of India*[19] and *Union of India* v *Sriharan @ Murugan.* [20] First, it is not necessary to show the petitioner is aggrieved party. Second, a matter of public interest may be filed under article 32 even if arguments for violations of fundamental rights are not directly made. Who's right or which right are not material question for article 32 and specific private interest has given way to sufficient public interest. Therefore a person displaced or a group of displaced persons or any other person not affected by such displacement or even if fundamental rights is not violated may directly approach the Supreme Court. Even a policy can be challenged if it is arbitrary and unfair. A constitution bench in 2012 *in Re: Special Reference No.1 Of 2012*[21] observed as under that Courts could not and would not compare which policy was fairer than other, but, *if a policy or law was patently unfair to extent that it fell foul of fairness requirement of art. 14 of Constitution, Court would strike it down.*

18 (2003)4 SCC 1.

19 2 December, 2015.

20 Justice D.K. Jain, Jagdish Singh Khehar, S.H. Kapadia, Dipak Misra, Ranjan Gogoi.

21 A three judges bench eonsisting of Aftab Alam, K.S. Radhakrishnan, Ranjan Gogoi decided this case on 18 April, 2013.

Displacement means Violation of bunch of rights

Right to environment as well as rights of persons displaced due to development projects is a bundle of various rights viz. natural right, divine right, basic right, human right, religious right, legal right, constitutional right. In the case of *Orissa Mining Corporation Ltd* v *Ministry Of Environment & Forest* (2013)[22] these collective rights have been recognised. The case deals with Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 with 2007 Rules read with 2012 amendment rules. The conrt discussed the case under various heads like Individual/Community Rights, Customary and Religious Rights (Sacred Rights) of scheduled tribes (STs)/other traditional forest dwellers (TFDs). One of the arguments was:

that Section 3.1(e) recognizes the right to community tenures of habitat and habitation for "primitive tribal groups" and that Dongaria Kondh have the right to grazing and the collection of mineral forest of the hills and that they have the customary right to worship the mountains in exercise of their traditional rights, which would be robed of if mining is permitted in Niyamgiri hills.

The court observed as uuder:

40. We notice, bearing in mind the above objects, the Forest Rights Act has been enacted conferring powers on the Gram Sabha constituted under the Act to protect the community resources, *individual rights, cultural and religious rights.*

56. Gram Sabha has a role to play in safeguarding the *customary and religious rights of the STs and other TFDs* under the Forest Rights Act. Section 6 of the Act confers powers on the Gram Sabha to determine the nature and *extent of "individual" or "community rights"*. [Emphasis added]

From the last quarter of the last century ie in the decade of 80s the Supreme Court of India has declared that the right to environment is a Fundamental Right,[23] the most powerful right in the democratic world. Other decisions acknowledge they contain a bundle of rights, fundamental or legal or religious or customary or community.

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22 Fundamental Rights are those rights which are provided in Part III of the constitulion of India, and for the enforcement of which one can approach to the Supreme Court of India or respective high Courts. Fundamental Rights are more powerful than iegal rights provided in any enactment because for violation of legal rights one cannot directiy go to Supreme Court of India

23 Date of decision -29 July, 2015. Decided by division bench of the Supreme Court of M.Y. Eqbal and C. Nagappan, JJ.

Reasons of displacement

Article 12 of the ILO Convention No. 107 says that "Populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations relating to national security, or in the interest of national economic development or of the health of the said populations". Therefore there may be various causes of displacement. Security, Personal choice (better exposure, better health care, education,) Employment opportunity, Natural disaster, Development etc.

1. Security

Due to security reasons State may compel displacement. One recent case is none other than security threat to Supreme Court where venders earning their livelihood near Indian Law Institute and New Lawyers Chambers, New Delhi were affected. The case is *Sh. Dharam Chand* v *Chairman, NDMC*.[24] Facts are as under:

...since 1965 appellant was squatting in the area of Chandni Chowk as a Hawker selling cloths and thereafter Tehbazari of selling tea was given by the NDMC to him at Bhagwan Das Road and he remained there till 1982, when he was shifted to the present place opposite to the Supreme Court. In 1989, a large number of writ petitions claiming a right to trade on the pavements in different parts of Delhi were filed under Article 32 of the Constitution and the Apex Court appointed a Committee known as Thareja Committee to examine the claims made by the squatters in the light of Scheme prepared by the NDMC and the decision in *Sodan Singh vs. New Delhi Municipal Corporation,* (1989) 4 SCC 155 to identify street pavement in different areas where the street hawking could be regulated without being a hindrance to general public. On the application of the appellant before the Thareja Committee, in May, 1999, he had been allotted one stall bearing size 6' x 4', opposite Supreme Court, towards Bhagwan Das Road and near Office Complex of Supreme Court Lawyers and Purana Quila Road Bungalows in May, 1999 by Director (Enforcement) NDMC, New Delhi."

On 07.09.2011 after the bomb blast outside Delhi High Court, a meeting was called by the then Chief Justice of India. After deliberations with the Delhi Police, vendors were prohibited to squat along the perimeter of the

24 This author is from Bokaro steel city. He is witness of both murder, displacement and return of Sikh in Bokaro steel city.

Supreme Court. A security arrangement was reviewed with the Delhi Police and a decision was taken on the administrative side not to allow any hawkers near the Supreme Court premises.

It was argued that "the appellant over a long period of time has developed goodwill and a very strong customer base and his shifting from the present place of business for security reasons has the effect of taking away his customers and would be a restriction on his right to trade, profession and occupation guaranteed under Article 19(1)(g) of the Constitution."

The court considered the conflict of two interest as under:

20. On the one hand, appellant has a right to earn his livelihood, but on the other hand there is serious issue of safety and security of the premises near the Supreme Court compound. Hence, the Court has to balance between the two. The purpose involving general interest of community as opposed to the interest of individual directly or indirectly has to be balanced. Merely because of the contention of the appellant and the respondents that after the bomb blasts took place in Delhi High Court compound in 2011, no such incident happened till date, it cannot be presumed that such incident will not happen in a near future. The Court cannot assume and presume that there is no threat to the safety and security of the Supreme Court and its vicinity and allow the appellant to continue the said business.

Due to security reasons thousands of poor vendors and residents are displaced every year. The vendors in this case are now continuing their work in the same place but they don't have place to keep their small trade stuff. They cannot move to other place because the customer cannot come to that place. State did not made any special arrangement for those who are dependent on his daily in come. The dependent includes their children, parents and wife.

2. Riots/ terrorism and its impact

In riots people are displaced. In 1984 riots thousands of Sikh were killed in various cities including Delhi, Kanpur and Bokaro. A number of Sikhs were displaced. A good number of these Sikhs, however, returned back.[25] Similarly in 2002 in Gujrat a number of Muslims family were displaced due to riot where various muslims and hindus were killed. However, a number of

25 Narmada Bachao Andolan v Union of India. Decided by 3:1 on October 18, 2000.

Muslim family came back in Gujrat. In North East various Bihari laboures are murdered. In Maharstra various Bihari and UP people are beaten and displaced. Most of them ,however, came back and are back to business. Due to terror threat people displaced from Punjab, and Jammu/Kashmir. Most shameful is Jammu and Kashmir where due to terrorism lakhs of people left Kashmir. There was ethnic cleansing of minority Hindus in 90s with connivance of some men in power in JK govt. Right to religion, security education, life, expression all trampled. They are still scared and displaced and do not want to go back.

3. Naturai disaster

In certain cases displacement may be because of natural disaster like tsunami, flood, earth quake etc. They are beyond human and State control but they do cause displacement.

4. Development

What is development is discussed previously. Development has negative and positive impacts. Negative development impacts means affecting human and social capital, economic growth, poverty rednction, Millennium Development Goals (MDGs), and environmental sustainability. Displacement can have positive effects when the displaced are able to develop skills and coping mechanisms and contribute to economic growth. *Narmada* judgement (Sardar Sarovar Project case) acknowledges that 'at the rehabilltation sites they [tribels] will have more and better amenities than which they enjoyed in their tribal hamlets. The gradual assimilation in the mainstream of the society will lead to betterment and progress.'[26]

Narrow policy- Some time the policy of government is motivated by narrow political considerations of vote, regionalism etc which lead to displacement and gross human rights violations. State governments some time pursue displacement as a part of policy. Two incidents may be discussed.

i. West Bengal

Marichjhapi Incident- Refugees from Pakistan who came to West Bengal were rich and poor. Rich were easily accommodated with the

26 Olga Tellis v Bombay Municipal Corporation, 1986 AIR 180, 1985 SCR Supl. (2) 51. It was a constitution bench decision dated 10 July, 1985. The bench consisted of Chandrachud, Y.V. (CJ), Fazalali, Syed Murtaza, Tulzapurkar, V.D., Reddy, O. Chinnappa , Varadarajan, A. Deeision written by Y V Chandrachud. The judgement completes 30 years in 2015.

help of party in power(congress and communists parties). Poor Dalits (mostly lower caste "Namasudra initially were welcomed but sooner left front found them as a burden on State. Poor refugees occupied a place(they were staying in a unauthorised place). The police and the district administiation started an economic blockade. WB government prevented anyone from providing food or water to the residents/ refugees of the place. Between January 26 and May 16, 1979, the forcible eviction of refugees who had fled from East Pakistan started. Meanwhile Calcutta High Court ruled that "The supply of drinking water, essential food items and medicines as well as the passage of doctors must be allowed to Marichjhapi." The comrades had shown no mercy. It was reported that 4,128 families perished in transit, died of starvation, exhaustion, and many were killed in Kashipur, Kumirmari, and Marichjhapi during CPI (M) rule.

ii. Maharashtra government policy

On July 13, 1981 the then Chief Minister of Maharashtra, Shri A.R. Antulay, announced that all pavement dwellers Bombay will be evicted forcibly and deported to their respeetive places of origin or removed to places outside the city of Bombay. They constituted nearly half the population of the city. The Commissioner of Police and the Bombay Municipal Corporation(BMC), were asked to demolish the pavement dwellings and deport the pavement dwellers. BMC used Section 312, 313 and 314 of the Bombay Municipal Corporation Act 1988 which deals with prohibition on housing and depositions of various items on the pavements by the dwellers.

The plight of these poor fellows were explaiued as ander:[27]

Those who have made pavements their homes exist in the midst of filth and squalor, which has to be seen to be believed. Rabid dogs in search of stinking meat and cats in search of hungry rats keep them company. They cook and sleep where they ease, for no conveniences are available to them. Their daughters, come of age, bathe under the nosy gaze of passers by, unmindful of the feminine sense of bashfulness. The cooking and washing over, women pick lice from each other's hair. The boys beg. Menfolk, without occupation, snatch chains with the connivance of the defenders of law and order; when caught, if at all, they say : "Who doesn't commit crimes in this city ?

27 *Supra.*

The policy and provision of Maharashtra government was challenged in the high court and then in the Supreme Court known as *Olga Tellis* v *Bombay Municipal Corporation*.[28] The constitution bench judgement makes following mandatory directions:

i. no person has the right to encroach, by erecting a structure or otherwise, on footpaths, pavements or any other place reserved or ear-marked for a public purpose like, for example, a garden or a playground;

ii. that the provision contained in section 314 of the Bombay Municipal Corporation Aet is not unreasonable in the circumstances of the case;

iii. pavement dwellers who were censused or who happened to be censused in 1976 should be given, though not as a condition precedent to their removal, alternate pitches at Malavani or at such other convenient place as the Government considers reasonable but not farther away in terms of distance;

iv. slum dwellers who were given identity cards and whose dwellings were numbered in the 1976 census must be given alternate sites for their resettlement;

v. slums which have been in existence for a long time, say for twenty years or more, and which have been improved and developed will not be removed unless the land on which they stand or the appurtenant land, is required for a public purposes, in which ease, alternate sites or accommodation will be provided to them,

vi. the 'Low Income Scheme Shelter Programme' which is proposed to be undertaken with the aid of the World Bank will be pursued earnestly; and,

vii. the Slum Upgradation Programme (SUP)' under which basie amenities are to be given to slum dwellers will be implemented without delay.

viii. the slums, wherever situated, will not be removed until one month after the end of the current monsoon season, that is, until October 31,1985 and, thereafter, only in accordance with this judgment.

ix. if any slum is required to be removed before that date, parties may apply to this Court.

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28 A division bench of Justice Anil R. Dave, Adarsh Kumar Goel decided the case on 17 September, 2015.

The judgement endorses the policy of forced displacement under certain circumstances. The cireumstances or conditions are iu favour of slum dwellers and venders who were displaced. Another point whieh goes in favour of those displaced is the faet that though unauthorised, 'they are in no way "criminal trespassers" under section 441 of the Indian penal code since their object or reasons for doing so was/is not to commit any offence or intimidate, insult or annoy any person. Rather they are/ were compelled by inevitable circumstances and are not guided by choice.'

Chakma Refugee case

Chakma Refugee case is hybrid of displacement due to development and security both. In the case of *Committee For C.R.of C.A.P.* v *State of Arunachal Pradesh*[29]the court observed the reasons of displacement as under: [30]

18. ... It is well known that the Chakmas and Hajongs were displaced from the area which became part of East Pakistan (now in Bangladesh) *on construction of Kaptai Dam and were allowed to be rehabilitated under the decision of the Government of India.* As earlier held by this Court, the Delhi High Court and Gauhati High Court, they need to be protected and their claims of citizenship need to be considered as per applicable procedure. They could not be discriminated against in any manner pendiug fonnal conferment of rights of citizenship. Their status also stands duly acknowledged in the guidelines of the Election Commission of India.

Prior to the Supreme Court verdict the Gauhati High Court in the case of *All Arunachal Pradesh Students Union (AAPSU)* v. *The Election Commission of India*[31] noted that in contradiction to those unwanted illegal migrants who sneak into the country, the Chakmas migrated to India on account of their displacement and the Government of India agreed to grant them citizenship.

Conelnsion

It is fashionable to make State responsible for all displacement because State is an easy and soft target. State, of course, is responsible for maximum of the displacement either the policy is faulty or failure to take positive measures in protection of displaced persons. Rural urban divide, concentration of industries and institutions in a metropolitan locality led to growth of slums etc in Mumbai, Delhi etc. they are illustrations of faulty policies. The displacement of Kashmiri

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29 *Id* at para 18.

30 Decision dated 19th March, 2013 in PIL No.52 of 2010.

31 2014 (5) GauLJ 194

people in Delhi etc is failure of State to protect the right to life, liberty, property and security from terrorism. The problem also owes its origin to material desire to earn quick money. People employed corrupt and exploitative means to became millionaires. This attitude encouraged government servants to casually take rehabilitation measure. After 90s when the new economic policy became order of the day in India, the threat of displacement is multiplied. Consequently, a major challenge in this backdrop is to arrive at a successful model of sustainable development. While cases like *Olga Telis*(1985) *Narmada Bachao*(2000), *Dharmapal* (2015) the judicial delineation supports State policy of development, security and accepts displacement as inevitable consequences with marginal protection of human rights, *Chakma* case (2015) comes in support of protection of individual rights violated due to displacement. *Olga Telis*(1985) finishes 30 years but the spirit of this judgement is not observed. Everyday in some part of country a group of poor persons in slum or venders are displaced in the name of security, development or provision of municipal law. The administration either is not aware of the directions and spirit of *Olga Telis* and other cases or deliberately avoid it. The poor people cannot be expected to know and fight for their right. Though these issues affect lower classes of society where marginalised persons are most affected. These issues of development and displacement have been pushed to margins or circumference consciously or unconsciously.

Providing job and home to all especially weaker section of society is a duty of State under part IV, Directive Principles of the State Policy (DPSP) in the constitution of India which is in margins or circumference of constitutional contours because of its unenforceability content. DPSP has to be fundamental in government which was largely ignored in last 67 years baring a few distinguished exceptions. It was, therefore, duty of intellectuals and media to keep the issues like displacement due to various reasons including development and DPSP in forefront. Though fundamental rights are more important because it is in part III of the constitution of India, it does not need additional protection from media and intellegentia. The reason is art 32 or 226 that any violation of fundamental rights can be petitioned in and protected by the Supreme Court and the high courts. As DPSP do not have similar protection, it is responsibility of other stake holders of society to discuss it in various forums. This is primary purpose of universities and academic institutions to discuss about poverty, hunger, unemployment, malnutrition, health, education especially quality of higher education, gender justice, displacement etc and make governments accountable for the same. Hard reality is that like in the constitution of India where these issues are in margins and circumferences the media and intellectuals have also thrown the issues in circumferences. Politicians in power or opposition and IAS are consciously/deliberately avoiding any discussion

beeause of obvious reasons. Unconsciously media is not finding these issues as attractive enough for TRP. But why by intellectuals? Why academic leaders and professors are not finding these issues attractive enough for open discussion on campus. Is the selection of topic for discussion unconscious or by design? Why the deliberation is not on *bhukhmari se aajadee, displacement se aajadee*. Are the choice of slogan a part of a subjective plan or an objective assessment of situation has led to those slogans? It was high time to ask all central governments and state governments why after 70 years of independence in the name of development, security, riot, terrorism etc lakhs of people mostly poor and daily wagers are subject to unreasonable displacement without following due process. As we know the politicians executives in power and civil executives will escape accountability, who other than media and intellectuals ean deliberate and decided the accountability of these political parties and civil servants in power. Sometime they have tried to do so but the attention was for a small period or opportunity was casual. JNU incident was a serious opportunity to ask parties in power and oppositions and the policy makers to make them responsible for *bhukhmari se aajaadee, displacement se aajaadee*, etc but it seems the opportunity after 9 February 2016 incident of JNU is lost as JNUSU and a few professors are acting not agent of change but agent of some political parties with certain hidden agenda. Or they do not have moral authority to raise this question as they have sympathy for an ideology which has failed to deliver.

A separate forest or environment bench has been working on the initiative of Supreme Court for last various years. National Green Tribuual is working and exereising its power. Protection of displaced person is not only the responsibility of government or Supreme Court of India. The need for spreading the environment friendly culture in the present Indian situation is an imperative. It is the duty as well as responsibility of the enlightened class to not only spreading the awareness regarding the displaeement due to various factors but also to see that a reasonable balance between displacement and development is maintained. They are presumed to bring the cases of violations of human rights norms into the limelight through the seminars, discussions and media and should also be prepared to actively fight such cases in a spirited manner. Education and maintaining the *lakshman rekha* between need and greed seems to be the only way out to establish a just and proper society wherein protection could be accorded to persons who are displaced. The healthy development of our nation and next generation depends on how much the present generation can check its desire to use more and more AC, Freeze, cars etc and shift to eycles and protection of environment.

CBI at work - Problems and prescription for change

Dr. Upma Gantam[1*]

ABSTRACT

Despite the fact that the various anti-corruption laws were enacted by the legislature and the institutions were established with defined powers and duties. Still, the experience shows that the corruption has increased in different ways on a daily basis to the extent that now India, is considered one amongst the most corrupt nations. The object of the present research was to gather a first-hand empirical data on various aspects of corruption, anti-corruption laws, and anti-corruption agencies so that the same can be fruitfully used for reference by all the concerned authorities and personnel i.e. CBI officials, special judges, legislators, advocates, etc. The present research seeks to formulate the measures and steps to make the Prevention of Corruption Act, 1988 and other allied laws implementable in the right spirit of their legislation thereby improving the working of Anti-Corruption agencies for the betterment of society by eradicating corruption.

Key Words: *CBI, corruption, investigation, trial.*

1.0. Introduction:

Corruption has been a feature of human behavior sinee the beginning of time. It has been part of the strueture of human relationships and very much bound to the way people live their lives with each other and distribute status and power. Two thousand years ago, Kautilya the prime minister of an Indian King, had already written a book, 'Arthashastra' says: "[The King] shall proteet trade routes from harassment by courtiers, state officials, thieves and frontier guards...(and) frontier officers shall make good what is lost...just as it is impossible not to taste honey or poison that one may find at the tip of one's tongue, so it is impossible for one dealing with government funds not to taste at least a little bit of the king's wealth". Therefore, it is incorrect to state that corruption has become more widespread today, as it has existed in some form from the earliest days of the social organization. Corruption has been an omnipresent and universal phenomenon

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which co-existed with human society, and studies show[2] that it is an ancient practice that has been traced back to pre-biblical times and made itself known in ancient civilizations of China, Greece, India, and Rome[3]. A review of penal codes utilized in various ancient civilization clearly demonstrates[4] that bribery was a serious problem among the Jews, the Chinese, the Japanese, the Greeks, the Romans as well as in the New World[5]. What has changed with time is that information about corrupt practices has become widely available. Governments have become increasingly unable to conceal evidence of wrongdoing; the level of public tolerance for corruption has declined, and the spread of democracy seems to afford less fertile ground in which corruption can flourish.

"Corruption" in recent times is termed as a disease[6], a cover by various thinkers that eats into the cultural, political and economic fabric of society[7] and destroys the functioning of vital organs[8]. During the past some years, international scandals have reduced tolerance for corruption and have increased receptiveness to legal solutions and this trend extends around the world. In the words of Transparency International – Corruption is one of the greatest challenges of the Contemporary world. It undermines the good government, fundamentally distorts public policy, leads to the misallocation of resources, harms the private sector and private sector development and particularly hurts the poor[9].

Corruption in India is an issue that has serious ramifications for both protecting the rule of Law and ensuring access to justice. The pervasive presence of corruption in the system of governance in India undermines the effectiveness of all institutions of governance. From independence to now, successive governments have undertaken various legislative and institutional measures to reduce the levels of corruption in the country; however, due to an absence of political will and sincerity in taking concrete steps to eliminate corruption, most of these measures have not achieved the results that were intended.

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2 See, D. Narsimha Reddy, "*Crime, Corruption and Development*", Deep and Deep Publications, New Delhi, 2008.

3 B. Mohanan, " *Controlling Corruption at the Grassroots*",N. Narayanasamy, *et.al.,(eds),* "*Corruption at the Grassroots: The Shades and Shadows*", Concept Publishing Company, New Delhi, 2000, pp.133-134.

4 Amartya Sen, "*Development as Freedom*", Oxford University Press, New Delhi, 1999, p.275.

5 Upendra Thaknr, *op.cit.*, at p.21.

6 State of M.P. v. Ram Singh, AIR 2000 SC 870 at p. 873.

7 State of Haryana v. Bhajan Lal, AIR 1992 SC 604 at p. 608.

8 Bhure Lal , "*Corruption: Functional Anarchy in Governance*", Siddharth Pnblications, New Delhi, 2002, p.37.

9 Transparency International, http://www.transparency.de/mission.html. (last visited on 9/1/13)

The past two decades had witnessed an unprecedented attempt by the governments of various countries and international agencies to combat corruption. Widespread action has come to the realization of the extent and gravity of the problem due to liberalization, privatization, and globalization. Various legal instruments addressing corruption have discoursed under the auspices of the different inter-governmental organization[10].

The legislative and institutional framework for ensuring corruption-free governance in India has primarily been based on two approaches, first, the promulgation of anti-corruption laws, and second, vesting police and other similar law enforcement institutions with the task of investigation and prosecution of crimes relating to corruption[11]. The legal framework for combating corruption in India has been established[12] by developing a criminal law approach whereby corruption is recognized as a crime[13] to which the criminal justice system must respond with punishment.

The absence of institutions and legislations designed to combat corruption is not the problem in India. Given the broad range of anti-corruption related steps taken in the past six decades, but significant steps remain to be undertaken to the policy and the practice. The challenge of enforcing the rule of law continues to be the single greatest impediment impacting the effectiveness of anti-corruption laws in India. Thus the larger issue of establishing a rule-of –law adhering social behavior

10 The United Nations Convention against Corruption (2003), The United Nations Convention against Transnational Organised Crimes (2000), International code of conduct of pnblic officials (1996), African Union Convention on Preventing and Combating Corruption (2003), Inter-American Convention against corruption (OAS Convention) (1997), The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD)(1997), Criminal Law Convention of Europe (The COE Criminal Law Convention) (1998)

11 The Lokpal and Lokaynktas Act, 2013, received assent of the President on the 1st January, 2014, which provides for the establishment of a body of Lokpal for the Union and Lokayukta for States to inquire into allegations of corruption against public functionaries and for matters connected therewith.

12 The Prevention of Corruption Act, 1988, as stated in its statement of objects and reasons, 'is intended to make the existing anti-corruption laws more effective by widening their coverage and by strengthening the provisions'. See, P.V. Ramakrishna, "*A Treatise on Anti-corruption Law in India*", Eastern Book Company, Lucknow, 2001, p.1563; This Act recognizes that there were provisions already existing in Chapter IX of the Indian Penal Code to deal with pnblic servants and those who abet them by way of criminal misconduct. In addition, the 1944 Criminal Law Amendment Ordinance also inserted provisions enabling the confiscation of wealth obtained through corrupt means, including from transferees of such wealth.

13 Sections 7, 8, and 9 of the Prevention of Corruption Act, 1988, discnss the nature of the offences covered under the Act.

in India needs to be addressed immediately. The reeognition of corruption as a major problem of governanee needs to be followed by the reformulation of legal and institutional mechanisms to combat it. Such a reformulation would require continnous efforts towards revamping the enforcement maehinery and empowering the officers.

It is in this context the present study was taken up to evaluate the working of Prevention of Corruption Act, 1988 with an empirical study of CBI involved in the investigation and trial of corruption cases. This study identifies some specific weaknesses in the existing legal and institutional framework during the investigations and trial of corruption cases In India. The weaknesses so identified, can be considered to improve, strengthen and reorient the legal and institutional framework meant for corruption eases.

The present work intends to examine the working of the CBI, a premier investigating agency, viz. ground realities in which this organization works. The purpose of this study is to provide a ncw framework for legislative and institutional reforms to make CBI a much better tool for fighting corruption. While proposing this framework, the researeher is mindful of the inherent weaknesses of legislative changes in Indian society, as well as of the crisis of law enforcement, a ehallenge faced by all sectors of administration in the country.

2.0. Research Methodology:

Spatial area of the present study was confined to NCT Delhi. This metropolitan city which is a National Capital was chosen as the locale of the survey.

For the interview purpose, the officials of Anti-Corruption Division were selected as they are the officials posted in this development for handling the investigation of corruption cases. Amongst police officials of CBI a sample of 30 was selected comprising of Superintendent of Police, Additional Superintendent of Police, Deputy Superintendent of Police, Inspector thereby representing each cadre of Investigators to make it more informative as to reflection of various difficulties they face during the investigation of corruption cases at different levels. Thus the sample design followed in the event of investigators is stratified sampling[14]. But because the investigators selected from each stratum is based on simple random sampling the entire procedure *i.e.* first stratification and then simple random sampling is known as stratified random sampling.

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14 If the popnlation from which a sample is to be drawn dnes not constitute a homogenous group, then stratified sampling technique is applied so as to obtain a representative sample from each strata; see C.R. Kothari, "Research Methodology: Methods and Techniques", New Age International, New Delhi, 2006, p.16.

Further amongst the special prosecutors appointed for the prosecution of corruption cases, it was ensured that prosecutors from each group of cadre be interviewed so as to have views of prosecutors at various levels and therefore yet again Stratified Random Sampling was done. A sample of 25 prosecutors comprising of public prosecutors, Deputy legal advisor, and additional legal advisor was made.

The criterion of choosing the investigators and prosecutors was based on two-factor – first, the availability of the officials, and second was the reasonable representation of officials from each cadre of investigators and prosecutors.

Special Judges[15] appointed in Special Courts occupies a pivotal position in the anti-corruption framework. Corruption being a complex phenomenon makes the prosecution of corruption cases technical which involves specialized knowledge of particular fields like complex financial transactions. Since it is seen white collar crimes including corruption is done by people who belong to the npper class and unlike conventional crimes, they involve complex operations. The latest exampie of which is high profile 2G Scam, CWG Scam, Coal Mining Case and many other where it requires highly specialized knowledge to understand the transactions involved in scams. It was neeessary that special judges should form a part of a sample to have a better understanding of constraints faced by these judges aeting as a presiding officer of special courts. There are 25 special courts functionai in Delhi to deal with Corruption Cases which includes nine Courts in Tis Hazari Courts, six Courts in Patiala House, one Court in Karkaidooma, three Courts in Rohini, three Courts in Dwarka and three Courts in Saket. Amongst 25 Special Judges, 15 judges were interviewed having the representation of each zone. Again the criterion of choosing the Judges was based on their availability and consent. In addition to above, two ex-CBI directors who happen to be senior IPS officers[16] were interviewed. Though they are not involved in the investigation of corruption, their view was considered necessary for understanding the working, limitations, and strengths of CBI. It was not possible due to Service Rules to get the interview of Serving CBI Director, so the interview of two ex-CBI Director was taken. It proved to be of significant advantage as they gave very crucial information about vaiious aspects of CBI.

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15 Selection 3 of Prevention of Corruption Aet, 1988 provides for the appointment of special jndges who are of a status of a session Judge or additional Session Judge or assistant Session Judge.

16 The CBI Director is an IPS Officer of the rank of Director General of Police or Commissioner of Police (State). He is selected based on the procedure laid down by the CVC Act, 2003 v/s 26 of the Act, and has a tenure of a minimum of 2 Years.

3.0 "CBI at work"-Roadblocks and Bottlenecks in investigation and trial of corrnption cases:

The study revealed different constraints an investigator faees during the investigation of corruption cases, not only from the perspective of investigators but also from that of the public prosecutor and special judges assigned to corruption case, defense counsel, and ex-CBI Directors. The anti-corruption framework may it be legal or institutional, needs reforms.

3.1. Special Judges:

The working of CBI, which is a premier investigating agency was analyzed *viz.* the experience of special judges presiding over the special court conducting the trial, which is prosecuted by the special prosecutors of CBI based on evidence collected by the investigators of CBI during an investigation. The questions were open-ended, and the judges shared their experience which is summarized under following heads:

3.1.1. Digital Video Recording by CBI dnring Trap cases:

In spite of all the judgments and guidelines[17] related to digital video recording, the experience of special judges was diagonally opposite to these stated guidelines. They were of the opinion that the manner in which this recording was done and produced in the court helped the accused rather than helping the prosecution on the ground of tempering flows:

a. The investigator doesn't preserve the device. They transfer the data to the eomputer and then burn on CD and because of which the defense counsei takes the plea of editing.

b. Audio recording done is useless as it is not audible. It takes the entire day to understand the conversation by again and again getting it replayed.

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17 The Apex Conrt in Yusufalli Esmail Nagree v/s State of Maharashtra, AIR 1968 SC 147, laid down: 1) The contemporaneous dialogue, which was tape recorded, formed part of res-gestae and is relevant and admissible under Section 8 of the Indian Evidence Act; 2) Such a statement was not in fact a statement made to police during investigatiou aud, therefore, cannot be held to be inadmissible under Seetiou 162 of the Cr.P.C.; 3) Such a reeorded conversation though procured without the knowledge of the aecnsed but the same is not elicited by duress, coercion or compulsion nor extracted in an oppressive manner or by force or against the wishes of the accused. Therefore, the protection of the article 20(3) was not available; 4) One of the features of magnetic tape recording is the ability to erase and re-use the recording medium. Therefore, the evidence must be received with caution. The court must be satisfied beyond reasonable doubt that the record has not been tampered with.

c. Transcript poorly prepared[18]. It doesn't match word by word to the recorded version.

d. A procedural lapse in electronic evidence and forensic evidence.

e. As mentioned before, since the digital video recorder is never preserved, and therefore are never produced in the court of law as it never forms the part of case property in addition to this, the recovery is not cemented by the proper evidence.

f. According to the special judges, the investigators of CBI are not adequately trained and are not well versed with the technicalities of the electronic evidence and its admissibility in the court of law.

3.1.2. Lack of Investigating Skills:

According to the judges due to the reason that most of the officers in CBI are on deputation from various other government departments and due to this reason they completely lack investigating skills required. They added further that they are not having clarity of even basics of law, especially Law of Evidence. They don't know how to record the evidence under Section 161 of Cr. P.C. They don't connect the evidence and leaves important witnesses. One of the judges commented that the CBI officers should take training from Delhi Police who are far better than CBI as far as the investigation is concerned. Further, they added that financial frauds one needs to have specialized knowledge which the investigators of CBI are lacking.

3.1.3. Frequent transfers of Investigating officers and more than one Investigator involved:

One of the important aspects of working of CBI during an investigation was the frequent transfers of the IO's even during the pending case. The frequent transfers lead to lots of confusion during the investigation thereby affecting the trial because

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18 The importance of having a transcript of the tape recorded conversation cannot be underestimated because the same ensures that the recording was not tampered subsequently. In the case of Ziyauddin Burhanuddin Bukhari v/s Brijmohan Ramdas Mehta, AIR 1975 SC 1788, the Apex Court considered the value and use of such transcripts and expressed the view that transcript could be used to show what the transcriber has found recorded there at the time of transcription and the evidence of the makers of the transcripts is certainly corroborative because it goes to confirm what the tape record contained. The Apex Court also make it clear that such transcripts can be used by a witness to refresh his memory under Section 159 of the Evidence Act and their contents can be brought on record by direct oral evidence in the manner prescribed by Section 160 of Evidence Act.

even the prosecutor does not know what is the relevance of a particular document/ evidence collected by an individual Investigator.

3.1.4. Laek of Co-ordination hetwcen Investigators and prosecutors:

According to an observation made by Special Judges, there is a complete lack of co-ordination between the investigators and prosecutors. They don't formulate a strategy regarding production or non-production of a particular evidence in the court of law. There is a lack of coordination between the I.O. and the prosecutor regarding witnesses. Further, because of transfer of I.O.'s the I.O. that investigated the case seldom assists the prosecutor thereby leading to chaos and giving the benefit to the accused.

3.I.5. Improper Managcment of documents:

The documents filed by CBI are voluminous and in addition to this they are not adequately paginated and managed. Judges experienced many a time that they start looking for documents opening the trunks, at the time when a witness is to be examined, thereby delaying the examination of the witness and thus delaying the trial. One of the judges shared the practice of issuing no summons for the witnesses till the time the CBI officers search for the documents thereby reducing the chances of a witness of unnecessarily being harassed.

3.I.6. Hnge nnmber of witnesses:

The numbers of witnesses are enormous in a corruption case, and most of them are unnecessary. According to the observation of judges, the number of witnesses cited by CBI in a corruption case is huge, and they cite unnecessary witnesses. The standard view of judges regarding the working of CBI officers was that these officers play safe thereby meaning that even if a fact is proved by two witnesses for the same fact making it repetitive and thus unnecessary prolonging the trial. The reason they gave was the lack of independence. The file work is imperative, and if they do not examine all the witnesses regarding the same fact, they fear the eounter questioning by their superiors.

3.I.7. Panch Witness:

One of the judges pointed out that panch witnesses don't understand the facts of the case. This mainly happens in illegitimate traps.

3.I.8. Diligence of CBI prosecntors:

The opinion of judges didn't seem to be very positive about the working style of prosecutors of CBI. According to them, the prosecutors of CBI conduct the trial in a very mechanical way. They are very mueh concerned about the paperwork

because of the reason that they don't enjoy any professional independence and can't take any decision on their own and are always busy in saving their skin, as discussed before regarding examination of huge no. of witnesses for proving an already established fact. They don't enjoy even the basic freedom to drop any witness if the examination is unnecessary.

They added that it is not that the prosecutors are not well versed with the procedures, but they lack independence. Further reasons which they thought contributes to the inefficiency working of prosecutors are:

a) The employment of retired prosecutors as standing counsels. Though they are experienced because they are paid on the hearing basis, they work more towards raising the bells rather than working hard on the case.

b) Not assisted properly by the investigating officers.

3.2. Investigators:

3.2.1. Constraints faced during traps:

The discussion mentioned above is the compilation of the procedure told by the investigators during an interview regarding trap. On being asked that what are the constraints faced by them doring the traps, not many came up with their experiences. Instead, they said that there were no constraints faced by them during the trap, but few of them recollected their experiences and told some of the constraints which are as follows-

a. Arranging of bribe money:

Laying down traps involve money with the complainant to be given to the accused when the trap is laid. It was told by few investigators that arranging for the trap money becomes a problem in cases where the complainant is not having money. According to them, the State should make such provisions for arranging the money. The Supreme Court disapproved the practice of providing money to the complainant by the police authorities. The Supreme Court[19] held that the detection of corruption might sometimes call for laying of traps. But the Court found no justification for the police authorities to undertake the taking of a bribe by providing the bribe money to the giver

19 Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, AIR 1954 SC 322 at pp. 334-335; Also See, Ramjanam Singh v. State of Bihar, AIR 1956 SC 643 at p. 651; Ram Kishan v. State of Delhi, AIR 1956 SC 476 at p. 479, in which Supreme Court held that while laying of traps cannot be prohibited, where matters go further and the police authorities themselves supply the money to be giveu as a bribe , severe condemnation of the method is merited.

where he has neither got it nor can find it for himself. The Court stated that while it is the duty of the police authorities to prevent crimes being committed, it is no part of their business to provide the instruments of the offense.

The judgment above[20], to the effect, was approved by the Constitution Bench of Supreme Court[21]. However, the question of the bribe money being provided by the police officer was not answered by the Supreme Court in a decisive manner[22].

According to investigators as well there may be persons who may not have bribe money for laying a trap, and in these circumstances, it would be preposterous to come to the conclusion that in the absence of such money, the trap could not be laid and a serious offense could not be detected.

b. Motivation of complainant:

Lack of motivation is another constraint pointed out by the officers. They explained this constraint by saying that generally, it happens that initially, the complainant makes the complaint but later on due to various other factor loses the motivation to proceed ahead or cooperate with the investigating agency. Officers quoted some of the instances where they have to face embarrassment due to backing out of the complainant.

c. Resistance by the colleagues of the public servant during trap:

Few instances were quoted to illustrate the situation which arises when during the trap or after the trap the members of the organization and the colleagues of the tainted public servant cause resistance thereby creating a tense situation for the CBI officials.

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20 *Ibid.*

21 State of Bihar v. Basawan Singh, AIR 1958 SC 500 at p. 505.

22 It was held that –"we must make it clear that we do not wish it to be understood that we are deciding in this case that if the money offered as a bribe is provided by somebody other than the bribe giver, it makes a distinction in principle. That question does not arise for decision here. All that we say and have said so ar is that in assenting the value of the testimony of a witness, diverse factors must arise for consideration and the comparative importance of this or that factor must depend on the facts or circumstances of each case.; Also See, *Jayantilal* Kuberdas Sharma v. State of Gujrat, 2007(I) Guj LR 99(Guj), where it was held that there could not be any hesitation to accept that the amount which was produced by the police inspector was from the account of his office, and that particularly in absence of cross-examination on this aspect, in any case, this would not cast any suspicion on the role of the Investigating Officer.

d. **Collusion between the shadow witness or the complainant with the public servant:**

Further, another peculiar constraint pointed out by some of the officers was collusion which frustrates the entire exercise of a trap as the money is not recovered due to signal not given in proper by the complainant to shadow witness.

3.2.2. Constraints faced during investigation of cases of disproportionate assets:

Apart from the constraints discussed above which the investigating officers face during the traps, some more constraints were elaborated by them regarding cases of disproportionate assets which were-

a. **Identification of property:**

The investigators pointed at this constraint of locating and identifying the property which causes delay during an investigation which clearly indicated towards the menace of Benami transactions[23]. Benami transactions are used as a way to conceal black money obtained through corrupt practices.

b. **Availability of documents:**

Non- availability of papers is another constraint pointed out by the investigators. According to them in a case where several proceedings are going on including departmental proceedings becomes an issue. In addition to this the documents which are to be used by the departments in their daily working and therefore cannot be seized, the availability of such documents becomes difficult as the coordination between the CVO, Department/Bank/ PSU is not proper.

c. **Proceeds of crime:**

Over the period according to investigators the offense of corruption has changed its form and format. Now the transactions are not that simple and straight. In addition to this with the development of technology the money involved in the transaction crosses not only the state borders but also that of the country, and it is time consuming exercise to locate the proceeds of crime.

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23 Benami Transactions are those transactions which are made under the name of another person who does not pay the consideration but merely lends his or her name as the owner of the property, while the real title vests in another person who actually paid the consideration and purchased the property.

d. Assistance of the local police and state anti-corruption Bnrean:

Another constraint which was pointed out by the CBI investigators was that in cases of searches to be conducted in other states, they don't get the proper assistance of the local police because of the State Anti-Corruption Bureau, which, is in appalling shape, effects the investigation of the cases to be conducted in states.

e. No Formai coordination with State Anti-Corruption Bureau:

Formal Coordination between CBI and State ACBs has always been argued and insisted upon in various Biennial Conferences between CBI and State Anti-Corruption Bureau. The same was the opinion of the investigators that lack of precise eoordination between these ageneies at Union and state level acts as a constraint during the investigation of inter-state corruption cases.

f. Procedure of attachment of property is cnmbersome:

It was pointed out by investigators as a constraint during an investigation of DA cases that the procedure as laid down under Section 3 of Criminal Law Amendment Ordinance, 1944[24]

Section 3(I)&(3) of Criminal Law Amendment Ordinance, 1944-1) Where the [state Governinent or as the case may be, the Cen tral Government] has reason to believe that any person has com-mitted (whether after the commencement of this Ordinance or not) any scheduled offence the [State Government may, whether or not any Court has taken cognizance of the offence, authorise the making of an application to the District Judge within the iocal limits of whose jurisdiction the said person ordinarily resides or

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24 Section 3(1)&(3) of Criminal Law Amendment Ordinance, 1944-

i) Where the [state Government or as the case may be, the Central Governntent] has reason to believe that any person has com-mitted (whether after the commencement of this Ordinance or not) any scheduled offence the [State Government may, whether or not any Court has taken cognizance of the offence, anthorise the making of an applieation to the District Jndge within the local limits of whose jurisdiction the said person ordinarily resides or carries on business, for attachment, under this Ordinance, of the money or other property which the [State Government, or as the case may be, the Central Government] believes the said person to have procured by means of the offence, or if such money or property cannot for any reason be attached, of other property of the said person of vaine as neariy as may be equivaient to that of the aforesaid money or property.(Amended hy A.O. 1950 & again by PCA, 1988).

(3) An application under sub-section (1) shall be accompanied by one or more affidavits,

carries on business, for attachment, under this Ordinance, of the money or other property which the [State Government, or as the case may be, the Central Government] believes the said person to have procured by means of the offence, or if such money or property cannot for any reason be attached, of other property of the said person of value as nearly as may be equivalent to that of the aforesaid money or property.(Amended by A.O. 1950 & again by PCA, 1988). (3) An application under sab-section (1) shall be accompanied by one or more affidavits, stating the grounds on which the belief that the said person has committed any scheduled offence is founded, and the amount of money or value of other property believed to have been procured by means of the offence, which deals with the attachment of property accrued through corrupt and illegal means is very lengthy and cumbersome.

g. Lack of infrastructure including workforce:

Many investigators interviewed were of the opinion that though CBI is a premium investigating agency still lacks the infrastructure including the workforce. It was pointed out by some of the investigators that they don't have even the basic facility of junior staff to serve a summons and sometimes that has to be done by them. This data further confirms the information given by the special judges.

h. Execution of Letters Rogatory:

A letter rogatory or letter of request is a formal request from a court to a foreign court for some judicial assistance. It was pointed out by few investigators that letters rogatory can't be transmitted directly between the applicable courts. They had to be transmitted via diplomatic channels, which make the whole process very slow[25].

i. Single Directive:

According to all investigators i.e. 29 (100%), while dealing with cases of joint secretary and above, the primary impediment is seeking prior sanction under Section 6A of DSPE Act even to register a case against them. According to 29 (100%) of the investigators, this provision should be deleted

25 In the Second Conference of Police Liaison officers of Foreign Countries in India, organized by CBI in the month of July 2011, faced with recent failures in extradition cases , the CBI said that while India responds to such requests in timely manner, 194 Indian judicial requests are pending in various countries. This is against only 59 requests of different countries pending with Indian Authorities.

in conformity with the Supreme Court's judgment in *Vineet Narain*[26] 1996 SCC (2) 199.

3.3. Public prosecutors:

Reasons attributed by the prosecutors for the acquittal were most of the same which again have already discussed under the head of Special Judges and Investigators. But still, the important reasons pointed out were:

a. Freqnent Transfer of IOs.

b. Witnesses were turning hostile.

c. The corrupt complainant, and collusion with accused

d. Noncooperation of witnesses.

e. Not being properly assisted by IO.

f. Lack of technical knowledge on the part of judges.

g. Unavailability of Witnesses.

h. Lack of autonomy to work.

i. Archaic method of investigations.

j. Unskilled Investigators because of being in CBI on Deputation.

k. Delayed trial, reason of whieh is reeruiting Retired CBI prosecutors as standing counsels who are more interested in delayed trial than early disposal of a trial.

3.4. Former CBI Directors:

Both the CBI Directors were asked that what were the constraints which they faced or felt during their tenure, the answer of which can be summed up as:

3.4.i. Tbe antonomy of CBI:

Both the former CBI Directors supported the constitutional status being given to CBI, and to ensure that CBI becomes an autonomous body.

26 1996 SCC (2) 199.

3.4.2. Letter Rogatory[27]:

The experience of both the former CBI Directors was very de-motivating regarding letter rogatory. They said that foreign governments don't respond to letter rogatory in the manner they ought to. They added that such requests remain pending with the countries[28]. One of the former CBI Director said that the possible reason for noncooperation of these countries could be that no system wants to expose their drawbacks as far as the presence of proceeds of crime is concerned.

3.4.3. Staff Recruitment:

The scarcity of staff was one of the major concerns expressed by both former CBI Directors. They said that the CBI/CBI Director should be given be given exclusive power to appoint their staff.

But, on the question of reducing the staff on deputation, one of the former CBI Director answered in negative. He said that the fundamental purpose of CBI would be frustrated if the officers from various departments will not be taken. CBI investigates serious economic offenses as well as traditional offenses which are serious in nature. Therefore, people from different departments are required to make it multidisciplinary. No amount of training will make them an expert, which people on deputation are already wielding their vast experience of a parent department. He further added that if CBI will recruit the entire staff the ancillary problems like forming of unions etc. will begin. Whereas, the other former CBI Director supported the idea of having more regular staff than on deputation.

3.5. Defense Counsel:

Investigation forms the most important part of the criminal proceeding. Any lacunae left during investigation gives the benefit to the accused, and the defense counsel takes advantage of that shortcoming. To have an objective opinion about the working of an investigator of CBI, defense counsels were asked to point out some of the lacunas left by the investigators of CBI during an investigation which benefits them as defense counsel. The data revealed by them is the same as what the special judges revealed during their interview. Similar issues like, archaic

27 A letter rogatory or letter of request is a formal request from a court to a foreign court for some type of judicial assistance. The most common remedies sought by letters rogatory are 'service of process' and 'taking of evidence'; See Section 166-A Cr.P.C., 1973.

28 Inaugurating the second conference of '*police liaison officers of foreign countries in India*', on july 2011, former CBI Director Mr. A.P Singh quoted that 194 letters rogatory from India are pending with various member countries. This is against only 59 requests of different countries pending with Indian authorities; See, www.cbi.gov.in (last retrieved on 18/11/12).

methods of investigation, tape recording, wrong calculation of assets in cases of disproportionate assets, listing of unnecessary witnesses, voluminous documents and more of them are useless which delays compliance with section 207 of Cr.P.c., iilegitimate traps, lack of resources, not properly trained, non-sifting of evidence, etc.

4.0. Prescription for change:

It is concluded that legal and institutional shortcomings may have a substantial impact on the effectiveness of the investigation and trial of the corruption cases. Corruption cases are often characterized by a high degree of sophistication concerning the methods of committing and camouflaging the crimes. This complexity of corruption cases contrasts with the widespread lack of proper training of investigators, prosecutors and special judges in specific matters such as forensic accounting, public funds, insider training, frauds using technologies, etc. Unsuitable institutional provisions, especially insufficient independence of the law enforcement agencies from interfering government bureaus, add to these problems.

The influence a leading figure can exercise who is Involved in a corruption case on his or her trial constitutes a second major obstacle. Supported by skilled lawyers such accused can obstruct the prosecution with lengthy contentions of sanction, and other such legal technicalities.

Following are the thrust areas which CBI needs to pursue in becoming a premier investigating agency in its true spirit:

(i) CBI needs to hit strongly at all the high-level corruption cases in all Departments and Public Sector Undertakings by registering quality cases of disproportionate assets, traps and abuse of official position if any.

(ii) CBI needs to sharpen and strengthen intelligence-gathering all over the country to detect quality cases against corrupt officials.

(iii) CBI needs to speed up 'secret verifications' before registration of cases.This needs to be done to improve the quality of pre-registration work so that no real accused escapes and no innocent man suffers.

(iv) CBI needs to speed up investigations and the decision-making process so that the cases are charge sheeted/decided at the earliest and a tangible impact is made on cheeking corruption.

(v) CBI needs to improve the quality of investigation, evaluation of evidence and decision-making. This step will go a long way to ensuring that the real accused are brought to justice, and innocent are unharmed.

(vi) CBI needs to expedite the prosecution of cases, ensure close monitoring of *pairvi* work and improve the quality of prosecution.

(vii) CBI needs to improve the intelligence, investigation and prosecution skills of its Officers/officials through continuous in-service and on-the-job training.

Following suggestions can be taken into consideration to improve the functioning of CBI:

1. Enactment of a CBI Act along the lines suggested by the Parliamentary Standing Committee on Personnel, Public Grievances, Law, and Justice.

2. There is a lack of formal coordination mechanism between the CBI and the state Anti-Corruption Bureaus. In this regard, there is an urgent need to fully implement the resolutions of the XVII Biennial Conference of anti-corruption heads of agencies to the extent of evolution of a system of half-yearly meetings between Heads of State ACB and Heads of Zones / Branches of CBI.

3. The CBI Academy is a repository of knowledge, and it conducts training programs for the benefit of anti-corruption practitioners. This training programs should be leveraged for training anticorruption practitioners. The National Crime Record Bureau should undertake the collection of statistics on corruption cases and trend analysis.

4. In the aftermath of a CBI case, a client satisfaction survey of the complainants of anti-corruption cases with the concerned department should be conducted. Guidelines for appropriate grievance redressal mechanism for the victims of corruption, under the supervision of the Chief Vigilance Officers of the respective organizations, should be issued by the Government.

It is evident that there have been significant events or scams, rocking the nation. Wherein, in some Anti-Corruption agencies restored public faith in the system and had ensured that the supremacy of law reigns ultimately, but the question that whether these agencies have been able to fulfill the public expectations and its legal mandate is debatable. Over the period there has been erosion in the confidence which the public reposed on these agencies in particular matters. Taking cognizance of this, it is also true that whenever a high-profile crime is committed or when the State police fail to investigate a case properly, there is always a demand for an investigation by the CBI. It is a fact that the public expectations have always been very high from CBI because it is the premier investigating agency in the country. This also is true that CBI has, due to various reasons, not been able to rise to the expectations in certain cases. Though the CBI has withstood the test

of time and continues to receive a high level of demand for its service from various stakeholders, ever increasing expectations and jurisdictional constraints, have been putting an enormous burden on the organization and stretched its ability to discharge its mandate efficiently.

It is observed and supported by the people interviewed that there is political interference in the functioning of CBI and the need to ensure the independent and autonomous functioning of CBI is always stressed upon. Due to limited jurisdiction in the present scheme of DSPE Act, 1946, Section 6A of the DSPE Act, 1946, a need for prosecution sanction, inadequate protection to the victims of corruption and witnesses against retaliation causes undue delay in the investigation and then a trial of corruption cases.

It is observed that Section 6 of DSPE Act, 1946 clips the wings of CBI. The jurisdiction of CBI is confined only to Union Territories for investigation of offenses notified under Section 3 of DSPE Act, 1946. It requires the consent of the concerned state government under Section 6 and a corresponding notification from the Central government under Section 5 of DSPE Act, 1946, before taking up investigation of a case outside the Union Territories. Due to this legal hurdle, CBI cannot be the first responders. By the time the CBI is handed over the case, precious time is lost which not only results in loss of the crucial evidence but also provides ample time for criminals to escape who operate at an electronic speed or move the ill- gotten wealth in safe havens across the globe.

Therefore, In the corruption cases having inter-state, inter-organisational and international ramification, CBI should be supported by a perfect legal fabric and should be given concurrent power to investigate the cases without any hurdles. Most of the states may hold the view that providing such powers to the CBI would be an infringement on their jurisdiction. But it is worthwhile to mention here that some states like Punjab, Orissa, and Himachal Pradesh have already agreed to the suggestion. Under the Chairmanship of Dr. Madhava Menon, this idea is also put forth by the Committee on Draft National Policy on Criminal Justice System. The Committee has stated in its report that – India could not afford to leave it to individual states within the Union to tackle the menace of terrorism and certain types of organised crimes and that some joint mechanism which is centrally activated and controlled, seemed to be an absolute necessity and the Constitutional division of powers however interpreted could not come in the way when nation's interest is in question.

Therefore, it is suggested that vesting CBI with appropriate statutory backing to take Suo-moto cognizance of corruption cases would in no way affect the essentials of our federal structure.

Further in continuation of above, it can be further suggested that in tune with the requirement of time, there should be a separate Act for CBI, in which it should be ensured that central government does not resort to arbitrary exercise of power, compromising the autonomy of the states in national interest while guaranteeing statutory autonomy to CBI and also fixing up its accountability by setting up Internal vigilance department, could be possible solution for improving the working of the CBI for better investigation and prosecution of corruption cases, rather than continuing with the present legal framework where CBI derives its powers from DSPE Act, 1946.

CBI being the only agency in India which has acquired and accumulated necessary expertise in successfully investigating organized crimes and therefore enacting an enabling legislation for CBI, can be a significant step towards establishing CBI into an independent and accountable agency dealing with investigation and prosecution of corruption cases.

'Circumventing' Public Participation iu Laud Acquisition: Loss of People's Voice

Dr Deeksha Bajpai Tewari[1*]

ABSTRACT

'Social Justice' is the foundation stone of the Constitution. Further, the idea of social justice finds its place in the concepts like fair redistribution of resources, equal access to opportunities and rights, fair system of law and due process, ability to take up opportunities and exercise rights; protection of vulnerable and disadvantaged people. These principles are well taken care of by the part III of the Constitution. Initially, The right to property too was considered a fundamental right but the questions of social justice were creating obstacles in the path of development for which the State through 'eminent domain' had to acquire private land. Therefore, the right to property was changed from a fundamental right to a legal one (through the 44th Amendment in 1978). Thus, no one could anymore challenge an acquisition of private property on grounds of violation of Fundamental Rights.

The use of 'eminent domain' for acquiring land from people and the absence of any clear cut national policy governing the principles and procedures of such acquisitions resulted in deep angst amongst people. To address such resistance, after a long and arduous deliberation, in 2013, the parliament promulgated an important Act called 'The right to fair compensation and transparency in land acquisition Resettlement and rehabilitation Act 2013'. The Act claims to provide to the different developmental projects Affected People (PAPs), a right to "fair" compensation for their losses. The Act also makes it obligatory for the government to ensure complete "transparency" in any land acquisition taking place for development and growth. For

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ensuring the fairness and transparency in the process of land acquisition, the Act also has made it mandatory for the land acquiring ageneies to involve public or the "affected" persons as stakeholders in the process of land acquisition. The Act makes provision for initiation of the process of social impact assessment in consultation with panchayat, municipality in the area. This is to be followed by wide scale publicized "public hearing" of the affected persons. Public consultation is the corner stone of any Impact Assessment process. It is intended to ascertain the views of 'local affected persons' and 'others with a plausible stake in the various aspects of the project' on the impacts of a proposed project. The views are to be considered by the agency responsible for granting or rejection of a proposed project at the Central or State Government level.

In light of the objectives of the Act and the long standing debates and deliberations regarding its effectiveness in creating equity and social justice, this paper critically evaluates the probable gaps and lacunae in the provisions of "public hearing" in the Land Acquisition Resettlement and Rehabilitation Act 2013 which allows the government to acquire land for private parties for public purpose and opens the floodgates for "corrupt" practices in the process of "manufacturing" a public participation. The paper further attempts to elaborate the provisions of the LARR (Amendment) Ordinance 2014 promulgated by the Government on 31st December 2014. The ordinance in effect "circumvents" the important and mandatory public participation *clause for certain types of development projects.*

Keywords: *Social Justice, eminent domain, land acquisition, LARR Act, Ordinance.*

Introduction:

Justice is a matter of social conflict and is required to resolve conflicts of interests. Since, it is always a social issue; the attribute "social" must take on special connotations if any meaning at all is to be given to the term "social justice". Social Justice which is a very vague and indeterminate expression is that form of justice which impels men to promote the common good; that is, the welfare of the community as such, as a unified entity, and also the common good

as comprising the welfare of all members of the society[2].It connotes the balance of adjustments of the various interests concerned in the social and economic structure of the State, in order to promote harmony upon an ethical and economic basis. Though, no clear cut definition of it can be laid down which will cover all the situations, still this notion of social justice is meaningful and essential to a good society.It is true that though social justice is imponderable but is an objective which is embodied and enshrined in our Constitution and it is a fact that all our legislations are aimed at bringing about social justice.

Right to property v/s eminent domain: A historicai review

Right to life, liberty and property were once considered to be inalienable rights under the Constitution, each one of these rights was considered to be inextricably bound to the other and none would exist without the other. Since ancient times, debates are going on as to whether the right to property is a "natural" right or merely a creation of 'social convention' and 'positive law' which reflects the centrality and uniqueness of this right[3].Eminent thinkers like *Hugo Grotius, Pufendorf, John Locke* , *Rousseau* and *William Blackstone* had expressed their own views on the right to property. Lockean rhetoric of property as a natural and absolute right but conventional in civil society has its roots in Aristotle and Aquinas, for Grotius and Pufendorf property was both natural and conventional. Pufendorf, like Grotius, never recognized that the rights to property on its owners are absolute but involve definite social responsibilities, and also held the view that the private property was not established merely for the purpose "allowing a man to avoid using it in the service of others and to brood in solitude over his hoard or riches". Like Grotius, Pufendorf recognised that those in extreme need may have a right to the property of others. For Rousseau, property was a conventional civii right and not a naturai right and private property right was subordinate to the public interest, but he insisted that it would never be in the pubiic interest to violate them[4].

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2 See, John A. Ryan, "*Roosevelt and social justice*", The review of Politics, Vol. 7, No.3(Jul., 1945), pp.297-305.

3 V.A, Smith , J.N.Samaddar, B. Breloer, Shamasastry, Hopkins and Buhler expressed the view that the soil was the property of the king. Maine is the chief propounder of the view that agricultural land was owned and cultivated by men grouped in village communities. The theory of individual ownership has been advocated among others by Baden-Powell , K.P. Jayaswal and P.N. Banerjee. See, Lallanji Gopal, "*Ownership of Agricultural land in Ancient India*", Journal of the Economic and Social History of the Orient, Vol.4 , No. 3 (Dec., 1961), pp.240-263.

4 K.T. Plantation Pvt. Ltd. And Anr. v/s State of Karnataka, AIR 2011 SC 3430.

With the emergence of modern written constitutions in the late eighteenth century and thereafter, the right to property was enshrined as a fundamental constitutional right in many of the Constitutions in the world and India was not an exception. Blackstone declared that so great is the regime of the private property that it will not authorise any sort of violation of it, not even for the general good of the whole community[5].

The first step for the makers of the framework of the Indian Constitution was to build a new social and economic order based on rapid economic development and social redistribution of justice.The difficult question faced by the Constituent Assembly was to tread a thin line of transition and create a fine balance of a democratic legal framework which guaranteed rights to liberty, equality and property on one hand, and transforming an economic and social order which was equitable and just in nature. There was an urgent need to develop a development strategy a shift from a feudal agrarian to a capital intensive industrial society. The task was a doubled-edged sword. On one side it hinged on transformative agenda of land reform, involving *zamindari* abolition and redistribution of land amongst the peasants, on the other side was the state planned industrial growth and encouragement of growth of private industry.

This resulted in a long and arduous debate of balancing the interests of an individual and that of a community. The Constituent Assembly debated both the inclusion and content of a fundamental right to property for two and a half years before adopting Articles 19(1)(f) and 31. This in-built anti-thesis of guaranteeing a fundamental right to property, and moving ahead with a socialist developmental strategy of land reform and state planned industrial growth, predictably resulted in friction in working of legislature and executive- entrusted with the task of implementation of development agenda and the judiciary, which enforced the fundamental right to property of those affected.Property rights at times were compared to right to life which determine access to the basic means of sustenance and considered as prerequisite to the meaningful exercise of other rights guaranteed under Article 21 of the Constitution.

Article 31 codified the 'eminent domain'[6] power of the state. This power inherent in the exercise of a state's sovereignty allows the state to compulsorily acquire property belonging to private persons for a public purpose upon payment of just

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6 Hugo Grotius is credited with the invention of the term "eminent domain", which implies that public rights always overlap with the private rights to property, and in the case of public utility, public rights take precedence. Grotius sets two conditions on the exercise of the power of eminent domain :the first requisite is public advantage and then compensation from the public funds be made, if possible, to the one who has lost his right.

compensation[7]. The two operative words here are 'public purpose' and 'compensation'. The idea is based on the conception that nobody should be made to pay disproportionately for the social good[8]. 'Acquisition and requisitioning of property' was included as a subject in the Concurrent List enabling both Parliament and the state legislatures to enact laws on the subject. Article 31 was drafted with a view to reaching a just compromise between various diverse competing interests. On one hand, were the industrialists seeking to protect their property interests and payment of market value compensation for acquisition of their property. On the other hand, were the activists who wanted abolition of zamindari without compensation, land redistribution and nationalization of key industries. The following decades saw conflict between Parliament and the Supreme Court, with the court invalidating acquisition laws for violating the fundamental right to property and Parliament responding with numerous amendments to the Constitution that redefined property rights. This conflict culminated in the 44th Amendment to the Constitution, which abolished the fundamental right to property in 1978[9]. Thus, the main bottleneck in the road to

7 Germany, America and Autralian Constitutions bar uncompensated takings wheras Canadian Constitution doesn't contain the equivalent clause. In India payment of compensation amount is a constitutional requirement under Article 30(IA) and under 2nd proviso to Article 31A(1), unlike Article 300A. After the 44th Amendment, 1978, the constitutional obligation to pay compensation to a person who is dperived of his property primarily depends upon the the terms of the statute and the legislative policy.

8 The question whether the element of compensation is necessarily involved in the idea of eminent domain arouses much controversy . One school of thought opined that this question must be answered in negative, but another view was that the claim for compensation is an inherent attribute of the concept of eminent domain; See, John Lewis,"A treatise on the law of eminent domain in the United States", William S Hein & Co., 3rd Ed., 1997; Also see, Carman F. Randolph, "The law of eminent domain in the United States", Gale, Making *of modern Law, 2010: Professor Thayer however , took a mid*dle view according to which the concept of eminent domain springs from the necessity of the sate , while the obligation to reimburse rests upon the natural rights of individuals; See, Charles F. A. Currier, "Cases on Constitntional law, Part III and Part IV by Jam*es Bradley Thayer", Annals* of the American Academy of Political and Social Science, Vol. 5, May, 1895, pp. 150-151; K.T. Plantation Pvt. Ltd. And Anr. v/s State of Karnataka, AIR 2011 SC 3430.

9 Article 19(1)(f) and Article 31 was deleted from the Constitution of India and Article 300A was introduced by 44th Amendment in the *year 1978.The effect of this amendment was that firstly, r*ight to acquire, hold and dispose of property ceased to be a fundament*al right; secondly, legislature can deprive a per*son of his property only by authority of law; thirdly, right to property is no more a basic feature of the constitution and is only a constitutional right; and fourthly, the jurisdiction of the Supreme Court cannot be generally invoked and the aggrieved person has to approach th*e High Court under Article 226 of the Constitution.*

enact the state's power of "eminent domain" was removed /amended from the Constitution[10].

Over the last sixty years, as India pursued a strategy of economic development and social redistribution, more than a hundred land acquisition laws were enacted to achieve these goals. Acquisitions also continued to be made under colonial laws that remained in force post the adoption of the Constitution pursuant to Article 13(2). The most important of these colonial laws was the Land Acquisition Act, 1894, which was amended frequently by Parliament and state legislatures post-independence. This law originally enacted for the territory of British India was, following independence, extended to cover the entire territory of India except for the state of Jammu and Kashmir.

The massive displacement and dispossession of poor peasants and traditional communities like forest dwellers, cattle grazers, fishermen and indigenous tribal groups, and extensive environmental damage have led to land conflicts in many states. Land Acquisition is inevitably a controversial issue in countries with land scarcity that are trying to achieve rapid economic development through greater industrialization. Clearly, trade-offs must be made. However, it is imperative and certainly possible that land may be acquired for public purposes in a participatory manner that not only compensates those who are dispossessed but also enables them to share in the benefits from the projects which occasion their displacement. Given public outrage regarding such land conflicts, since 2007 there have been moves for comprehensive amendment of the 1894 Act. The inter-ministerial debate on a national displacement/rehabilitation policy and on the related issue of a need to overhaul the colonial Land Acquisition Act 1894 began in the 1980s and continued over nearly three decades under successive governments. Simultaneously, there were debates in civil society too. The attempt to find a generally acceptable compromise which would reconcile the conflicting interests of industry and farmers/ landowners continued intermittently. Eventually, came the LARR Act 2013. The new land acquisition law came into force on 1st January, 2014.The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, (LARR Act) replaced the Land Acquisition Act, 1894, which existed from colonial times. The new LARR Act is an attempt to revamp and make the land acquisition process more effective by addressing the major lacunae in the old Land Acquisition Act. But, on 31st December 2014, the Union Government promulgated the LARR (Amendment)

10 *Principle of emin*ent domain as such is not incorporated in Article 300A as is in Article 30(1A), as well as in 2nd *proviso of Article 31A(1) , but can be inferred in Articl*e 300A; See, K.T. Plantation Pvt. Ltd. And Anr. v/s State of Karnataka, AIR 2011 SC 3430.

Ordinance arguably seriously jeopardizing the limited ground gained by the stakeholders in the process of land acquisition in this country. This may open floodgates for long and arduous struggle for the "affected" population.

The main objectives of the paper can be enlisted as follows:

1. Review of the provisions of 'The Right to Fair Compensation and Transparency in Land Acquisition, Rehabiiitation and Resettlement Aet, 2013' in the context of public participation and stakeholders participation.

2. Critical Analysis of the provisions of people's participation in the new Land Acquisition Resettlemcnt and Rehabilitation Act 2013.

From the Land Acquisition Act 1894 to LARR 2013

The Land Acquisition Act, 1894 was under serve criticism for various reasons which inciude:

(i) *No Comprehensive definition of the term "public Purpose":* lack of comprehensive definition of public purpose, which determines the need for land acquisition.

(2) *No legal framework to determine the "entitlements" of compensation:* lack of proper legal framework to determine adequate compensation for acquired land. Lack of the legal stipulation to take care of rehabilitation and resettlement, discounts the human rights regarding housing, livelihood and other allied rights of the affected people.

There was a severe lack of understanding on other people-centric impacts of displacement and resettlement, not only among the legal fraternity of India but also amongst the various wings of the Government. The entire land acquisition approach and exercise in this country severely lack:

(1) the understanding of the impact that land acquisition could cause on the concerned community,

(2) the need of bringing in the view of the public affected by the land acquisition by way of public participation through public hearing and

(3) acquiring land acquisition by way of informed consent of the land owner.

Land Acquisition is inevitabiy a controversial issue in countries with land scarcity that are trying to aehieve rapid economic development through greater industrialization. Clearly, trade-offs must be made. However, it is imperative and certainly possible that land may be acquired for public purposes in a participatory

manner that not only compensates those who are dispossessed but also enables them to share in the benefits from the projects which occasion their displacement. The LARR Act is a step in the right direction of ushering in a culture of justification wherein the government is required to explain and engage with the people it dispossesses of their lands, livelihoods and ways of life, of the legitimacy and necessity of such dispossession. This section deals with the review of the provisions of 'The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013'.

There are four provisions of 'The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013' Act which paves way for a better involvement of the stakeholders, affected persons in the development project and its implementation. The four important provisions are:

1. Section 3 (za) of the LARR Act contains a more detailed listing of 'public purposes' than the 1894 Act.
2. By defining 'persons interested' [Section 3(x)] as those having an interest in the land as opposed to actual title and 'affected family']Section 3(c)] as those dependent on the land for their livelihood, it seeks to broaden the group of people to be compensated in case of acquisition.
3. The LARR Act states that while government may acquire land for private companies 'for the production of goods for public or provision of public services', it will do so only if at least 80% of the affected people have already consented to such acquisition.
4. In its inclusion of requirements for Social Impact Assessment (SIA) of large projects (Sections 4-8), the LARR Act acknowledges the need for public participation in assessing the governmental need for land acquisition.

Critical Analysis of the "Participative" nature of the LARR Act 2013

Detail listing of "Public Purpose": Section 3 (za) of the LARR Act contains a more detailed listing of 'public purposes' than the 1894 Act. But, it has made the definition too expansive and a tad ambiguous in nature. the Act defines public purpose as any purpose that 'benefits the general public'. This vests the government with considerable discretion in its decisions regarding land acquisition. Also, the Act contains an extremely expansive definition of 'infrastructure' [Section 3(o)] to include not just 'electricity, railways, defence' etc., but also 'education, sports and tourism'. One understands the debilitating impact that an exhaustive definition of the term "public purpose" may be restrictive in nature for any governmental intervention, but in the current development discourse the

government may be under pressure to declare any kind of industrial or infrastructural development as being useful to the general public irrespective of its short-term and long-term consequenees. The Act's provision provides no safeguard against expansive government interventions for private projects, which is one of the primary reasons for discontent with the current law. This may open flood gates for various types of corrupt practices and operation of different "interested" pressure groups.

Definition of "Interested Persons": Although, this broadens the ambit of "entitlements" matrix and eligible persons for compensation , but, the definition of 'persons interested' excludes landless labourers and others like fisherfolk and cattle grazers, which are included within the definition of 'affected families' only. Since only 'persons interested' can raise objections to the acquisition of land (Section 16), this definition must be amended to include all those who are affected by the proposed acquisition. In addition, the practice of land acquisition has revealed that government officials often deny the very existence of these people or their dependence on the land in question, insisting upon documentary proof of their association with the land, which these people do not usually possess. Therefore, the current Act must be amended to ensure that all affected persons are not only rehabilitated and compensated but are also consulted in the process of acquisition.

Legal Stipulation of Rehabilitation and Resettlement Measure: Rehabilitation and Resettlement (R& R) has been made mandatory in this Act. Sec 16 of the Act deals with the preparation for R& R scheme. The Collector is the Administrator for R & R scheme. The functions of the Administrator include conducting of survey for the eensus of affected family. On the basis of this survey he prepares draft R & R scheme. LARR Act also deals with the provision for R&R committees at the project level involving local people and elected representatives. Separate Commissionerate for R&R at the state level and National Monitoring Committee for R&R at the central level oversee the functioning of R & R mechanism. The adjudicatory function is vested with Land Acquisition, Rehabilitation and Resettlement Authority which is presided over by a Judge.

These R & R provisions in the LARR Act are applicable to all land acquisitions by central and state governments. In the case of a land acquisition by a private entity, including companies, R & R provisions will only be applicable if the acquisition is of more than the prescribed limit determined by the state government. There have already been problems being witnessed especially by private companies, eg Singur, POSCO etc. In this light, it would have been appropriate to incorporate R& R mechanism in every land acquisition by private person or entities. Giving

powers to the state government to determine the limit above which R&R scheme has to be implemented in case of land acquisition by private entity could lead to the failure of the R&R mechanism conceived under this legislation. Moreover land acquisitions under the legislations prescribed in the Schedule IV of the LAAR Act (for example SEZ Aet 2005, Railway Act 1989, National Highway Act 1956) are also excluded from requirement of mandatory R & R scheme. The land acquisition for SEZ, raiiway, highway road expansion and other major activities being excluded from the ambit of R&R scheme, would again adversely impact the effectiveness of R&R scheme.

Mandatory Social Impact Assessment Study: Social Impact Assessment (SIA) is a new introduction to the land acquisition process by LARR Act. The SIA is considered as a tool which would help in understanding the implications of a proposed land acquisition of the affected population and various stakeholders.(Cyrille Valence, 2013) In its inclusion of requirements for Social Impact Assessment (SIA) of large projects (Sections 4-8), the LARR Aet acknowledges the need for public partieipation in assessing the governmental need for land acquisition. The LARR Act mandates that the SIA has to be conducted by the appropriate government in consultation with the Panchayat and Municipality leading to preparation of SIA report. The SIA report so prepared would be appraised by the expert group, who recommends whether the land acquisition is neeessary or not on. The expert committee reaches at this opinion on the basis of social-cost benefit analysis.

But there are emerging concerns regarding the appraisal of SIA report by the expert group. The expert group is being appointed by the government, which leads to conflict of interest. Moreover, the expert group report regarding whether the land need to be acquired or not, could be vitiated by the government. This loophole weakens the mandatory SIA provision. Hence there is a major issue of lack of transparency and aceountability in the present framework regarding SIA under the LARR Act.

Public Participation Provision: "Public consultation is the corner stone of the Environment Impact Assessment (EIA) process. It is intended to ascertain the views of 'local affected persons' and 'others with a plausible stake in the environmental aspects of the project' on the environmental impacts of a proposed project. The views are to be considered by the agency responsible for granting or rejection of a proposed project at the Central or State Government level. There are two parts of the Public Consultation process – Public Hearing and submission of written representations." (Ritwick Dutta, et.al, 2011). The LARR Act attempts to bring more legitimacy to the land acqulsition process by way of publie participation

mechanism. Public participation is being conceived at the SIA report preparation stage, by way of consultation with the concerned panchyat or municipality and by conducting a public hearing in the affected area. A major concern is whether consultation and a public hearing would remain as a mere procedure without any effective dialogue and deliberation between the various stakeholders, which is the experience with public hearing under the Environmental Impact Assessment notification. The absence of any member or representatives of Panchayats or municipalities in the expert group also cast aspersions of lack of transparency on the process of deliberations of the expert group.The inclusion of two representatives of Panchayat or Municipality in the expert group which appraises the SIA report could be perceived as a good practice. The views of the representatives have a significant role in the social-cost benefit analysis.

Requirement of Informed Consent of Affected Families: The LARR Act makes it mandatory to have prior informed consent of the affected families, but this provion is not to be applied total blanket. But the prior informed consent provision in the LARR Act is limited to the land acquisition for private companies and public private partnership projects. The prior consent required in case of land acquisition for private companies is at least of 80% of the affected families and in case of public private partnership project, it is 70% of the affected families.

Excluding the prior consent requirement for land acquisition, which do not fall under the private companies and public private partnership projects, fails the very purpose of informed consent requirement. Hence, most of the land acquisition under the LARR Act would also be coerced land acquisition, as under the old land acquisition legislation.

LARR (Amendment) Ordinance 2014: The Last Nail in the Coffin of "Participation" in Land Acquisition

The point to be considered is that the LARR Act 2013 was not a hasty, ill-considered piece of legislation but was a final outcome of almost three decades of debate and consultation amongst the political parties, within government and also between state and the civil society. On 31st December 2014, exactly one year after promulgating the Right to Fair Compensation and Transparency in the Land Acquisition, Rehabilitation and Resettlement Act, 2013, the Union Government led by Mr Modi passed an ordinance for it's amendment[11]. It is a fact that the

11 Article 123 gives power to the President to promulgate ordinances when both Houses of the Parliament are uot in sessiou aud the President is satisfied that circumstances exist which render it necessary for him to take immediate action; see A.K.Roy vs. Union of India, AIR 1982 SC 710, 720.

President had asked the government to explain the urgency behind the ordinance amending the Right to Fair Compensation and Transparency in the Land Acquisition, Rehabilitation and Resettlement Act, 2013[12].But, nonetheless, the ordinance was indeed promulgated. The provisions of the ordinance are as follows:

Major amendments to the provisions of Chapter II and III of the Act: The ordinance makes provisions for the appropriate Government, in public interest, to exempt any projects of the provisions of the erstwhile Act chapter II and III, regarding (a)projects vital to national security or defense of India or any part thereof. (b) rural infrastructure including electrification. (c) affordable housing and housing for the poor people. (d) industrial corridors. (e) infrastructure and social infrastructure projects including projects under public private partnerships where the ownership of the land continues to be vested with the Government.

In essence, such projects would not require the erstwhile mandatory social impact assessment (including environment impact assessment), public hearing and the mandatory informed consent of the affected people. Multi-cropped agricultural land can also be acquired for the above stated type of projeets. Outright rejection of any opportunity to participation in development interventions, not asking for the consent of the affected people and providing them with no choice or alternative in decision making may open floodgates for recalcitrant behavior amongst the affected population. This may also defy the basic principles of distributive justice. These are matters of grave importance and need thorough debate and discussion in a democracy.

Also, this will have a cumulative debilitating influence on the working of the Panchayati Raj Institutions (PRIs) in the affected areas where projects for the above mentioned causes are being undertaken. In the LARR Act 2013, Social Impact Assessment was to be conducted with the approval of the Gram Sabhas. But, with scrapping of the SIA, roles of PRIs, especially Gram Sabha in the land acquisition would become that of a spectator.

The Narendra Modi-led NDA government's decision to take the ordinance route to circumvent the Parliamentary logjam by issuing ordinance within a fortnight of the end of the winter session is critical[13] and open to criticism by opposition

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12 See ,http://indianexpress.com/article/india/politics/before-he-cleared-land-ordinance-president-asked-government-why-the-hurry/ (last visited - 9/01/2015).

13 On the question whether an ordinance made on the satisfaction of the President can be judicially reviewed by a Court or not refer, Barium Chemicals vs. Company Law Board,AIR 1967 SC 295; R.C. Cooper vs. Union of India, 1970 SC 564; *S.K.G.* Sugar Ltd, vs State of Bihar, AIR 1974 SC 1533; Venkata vs. State of A.P., AIR 1985 SC 724; K. Nagaraj vs State of A.P., AIR 1985 SC551; D.C. Wadhwa vs. State of Bihar, AIR 1987 SC579; S.R. Bommai vs. Union of India, AIR 1994 SC1918; Gurudev Datta VKSS Maryadit vs. State of Maharashtra, AIR 2001 SC1980.

parties as well as various development NGOs and activists alike. Giving an ear to the concerns of the industry, the government could have held a wide-ranging national debate and consultation to arrive at a fresh compromise betweeu conflicting interests.

Conclnsions

Planners and decision makers increasingly recognize the need for better appreciation of social consequeuces of policies, plans, programmes and projects (PPPPs). SIA is likely to contribute substantially toward understanding such impacts. This is all the more important in view of the fact that sueh impact assessment has become a mandatory requirement in the LARR (2013), though it is restricted only to the land acquisition for the private companies or public private projects. Stakeholder participation in land acquisition is thus no longer an optional operative but a mandatory provision. But, the news report from time to time and many state governments's initiative of curtailing and circumventing this SIA and thus public and stakeholders participation in their road to land acquisition cause greater public discontent. This approach, in a fast developing economy like India can only prove troublesome and full of bottlenecks and delays in the course of any developmental intervention.

Assisted Reproductive Technologies: Problems aud Concerns

Dr. Rajinder Kaur Randhawa*

ABSTRACT

Assisted Reproduction is defined as 'manipulating the gametes outside the body and transfer of gametes or embryos into the body'. The last two decades have been witness to a rapid increase in the number of technologies that assist reproduction, increasing the chance of conception and carrying a pregnancy to term. The term "Assisted Reproductive Technologies" (ARTs) encompasses various producers, ranging from the relatively simple intrauterine insemination (IUI) to variants of in-vitro fertilisation and embryo transplant (IVF-ET), also referred to as IVF and more commonly known as "test-tube baby technology". Since the latter half of the 20th century, these technologies have developed at a rapid pace. They have also influenced the way in which society views pregnancy, reproduction and motherhood. Research and promotion of ARTs was undertaken in India as a government initiative, but it soon fed into the private health sector and has since then flourished as a private enterprise. The public sector eventually discontinued the programme, but the ART industry in India has continued to expand steadily ever since its introduction. There are various legal tangles that manifest it in the different phases of the process involved.

Kewwords : *Assisted Reproduction, fertilisation, pregnancy, health sector.*

Introdnction

The concept of family has played an important role in the formation of the society since time immemorial. The privilege to marry and establish a family has been considered as a fundamental human right. Human right law upholds the positive right of all people to marry and form a family.[1] Every society across the world has given prime importance to the institution of family as the most basic and fundamental unit of social relationship. When two individuals get together and bind themselves in the matrimonial bond, then a new family comes into existence and such family gets complete with the birth of children. Unfortunately,

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1 Artlicle 16 (1) of Universal Declartion of Human Rights, 1948.

the gift of being able to bear an child is not evenly distributed by nature. This inability to bear a child in medical terms is known as infertility. The paradox of a child completing a family and the fact of inability to bear a progeny leaves the married couple into a difficult situation. This pressure of society on the couple to bear a child sometimes also leads to matrimonial breakdown and also brings couple to social ridicule.[2]

Till recently the only known alternative for a childless couple was adoption. With the advancement of time, science has also evolved considerably. More than any other scientific advancement, from the small pox vaccine to artificial heart, the techniques of medically assisted conception inspires an ongoing public debate on what attitude to adopt concerning these new powers over human reproduction.[3]

Assisted Reproduction is defined as 'manipulating the gametes outside the body and transfer of gametes or embryos into the body'. The last two decades have been witness to a rapid increase in the number of technologies that assist reproduction, increasing the chance of conception and carrying a pregnancy to term. The term "Assisted Reproductive Technologies" (ARTs) encompasses various producers, ranging from the relatively simple intrauterine insemination (IUI) to variants of *in-vitro* fertilisation and embryo transplant (IVF-ET), also referred to as IVF and more commonly known as "test-tube baby technology". Since the latter half of the 20th century, these technologies have developed at a rapid pace. They have also influenced the way in which society views pregnancy, reproduction and motherhood.[4]

The special programme of Research, Development and Research Training in Human Reproduction of the World Health Organisation (WHO) has estimated that there are 60-80 million infertile couples worldwide. It bas also been estimated that in India between 10-15 per cent of the couples are infertile. The advent of Assisted Reproductive Technologies (ARTs) has not only enhanced the possibility of pregnancy but has also made women conceive in situations which would not have been possible decades ago. However, many of these technologies require enormous technical expertise and infrastructure, carry a success rate below 30 per cent even in the best on hands, are expensive, and tax the couple's endurance physically, emotionally and economically.[5]

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2 Imrana Qadeer, "Social and Ethical Basis of Legislation on Surrogacy: Need for Debate" *Available at*: http://www.issuesinmedicalethics.org/171co28 (visited on September 19, 2012).

3 C.R. Jilova, "Surrogacy and Socio-Legal Challenges" *Chotanagpur Law Journal* 153 (July-September 2012).

4 Sama Team, "Assisted Reprodnctive Technologies in India: Implications for Women" *Economic and Political Weekly* 2185, June 9, 2007.

5 Statement of Specific Principles for Assisted Reproductive Technologies, Central Ethics Committee on Human
Research (CECHR) of the Indian Council of Medical Research (ICMR), September, 2000.

The first IVF baby in India may have been born just a few months after the birth in 1978 of Louise Brown, the world's first IVF baby, in the United Kingdom. Dr. Subhas Mukherjee from Kolkata claimed credit for the second IVF baby in the world, Durga. However his claim was considered to be inadequately documented and rejected. India's first "scientifically documented" IVF baby was born on August 6, 1986. Harash Chawala was born following the collaborative research efforts of the Indian Council of Medical Research's (ICMR) Institute for research in Reproduction and the King Edward Memorial Hospital, a municipal hospital in Mumbai.[6]

Research and promotion of ARTs was undertaken in India as a government initiative, but it soon fed into the private health sector and has since then flourished as a private enterprise. The publie sector eventually discontinued the programme, but the ART industry in India has continued to expand steadily ever since its introduction. The potential market is estimated conservatively at Rs. 25000 Crore. Clinics offering ART producers have also mushroomed all over the Country, from Mumbai to Guwahati. According to an ICMR publication published in 2005, "There are an estimated 250 IVF clinics in India today. There will be many more such clinics in 2007."Another indication of growth of ARTs is the rise in membership of the Indian Society for Assisted Reproduction, which was set up in 1997. The website of the society lists more than 600 members in 2007. In addition, there are "infertility centers" in smaller towns and rural areas that work in coordination with referral ART centers located in tertiary healthcare institutes in cities.[7]

Assisted reproductive technologies such as artificial insemination, *in vitro* fertilisation, surrogate motherhood have been proved to be a blessing for many infertile couples. The new reproductive technologies have given hope to many women and helped many women to have children that they would not have had otherwise. But along with potential benefits, modern reprodnctive technologies have posed various complex legal problems relating to family law and basic human rights. Assisted reproductive technologies have raised a number of human rights issues, including right to dignity, individual autonomy, right to know, procreative liberty etc.[8]

6 ICMR, *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India 2005.*

7 Sujoy Dhar, "HIV Cases Show Need to Fix Rules on Assisted Reproduction" *Health,* June 2003.

8 Belinda Bennett, "Reproductive Technology, Public Policy and Single Motherhood" *Sydney Law Review* 631 (2000).

Artificial Insemination

Artificial insemination means the insertion of sperm into a woman's vagina to cause pregnancy using a method other than sexual intercourse. When the semen is deposited in the vagina, the cervical canal or the uterus, by artificial means, such as instruments, is method of bringing about pregnancy in a healthy woman otherwise but who is unable to conceive a child through sexual intercourse with her husband, is called artificial insemination (AI).

The indications for artificial insemination are:

Incurable defects in the husband's semen reuding him incapable of procreation.

i. Mental disease In the husband

ii. Hereditary disease in the husband of such a kind as to contraindicate paternity and

iii. Rhesus incompatibility resulting in failure of children to survive beeause of erythoblastosis and the husband is homozygous Rhesus positive.

Where the male genetic material of the husband is introduced artificially into the woman's body, it is known as "Artificial Insemination Homologous" or Artificial Insemination Husband (AIH). Where the genetic material is obtained from male other than the woman's hushand, it is called "Artificial Insemination Donor (AID)". From the human rights point of view AID generates much heated debates.[9]

Anonymity and non –anonymity of gamete donor

One of the most problematic human rights aspects relating to AID is concerned with the anonymity of gamete donor. At international level, the vast majority of countries endorse anonymous gamete donation and some countries sueh as France, Denmark and Norway do not allow offspring any information. In England, the Human fertilisation and Embryology Act, 1990 stipulates that gamete donation should be anonymous; the identity of the donor cannot be given to either the donor offspring or the couple receiving the gametes. There is, however, in recent years a discernible trend towards allowing children access to identifying information about their gamete donor. The first country to remove tbe anonymity of gamete donor was Sweden, allowing the child, when sufficiently mature, to find out the identity of sperm donor. Austria also allows the child to gain identifying information. In the US, there is no legislation, at either federal or state level, that either prohibits or enforces anonymous gamete donatiou. The matter is regulated by

9 Kshitij Kumar Singh,"Human Genome and Human Right: An Overview" 50 *JILI* 74 (2008).

non- legally binding professional guidelines, which recommend the anonymity of the gamete donors.[10]

Child's right to know *vis-a-vis* parent's right not to tell the genetic origin

Many societies in the present time have begun to place greater emphasis on the rights of child. Article 7 of UN Convention on the Rights of the Child, 1989 can be seen as being of fundamental importance as it provides for the right to know one's parents. In the context of donor anonymity it has been expressed as the child's right to know the identity of gamete donor. In our contemporary culture young people have strong moral claims to know the genetic identities. It has been contended by some that now it is time for these moral elaims to convert to legal rights. Such a right based argument has been used by various legislators to justify policies of non-anonymous gamete donation. There are some people who argue that in case of gamete donation there are compelling reasons for not telling the ehiid. It has heen contented that it is not the best interest of child to tell about the gamete donation because there is a fear that telling a child how they were conceived would cause severe social and psychological problems. A further reason for not telling the child is that parents should have the right to privacy and if they keep such information confidential that is their prerogative. It is clear that balancing of these competing interests is a difficult matter that requires a full debate, discussing the merit of each case. However, in future it might well be the choice to be made between a reduced, non anonymous programme that respects the ehild's right to know and a much wider anonymous programme that secks to benefit a greater number of childless couples.[11]

In Vitro Fertilisation (IVF)

In in-vitro fertilisation, the eggs are surgically removed from woman, fertilized with the available sperms in a dish and the embryo replaced into the womb of the woman who completes the carriage till delivery. In IVF, semen samples of the husband/donor sereened two or three times. The semen of the husband/donor is checked for Hepatitis B surface antigen and HIV I and HIV II. In this, oocyte is picked up transvaginally.[12]

10 Lucy Frith,"Gamete Donation and Anouymity" *Human Reproduction* 819 (2001).

11 *Ibid.*

12 K.Mathiharan and Amrit K. Patnaik (eds.), *Modi's Medical Jurisprudence and Toxicology* 847 (2006).

Embryo Transplant (ET)

In embryo transplant, the embryo created from the 'egg and the sperm' is transferred into the carrier's womb. Carrier may or may not be the originator of the egg. The embryos can be created by the following methods.

(a) The extraction of ova from a woman; the impregnation of it within the laboratory by her husband's sperm and the return of the fertile ovum to the mother.

(b) Process is similar as in (a) above, but the sperm is provided by a male other than the husband where husband is infertile.

(c) The ovum is extracted from a third party, and after fertilisation by the husband's sperm, is introduced into his wife's body in order that she may in due course produce a child.

(d) Third parties provide both the ovum and the sperm which is then inserted into the potential mother's womb.

(e) The fertilised ovum of the husband and wife can be introduced into the womb of the third party-surrogate motherhood.[13]

Surrogate Motherhood

Surrogate arrangements have created a lot of confusion in legal circles, posing new challenges. The bifurcated role of woman in surrogate arrangements is prompting renewed assessment of the meaning of motherhood and the designation of the maternal rights. From the human rights point of view the underpinning issues involve right to individual autonomy, procreative liberty, right to dignity, right to privacy, commercialisation of human body etc.[14]

Individual Autonomy

The self-sufficiency principal is often invoked as a rationalisation for allowing surrogacy. The principle states that people are free to decide what to do with their bodies provided that there would be no harm caused to other person. The fundamental myth of the self-sufficiency argument lies in the fact that the decision a woman makes to have a child (i.e. to do something with her own body) is not the issue in case of surrogacy but the issue is rather the decision to give away the child to someone else who wanted it.

13 *Ibid.*

14 Andres E. Stumpf, "Redefining Mother: A Legal Matrix for New Reproductive Technologies" *The Yale Law Journal* 186 (1986).

Procreative Liberty

As courts have struggled to define the parameters of procreative choice, the right of procreation has received its most extensive legal expression as a right not to procreate. Included in the right to procreate is the right to conceive. Abortion is a right to conceive followed by a protected option- a right not to procreate.[15] Surrogate motherhood is the inverse: a right to conceive that should also be followed by a protected option- a right to procreate. In the abortion case, the mother's conception is only biological in origin. In the surrogate mother's case, the initiating mother's conception is only mental. Different kinds of proteetion are required for conceivers to realize different kinds of procreative intent. Courts in abortion cases must balance the rights of a mother and a child, whereas Courts in surrogate cases must balance the rights of two mothers and a child. However in both cases, the fundamental right of conception as a predicate of the right to procreate is at stake. Because even infertile mothers can exert their right of psychological conception, they too have a procreative right that Courts should preserve. Conscious and intentional exertion of the right to procreate should be accorded more protection than an accidental and unintended protection.[16]

Inviolability of Snrrogate Mother

Once the embryo is implanted in the womb of the surrogate mother, the process enters a realm of privacy which entails substantial personal freedom for gestating mother. The inviolability of this personal realm prohibits enforcement of the surrogate contract through specific performances during gestation. Damage remedies against the surrogate mother for non-performance must be severely limited to preserve the fundamental rights of privacy and procreative autonomy. The terms of the contract should serve primarily as indications of the parties' intent including a willingness on the part of the surrogate mother to abide by the terms. However, punishing the surrogate mother for "inadequate" birth is misplaced in traditional scheme of maternity, which accords pregnant women the freedom to lead their life without fear of sanction.[17]

Surrogacy Probiems

Although a large number of surrogacy success stories are reported every month; there are some problems associated with surrogate motherhood in India involving ethnic factors. Pregnancy is fraught with risks at all stages and puts a huge mental and physical strain on the surrogate mother. The surrogacy laws of

15 Roe vs. Wade *410 U.S. 113(1973).*

16 *Supra* Note 11.

17 *Ibid.*

western countries may not be compatible with those in India. Negligence of the health of the mother and child by the fertility clinics can lead to the complete wastage of the entire procedure.[18]

Different societies having distinct culture, social values, religious and social set up have different surrogacy arrangements. But human rights issues relating to surrogacy arrangements have universal character. These issues can be addressed by effectuating the basic human rights through legislation and the human rights instruments should be translated in tune with the current pace of assisted reproductive technologies.

Legal framework of Assisted Conception

Australia, Israel, Japan, Korea, Saudi Arabia, Singapore, South Africa, Taiwan and Turkey and several European countries have introduced legislation for ART practice. Scientific societies have drawn up ART guidelines in countries such as Finland, Poland, Portugal and USA. In countries such as Argentina, Egypt and the United Kingdom, both guidelines and legislation exist. In the UK, Human Fertilisation and Embryology Act, 1990 apart from ART practice authorized the Government to establish Human Fertilisation and Embryology Authority.[19]

In India, in September 2000, Central Ethics Committee on Human Research (CECHR) of the Indian Council of Medical Research (ICMR) has come out with a statement of specific principles for assisted reproductive technologies. In 2002, the Indian Council of Medical Research and the National Academy of Medical Sciences (India) has brought out a draft on National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India. This document has drawn up guidelines for the ethical practice of acceptable ART methods and for taking measures for setting up of an independent body through legislation for accreditation, regulation and supervision of infertility clinics in India, which was later, in 2005; released as a published document. However, since these guidelines had no legal binding and the rules and regulations were not mandatory, they were not strictly implemented, resulting in an absence of any form of regulation. Subsequent to this, Law Commission of India in 2009, issued its 228th Report for the regulation of ART clinics. Later in 2010, 2013 and 2016 respectively, Union Ministry of Health and Family Welfare and ICMR had formulated Assisted Reproductive Technologies (Regulation) Bill which is still awaiting enforcement.[20]

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18 *The Tribune*, 30th December 2011.

19 *Supra* Note 9.

20 Sama Team, "Assisted Reproductive Technologies: For Whose Benefit?" *Economical and Political Weekly*, May 2, 2009.

The 2016 bill aims at making surrogacy legal and transparent in India. Commercial surrogaey has been completely banned and will be limited only to close relatives. In addition to it, no other payment will be made to surrogate mother by intended parents except her medical bills.

Although the Bill attempts to incorporate many issues related to ART, it unfortunately carries on the imprint of the drawbacks present in the National Guidelines issued in 2005. When the title of the bill mentions the term "regulation", it is expeeted that such a bill will regulate the practiee of ART and safeguard the rights and interests of the users, in this case women, and incorporate provisions to prevent misuse and malpractice, thereby making the providers accountable to the women/couples and the law of the land. However, through the various clauses, it tends to promotc the interests of the private sector providers of these technologies rather than regulate them and comes across as inadequate in protecting and ensuring the health and well-bcing of women and children.[21]

Conclnsions

A very fundamental attribute of the human race is the desire to proereate. Unfortunately, due to several reasons biological and otherwise many are denied the joy of parenthood. With the development in reproductive sciences and technologies the barriers to parenthood are no longer as formidable as they were eariier. In modern times, the advent of new scientific reproductive technologies has conjured up novel values in the field of family law. Infertility of couples strips them of their cssential right to procreate and have genetically related offspring. With the advent of new reproductive technoiogies like artificial insemination, *in vitro* fertilisation, embryo transplant and surrogacy a new promise has ushered for them. The only roadblock the system faccs now reiate to the legal tangles that manifest it in the various phases of thc proccss involved.

21 *Ibid.*

The Right to Entitlement: An Examination of the Coneept

B. Bhavana Rao*

1. Introdnction

This paper seeks to give an understanding of the concept of entitlement from different perspectives. What is entitlement? To one, entitlement would mean a simple right. To another it might mean a concrete positive action taken by the government. For yet another, it may go in the direction of jurisprudential understanding of the concept of entitlement theory, that is, the theory of distributive justice. Further as gathered from material, there is a great and wide difference between rights and entitlements, realistically speaking. The real context may talk of welfare schemes as entitlements provided by the States. Yet they may look similar. This is a concept with wide dimensions. Therefore here this proceeds with a hope of trying to doing full justice within the constraints of time and resourees, to give elarity on the coneept.

A historical rewind of the concept of entitlements in a country like USA would reveal that until 1935, the welfare schemes were taken care of by the State or the local level. Later on the federal government joined in by passing the Social Security Act in 1935 to remove the difficulties of the complexities of the various schemes at the local level, which included make a distinction between the people as "worthy poor"[2] who were those estimated to be unable to take an employment, like the disabled, and "unworthy poor" who could cope without any aid.

An example of entitlement is right to food. Though food is a basic need, it cannot be given its due weight as a right until a person gets a feeling of entitlement to it. A right to entitlement to food perhaps is the remedy in such a case. The definition of *food security* at this time which is generally used, is of the World Food Summit which happened iu 1996, and puts up with this a substantial similarity to the definition of the *right to food*.[3] However a right-to-food pedestal to food security is distinct from other approaches to reducing hunger and malnutrition and complements food security considerations with dignity, rights acknowledgment, and transparency, accountability, and empowerment concerns. It is based on an *a*

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1 *Available at* http://www.brainyquote.com/quotes/keywords/entitlement.html (visited on 11/09/2014.)

2 Cristine N. Simini, "Welfare Entitlements in the Era of Devolution", 9(1) GJPLP 2002 93.

3 Kerstin Mechlem, "Food Security and the Right to food in the Discourse of the United Nations", 10(5) ELJ 2004 631.

priori commitment to the value of human dignity and makes the individual an agent of change in a way that enables him or her to hold governments accountable and to seek redress for violations of his or her rights.[4] A right-to-food approach is not based on vague and replaceable policy goals subject to periodic redefinition, but on existing, comparatively specific and continuously becoming more precise obligations undertaken by governments. Therefore, the right to food cannot only be regarded as a means to achieve food security, but must be seen as a wider, more encompassing, and distinct objective in itself. Realizing the right to food should, be part and parcel of rights-based approaches to development that aim to implement all human rights obligations which States have committed themselves to under human rights law.

2. Dignity: The Basis for Entitlement

The chunk of human rights instruments till date have been strongly advocating the importance of human dignity. Article 1 of the Universal Declaration of Human Rights says that[5] All human beings are born free and equal in dignity and rights.

Sometimes, however, these documents seem to make a stronger claim. They sometimes seem to imply that human dignity entails entitlements. For example, Article 1 of the "Charter of Fundamental Rights of the European Union", says that Human dignity is inviolable. It must be respected and protected.

The German Basic Law[6] says explicitly that the ascription of dignity is the basis for inferring rights-claims. The first clause of Article 1 in the Basic Law says Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

The second clause of the Article says

The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

3. The Meaning of Entitlement

The Social Context:

Social historian Michael Katz[7] has noted that the term entitlement once signified the solidarity of an expansive welfare state that expanded the rights and meaning of citizenship but by the 1990s had become a term almost as negative as welfare.

4 *Ibid.*

5 Article 1 Universal Declaration of Human Rights.

6 Article 1 Basic Law for the Federal Republic of Germany.

7 Michael B. Katz, *The Price of Citizenship: Redefining the American Welfare State*, 324-25 (UPP, Philadelphia, 2008).

The debates over the concept have lacked clarity. Some call for psychological entitlements and others call for legal entitlements. But before any broad meaning of the concept is conceived in our minds a look at the meaning of entitlement is called for. To a lawyer, an entitlement is a legally enforceable right. An entitlement program, then, would be a program that creates legally enforceable rights.[8]

Defining a public benefit program as an entitlement because it creates some legally enforceable rights, is so broad, that it is practically useless.[9] Claimants for benefits in programs funded under Temporary Assistance to Needy Families, clearly have some statutory rights: For example, recipients cannot be sanctioned for failing to comply with work requirements if they lack child care for preschoolers and have a right to receive assistance from secular providers when the state elects to contract with religious organizations. Yet, calling an entitlement merely because of these paltry rights, and the few others that may exist, would be plainly absurd.[10] The scope of individual rights that TANF offers is manifestly different from those in Social Security, food stamps, farm price supports, and other programs commonly regarded as entitlements. Thus, even leaving aside legislative and policy debates, some means of distinguishing among types of legal rights is clearly necessary for the concept of entitlement to have any objective value in analyzing public policy problems. Further, welfare rights are a necessary supplement to liberty rights because rights to freedom become hollow when their bearers are not able to take advantage of their freedom. Rights to be provided with certain goods are thus a natural outgrowth of a genuine concern to protect freedom.[11]

Artiele 28[12] of the UDHR statcs vehemently

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration ean be fully realized.

Article 28 of the UDHR talks clearly of 'entitlement' in a social context, and an individual as a member of a legal order, who has the right to a sound legal order in that, in order to enjoy all the entitlements which he has right to. The tone set forth in the Article states the State responsibility towards individuals as part of a national or international order. However, for the most part, entitlement requires positive State action.

8 David A Super, "The Political Economy of Entitlement", 104(3) CLR 2004 634-636.

9 *Ibid*

10 *Ibid*

11 Tara Smith, "On Deriving Rights to Goods from Rights to Freedom", 11(3) JLP 1992 224.

12 Article 28 of the Universal Declaration of Human Rights, 1948.

The Economic Context:

In business language it means the following:[13]

- Distribution or an exercise of an absolute privilege or right to an economic benefit such as old age pension, social security, unemployment stipend granted by a contract or law, automatically upon meeting the required qualification.
- Claim or right defended by reference to precedence or established procedure.
- Government scheme benefiting a particular group.
- Offer or an actual payment of cash or stock (shares) to the holder of a security.

However in its simplest explanation, an entitlement is the fact of having a right to something. Or, the amount to which a person has a right. If we talk of positive and negative rights, some entitlements are those which require positive State intervention, whereas other rights require only negative approach of the State.

Article 22 of UDHR[14] **states:**

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

These two point to a positive State action from an individual point of view. The State requires promising a guarantee to these rights to the populace. On the other hand, some rights are entitlements because they have been demanded by the group the individual is a part of. Minority Rights and Women's Rights are good examples. So may we say that entitlements have both positive connotations as well as tones of solidarity rights?

In the Context of Jurisprudence:

The Entitlement Theory of Nozick[15]: This is a theory of distributive justice and private property created by Robert Nozick in his book *Anarchy, State,*

13 *Available at* http://www.businessdictionary.com/definition/entitlement.html#ixzz3D9yP6CvR (visited on 13/09/2014.)

14 Article 22 of the Universal Declaration of Human Rights, 1948.

15 Jonathan Wolff, *Robert Nozick: Property, Justice and Minimal State*, 9 (Stanford University Press, Stanford, 1991).

right to entitlement? Nozick's Entitlement theory comprises of three main principles:

1. A principle of justice in acquisition[16] - This principle deals with the initial acquisition of holdings. It is an account of how people first come to own common property, what types of things can be held, and so forth.

2. A principle of justice in transfer[17] - This principle explains how one person can acquire holdings from another, including voluntary exchange and gifts.

3. A principle of rectification of injustice[18] - how to deal with holdings that are unjustly acquired or transferred, whether and how much victims can be compensated, how to deal with long past transgressions or injustices done by a government, and so on.

An analysis of Nozick's theory shows that this is not the kind of entitlement which we are talking about in terms of entitlement as a right. This theory is in a way opposite to what entitlements are in the contemporary context. It talks of entitlements to property from a starting point in the scheme of things and results in concentration of wealth in a select few. Here the role of State is limited to being a protector who ensnres justice to existing rights holders and not those who never have a chance to become rights holders due to the historical concentration of wealth in a few hands which pass on the gifts and properties to the closest ones. This theory ignores the large numbers who had been left out from the beginning.

Dr. Amartya Sen's definition of entitlement[19]: Entitlements have been defined[20] by Dr. Sen as "the set of alternative commodity bundles that a person can command in a society using the totality of rights and opportunities that he or she faces".

This is a descriptive rather than a normative concept; entitlements derive from legal rights rather than morality or human rights. According to an article published

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

19 Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Clarendon Press, Oxford, 1981).

20 Amartya Sen, *Resources, Values and Development,* 497 (Basil Blackwell, Oxford, 1984).

by the Oxford Development Studies[21] the meaning of entitlement set as given by Dr. Amartya Sen is as follows:

A person's "entitlement set" is the full range of goods and services that he or she can acquire by converting his or her "endowments" (assets and resources, including labour power) through "exchange entitlement mappings".

In the context of poverty and famine, the entitlement approach aims comprehensively to describe all legal sources of food, which Dr. Sen reduces to four categories:

1. Production-Based Entitlement (Growing Food)
2. Trade-Based Entitlement (Buying Food)
3. Own-Labour Entitlement (Working For Food)
4. Inheritance And Transfer Entitlement (Being Given Food By Others)

Individuals face starvation if their full entitlement set does not provide them with adequate food for subsistence. Famine scales this up: occupationally or geographically related groups of people face famine if they simultaneously experience catastrophic declines in their entitlements.[22] So for Dr. Sen, largely, a person is entitled to food if he grows it, buys it, works for it or inherits it, if we talk in the context of right to an entitlement for food.

4. Of Rights and Dnties in Entitlement Policies

Where there is a right, there is a duty. This seems to be a logical flow of the right to entitlement. There is more to it. The duty of the right holder vis a vis the right provider. A duty against a duty. For example, the American scheme of entitlements may have a huge burden on the provider that is the State, but the non insistence on a particular duty by the person who receives the claim in the form of either an unemployment stipend or a health benefit is a lacuna leading to social regression in many areas. When we talk of entitlement as a right to something, for e.g., the right to unemployment stipend, many scholars are of the view that the entitlement scheme prevalent, for example, in America is largely a result of political favours extended by the politicians to various groups, by completely ignoring the fact that the shielded groups are not given any set of requirements on how they ought to behave in return. Analysts point that the Benefit theory of entitlement may be a hindrance to the other population overall and the recipients also who enjoy these

21 Stephen Devereux, *Sen's Entitlement Approach: Critiques and Counter Critiques*, 2001 29(3) ODS 3.

22 *Supra* note 2

benefits without any contribution to self development and improvement. There is a difference of opinion among the conservatives and the liberals. The conservatives stress on the fact that the dependents are stopped from getting ahead on their own by this approach.

5. Various Conuotations of Entitlement

David A Super in his article titled 'The Political Economy of Entitlements' speaks about the following ways in which entitlements can be viewed.

i. Subjective Entitlement[23] – For him this categorisation arises out of the fact that everyone wants to feel secure. The purpose of the law has been to induce a subjective sense of security. People believing they have rights sense and act another way than those people who believe that their well-being is at the mercy of others. On the other hand, subjective entitlement can have a repellent side. When we consider someone arrogant, we may say that he acts like he is entitled.[24]

   Whether or not a given program is a subjective entitlement is a matter of individual perception. As such, it cannot be directly controlled by legislation, and individuals' perceptions may differ. Nonetheless, legislative and admiuistrative choices, as well as public rhetoric, can contribute to or undermine subjective entitlements. Individual legal rights can contribute to subjective entitlements, as can a set of straightforward and relatively non-discretionary program rules.

ii. Unconditional Entitlement[25] – The word entitlement can also be used in the sense of benefit that one need not earn or a benefit that is not subject to conditions or reciprocal obligations. Presumably having an entitlement in the unconditional sense may contribute to the subjective sense of entitlement. This usage is more rhetorical than technical. In reality, designing an entitlement without at least some reciprocal obligations is all but inconceivable. To begin with, programs generally want to require claimants to cooperate in the eligibility determination process by providing information and possibly appearing for interviews or snbmitting verification. Programs also typically want to disqualify those who engage in various kinds of misconduct, creating an implicit condition of good behaviour on eligibility for these programs' benefits.

23 David A Super, "The Political Economy of Entitlement", 104(3) CLR 2004 634-636.

24 *Ibid.*

25 *Ibid.*

iii. Positive Entitlement [26] - An entitlement can be a legally enforceable individual right. This is the meaning of the term, denoted by a positive entitlement. A program's being a positive entitlement has two specific implications. First, an individual denied benefits for reasons that an entitlement statute does not authorize can sue to require that those benefits be provided. Second, the rights an entitlement creates are sufficiently concrete to constitute a property interest for purposes of law.

iv. Budgetary Entitlement[27] - An entitlement under the State budget is that whose funding level is not ordinarily determined through the annual competitive appropriations process. Budget process law refers to entitlements more formally as mandatory or direct spending programs. A formula of some kind written into permanent law typically controls the amount committed to each budgetary entitlement. In some cases, this formula may be as simple as a specified funding level for each year with instructions about how those funds are to be allocated among eligible claimants, for example, individual states in any country. More commonly, however, a budgetary entitlement has eligibility requirements and a formula for determining the amount of benefits written into law or set administratively under criteria specified by law. Budgetary entitlements are considered mandatory spending because they are not conditioned on the enactment of appropriation legislation. The budgetary opposite of an entitlement or mandatory program is a discretionary program. The laws creating, or authorizing, these programs may contain detailed eligibility requirements and specifications.

v. Responsive Entitlement[28] - Many entitlements are funded based on the number of eligible people seeking benefits and the amount for which they are eligible. Funding for these programs therefore rises and falls based on need without any further legislative action. These responsive entitlements promise to meet the needs of all eligible claimants. Thus, a promise to leave no child behind is a promise of a responsive entitlement. The alternative is to cap program expenditures at a fixed amount. If demand appears likely to exceed available funds, the program's options include reducing benefit levels, establishing waiting lists or other systems for prioritizing claimants, or simply operating the program until it exhausts its funds and then shutting it down. By definition, programs funded with discretionary appropriations

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

cannot assure claimants of a responsive entitlement. On the other hand, if appropriations are fully adequate to meet all valid claims in a year, a discretionary program may operate as a responsive entitlement in that year.

vi. Functional Entitlement[29] - Another understanding of entitlement is that it is a guarantee that the program will meet some qualitatively definable need of its beneficiaries. These functional entitlements are perhaps more often described as standards than as entitlements.

6. Entitlements iu Developing Countries

In general, scholars note three distinct models historically that developing countries have used to incorporate soeioeconomic rights.[30]

i. First, several grant them the status of fundamental rights in the eonstitution, which makes them justiciable in the courts. Significantly, countries that pursue this approach often do so after fundamental regime change. Post-authoritarian Brazil and post-apartheid South Africa are exemplary cases.

ii. Second, other countries enunciate 'directive principles' in the constitution, which are meant to shape government policy.

iii. Finally, many countries become signatories to international conventions that protect socioeconomic rights, such as Mexico.

7. The Indian Context

1. Judicial Activism and Entitlements

The innovation of public interest litigation by the Court, widely seen as the most powerful in the world, encouraged popular grassroots movements and non-governmental organizations to serve as "midwives to judicial activism".[31]

Painfully aware of the limitations of legalism, the judiciary of India has struggled over the last few decades to bring law into the service of the poor and oppressed. Under the banner of Public Interest Litigation and the enforcement of fundamental rights under the Constitution, the courts have sought to rebalance the distribution of legal resources, increase access to justice for the disadvantaged, and imbue formal legal guarantees with

29 *Ibid.*

30 Sanjay Ruparelia, "Enacting Socioeconomic Rights: Lessons from India", in a Projeet by Princeton University named "Addressing Inequalities: The Heart of the Post-2015 Development Agenda and the Future We Want for All", Princeton, 2012.

31 Upendra Baxi, *The Future of Human Rights,* Oxford University Press, Oxford (2002)

substantive and positive eontent.[32] Originally aimed at combating inhumane prison conditions and the horrors of bonded labour, public interest actions have now established the right to a speedy trial, the right to legai aid, the right to a livelihood, a right against pollution, a right to be protected from industrial hazards, and the right to human dignity.

Recent analyses suggest that enhanced national spending for some of these flagship initiatives, such as NREGA, have led to cuts in rural development elsewhere. Additionally, how front-line bureaucrats actually nnderstand the meaning of these various rights and thus implement them remains a vital question given the shifting conceptual meanings and repertoires of resistance that have characterized the implementation of policy ideas as they travel from the commanding heights of the state to its peripheries. Three aspects of India's new rights agenda warrant close attention. First, the decision to legislate a right to basic socioeconomic entitlements marks a watershed in modern Indian democracy. Since achieving independence in 1947, national and state-level governments in India have introduced an extraordinary range of social welfare initiatives. These have ranged from area-based interventions and compensatory discrimination policies to specifically targeted schemes for women and children as well as resettlement programmes. Crucially, the vast majority of such initiatives came under the purview of the Directive Principles of State Policy in Part IV of the Constitution, making them non-justiciable. In contrast, political liberties and civic freedoms regarding speech, expression, assembly, movement and association, as well as private property, found protection as fundamental rights in Part III.

2. Individual *vs.* Gronp Entitlements

Certain schemes are meant for the benefit of the individual as a hnman being and some for the reason that the individual belongs to a particular group which requires special attention. This though, may lead to positive discrimination of the other left out groups, yet the discrimination is justified due to government reasoning. For example scholarships for bright students may be for the general population as a whole but scholarships for the scheduled t5ribes are entitlements given to a person who though could claim this entitlement individual level, would claim it for the reason that he or she is part of a group notified by the State Governments or the Union Government.

32 *Supra* note 29.

The Indian Constitution establishes a welfare state. This is clear from the salient features in the Preamble and the Directive Principles of State Policy (DPSP). In this spirit, India is making a determined attempt to fulfil its ideal of a welfare state not only in principle but also through economic planning, thus securing to the Indian citizens justice—social, economic and political.

3. Examples of Entitlement Schemes in India:

Employees' State Insurance Scheme[33] of India is a multidimensional social security system tailored to provide socio-economic protection to worker population and their dependants covered under the scheme. Besides full medical care for self and dependants, that is admissible from day one of insurable employment, the insured persons are also entitled to a variety of cash benefits in times of physical distress due to sickness, temporary or permanent disablement etc. resulting in loss of earning capacity, the confinement in respect of insured women, dependants of insured persons who die in industrial accidents or because of employment injury or occupational hazard are entitled to a monthly pension called the dependants benefit.[34]

The Maternity Benefit Act, 1961 is an Act to regulate the employment of women in certain establishments for certain periods before and after child-birth and to provide for maternity benefit and certain other benefits. Section 4 of the Act says,[35]

Employment of, or work by, women prohibited during certain period.- (1) No employer shall knowingly employ a woman in any establishment during the six weeks immediately following the day of her delivery or her miscarriage.

(2) No woman shall work in any establishment during the six weeks immediately following the day of her delivery or her miscarriage.

(3) Without prejudice to the provisions of section 6, no pregnant woman shall, on a request being made by her in this behalf, be required by her employer to do during the period specified in sub- section.

(4) any work which is of an arduous nature or which involves long hours of standing, or which in any way is likely to interfere with her pregnancy

33 *Available at* http://www.esic.nic.in/index.php (visited on 14/09/2014.)

34 *Ibid.*

35 *Available at* http://www.ilo.org/dyn/travail/docs/678/Maternity % 20 Benefits % 20 Act % 20 1961. pdf (visited on 14/09/2014)

or the normal development of the foetus, or is likely to cause her miscarriage or otherwise to adversely affect her health.

The National Food Security Act, 2013[36] is An Act to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity and for matters connected therewith or incidental thereto.

The National Programme for the Health Care for the Elderly (NPHCE) is an articulation of the International and national commitments of the Government as envisaged under the UN Convention on the Rights of Persons with Disabilities (UNCRPD), National Policy on Older Persons (NPOP) adopted by the Government of India in 1999 & Section 20 of "The Maintenance and Welfare of Parents and Senior Citizens Act, 2007" dealing with provisions for medical care of Senior Citizen. The Act seeks to provide accessible, affordable, and high-quality long-term, comprehensive and dedicated care services to an Ageing population, creating a new architecture for Ageing, build a framework to create an enabling environment for a Society for all Ages, to promote the concept of Active and Healthy Ageing.

Specific objectives of NPHCE are to provide an easy access to promotional, preventive, curative and rehabilitative services to the elderly through community based primary health care approach, to identify health problems in the elderly and provide appropriate health interventions in the community with a strong referral backup support. It aims to build capacity of the medical and paramedical professionals as well as the care-takers within the family for providing health care to the elderly and to provide referral services to the elderly patients through district hospitals, regional medical institutions.

The National Rural Employment Guarantee Act 2005 is an Act to enhance livelihood security in rural areas by providing at least 100 days of guaranteed wage employment in a financial year to every household whose adult members volunteer to do unskilled manual work. This work guarantee can also serve other objectives: generating productive assets, protecting the environment, empowering rural women, reducing rural-urban migration and fostering social equity, among others. For effective management, the legislation also mentions implementation principles and key agencies. The principles are collaborative partnership and public accountability, community participation, panchayats as principal authorities, overall responsibility of district programme coordinator and programme officer, coordination among agencies, and resource support. The agencies are Gram

36 The National Food Security Act, 2013

Sabha and Gram Panchayat at the village level, intermediate Panchayat and PO at the block level, district panchayats and DPC at the district level, state employment guarantee council (SEGC), state government and employment guarantee commissioner at the state level, and central employment guarantee council (CEGC) and Ministry of Rural Development at the central level. The Act further mandates its wide publicity. The statute further mandates planning through preparation of the District Perspective Plan and the Annual Plan. Likewise the stated registration process involves an application to the Gram Panchayat and issue of job cards. The wage employment must be provided within 15 days of the date of application. The work entitlement of 100 days per household per year may be shared between different adult members of the same household.

8. Entitlement Schemes in USA[37]

The programs vary in eligibility requirements and are provided by various organizations on a federal, state, local and private level.[38] They help to provide food, shelter, education, healthcare and money to U.S. citizens through primary and secondary education, subsidies of college education, unemployment disability insurance, subsidies for eligible low-wage workers, subsidy for housing, Supplemental Nutrition Assistance Program benefits, pension for eligible persons and health insurance programs that cover public employees.

The governmental safety net has three basic components:[39]

1) Social Security and Medicare for the Elderly

2) Unemployment insurance and worker's Compensation

3) Anti-poverty or Means-tested welfare programs

The Social Security system is the largest and most prominent social aid program. Medicare is another prominent program.[40] Following is a list retrieved from White House Historical Tables.[41]

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37 Feldstein, "Rethinking Social Insurance", 95(1) AER 2006 1–24

38 *Ibid.*

39 Robert Rector, "Examining the Means Tested Welfare State: 79 Programs and $927 in ANNUAL spending" *Available at* http://budget.house.gov/uploadedfiles/rectortestimony 04172012.pdf (visited on 15/09/2014.)

40 Esping-Andersen, G.,*The Three Worlds of Welfare Capitalism*, (PUP, Princeton,1991).

41 Historical Table of White House available at http://www.whitehouse.gov/omb/legislative-affairs visited on 18/09/2014.

9. Problems with Implementation of Entitlement Schemes

Every year, developing countries introduce various policies and welfare schemes to address the larger issues of poverty, social exclusion and healthcare services. Yet, many of these schemes and entitlements don't reach the bottom of the pyramid. In many cases, citizens don't know about the existence of these entitlements. In some cases, they know about the existence of these schemes – but they have no idea how to go about availing it. On the other hand, the various NGOs and policy makers lack information that allows them to understand why public welfare schemes do not reach the masses or promote evidence based policy making and designing of welfare programs.

A research paper published by Guy Standing[42], for the UNRISD[43] talks of why too many conditions on entitlements to schemes such as cash transfer schemes to the poor may actually be an infringement on the human rights of the poor.

This means they offer to overcome people's poverty if, and only if, they meet certain conditions, acting in ways that policy makers, or those designing policies, regard as desirable. Implicit in that judgment are several presumptions.

He says, by definition, conditions are paternalistic and patronizing, and thus contrary to human rights and freedom. In this regard, they offend two further principles of distributive justice. The first is the Paternalism Test Principle: A policy is just only if does not impose controls on some groups in society that are not imposed on the most free. If a poor person is only assisted if he/she fulfils a condition[44] not imposed on others in the community, that limits the person's freedom. And the policy presumes the designers know what is best for the individual or family and that there is a single best way of behaving. Social justice also requires policy makers to respect what might be called the Rights-not-Charity Principle: A policy or institutional change is just only if it extends the freedom, or rights, of the citizen while curbing the discretionary power of administrators, bureaucrats or officials. It is impossible to imagine a conditional scheme that does not give discretionary power to those required to put into effect the conditions. To meet minimal

42 Guy Standing, a British economist, is Professor of Development at the School of Oriental and African Studies, University of London. He is former Director of the Socio-Economic Security Programme of the International Labour Organisation, and is co-president of the Basic Income Earth Network that promotes the right to a basic income.

43 Guy Standing, "Conditionality and Human Rights", available online at http://eprints.soas.ac.uk / 18499 / 1 / Conditionality % 20 and % 20 Human % 20 Rights % 20 _ % 20 News % 20 % 26 % 20 Views % 20 _ % 20 UNRISD. pdf visited on 15/09/2014.

44 *Ibid.*

requirements of fairness, policy makers must be required to ensure those covered by the conditions are fully informed of them and their rationale. Mostly, as the policy stems from a view that people are ignorant and unable to understand, what is best for them, little attention is given to public education. What no evaluation seems to have done is test out a combination of unconditional cash transfers and public education on the virtues of particular behaviour without a threat of conditionality.

Conclusion

The dignity of an individual cannot be exalted unless there are provisions for realising the rights which otherwise would be only on paper. As Prof Baxi in his book, the Future of Human Rights[45] talks of the two sides of the rights paradigm, one being the rights themselves and the other the violations of human rights, the framework any legal human right should incorporate measures to perhaps quantify and provide the basic infrastructural and remedial measures in the norm itself. This would expand the scope of human rights to include not only the rights on paper but also guarantees in terms of remedies in case of violation. The State plays a positive role in guaranteeing the basic human rights which are of a socio economic nature and which in turn may alse be connected to the rights which may be called fourth generation rights. The concept of entitlement is closely related to the concept of human dignity and in turn the concept of justiciable human rights. A legal human right may sometimes be insufficient to ensure this dignity unless the State ensures some rights by positive intervention. Entitlements are a manifestation of the State's commitment to upholding the dignity of the human being, all and sundry. Sometimes the entitlements come in the form of a patriarchal attitude of a particular person or the State, and sometimes the question is of demand. Whatever is the basis, the State or the private individual gets into the boots of the obligated. Entitlements are rights in themselves. As against void rights which lose their sanctity as soon as they are not realised, and this with impunity, the rights to entitlement are those which have a very positive connotation both in guaranteeing the rights and also expanding the scope of rights. The enforcement may however depend on State funds in many cases but at least there would be a remedy available if the entitlement is in the form of a guarantee. This paper may not have complete justice to the concept of entitlement but an attempt has been made to explain the various connotation of this concept as realistically as possible. Yet again the researcher feels that there is more to it than what has been gathered in a short span of time.

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45 Upendra Baxi, *The Future Of Human Rights*, Oxford University Press, Oxford (2002).

There are some problems with entitlements in the practical sense of the word and has been discussed by some political scientists to have had curbs on the larger public good. The mention largely is of cash transfer schemes in this context. However, from an Indian perspective, the entitlement schemes are largely unconditional and a few on the schemes are conditional cash transfer schemes which have a larger cause and purpose for keeping them that way. For example cash transfers to girl children after reaching different stages in academies is a conditional one, that is, on fulfilling the requirement the cash is transferred to the girl's bank account.

In America for example, parents have instead instilled in their children the idea that "entitlement" should have a positive connotation, and that any public assistance programs should be favoured and supported, and that "labour" is no longer a term to take pride in, but instead something to reject at all costs. Parents who in their youth happily took odd jobs to provide for their families, have raised children who would rather not work at all then take a job they do not believe is luxurious enough for them, and have no shame in sucking society's economic pool dry. This never-ending cycle of blame evasion is perpetuating the trend.

Economic, social and cultural rights are recognised and protected in international and regional human rights instruments. Member states have a legal obligation to respect, protect and fulfil economic, social and cultural rights and are expected to take progressive action towards their fulfilment. While immediate fulfilment may not be possible due to the economic situation of a country, postponement of proactive action is not permitted. State parties must show genuine efforts to secure the economic, social and cultural rights enshrined in the ICESCR.

However the right to freebies in various jurisdictions have brought about the issues of using the State resources in a way that the development of the human capital in terms of productivity and labour has been a concern for many policy makers.[46] In 2007, the *International Social Security Review* released a detailed examination of the effects of the expansion of these social safety-net programs on the economy.[47]

In its simplest form, the prediction of this theoretical literature is that larger welfare states will have a negative impact on growth. Higher levels of taxes which are necessary to finance most social programs are expected to distort and lower the incentives to invest of private actors and, thus, slow down growth," the report concluded. It also examined the impacts of these programs on employment

46 Kate R Rourke, "You Owe Me; Examining a Generation of Entitlement" 3(1) ISJ 2011 1-2.
47 *Ibid.*

determining that statistics supported the fact that "larger welfare states are inimical not only to growth but also to employment," due to their tendency to raise the cost of labour and thereby decreasing employers ability to afford to employ more workers.

Under the guise of noble purpose the government had gradually usurped the space occupied by the private sector, co-operatives, individuals and social groups. This spread of Leviathan has been accompanied by a gradual but pervasive deterioration of governance.[48] It has also distorted the attitudes and operations of business, workers and farmers. Though this deterioration started with specific areas of government operations and specific regions of the country, by now encompasses the entire country, every State and every field of activity in which government is involved. In some States and in regions of other States Government failure has now reached a point at which government has become non-functional. It cannot even fulfil the basic role, the provision of 'Public goods' that it has played for centuries leave alone the grandiose development role envisaged for it in the development paradigm of the second half of the 20th century. However the fact remains that entitlements include a basic level of social security for the old, disabled and infirm, for children and those who are unable to get any work. A society cannot let its citizens starve or suffer from chronic hunger and government must provide food to the destitute. Human beings need a certain minimum consumption of food and non-food items to survive. In most of the countries the definition of poverty has been a matter of concern in providing entitlement benefits of certain kinds. However the perception regarding what constitutes poverty varies over time and across countries. Nevertheless there is need for a measure of poverty. Only then, it will be possibleto evaluate how the economy is performing in terms of providing a certain minimum standard of living to all its citizens. Measurement of Poverty has, therefore, important policy implications.

48 Arvind Virmani, "Challenges and Policy Response: Macro Policy Framework for Development", Background Paper for the Tenth Plan Development Policy Division Planning Commission, April 2002.

The Invisible Work: A Socio Historical Perspective on Domestic Work

Nikita Audichya*

ABSTRACT

Domestic services are ever present but invisible. With the growth of part time domestic workers, there has been a steady contractualisation of domestic work but the working conditions remain extremely exploitative, demeaning and such that the subordination of the worker to the employer is expected as a given norm. This article historicizes domestic work and places it within a theoretical framework to highlight the causal link between certain historical material conditions and the status of domestic work in contemporary times. In doing so, the article employs the term culture of domestic servitude[1] to show how domestic work, precisely because of its specific historicity, should not be seen as just merely another occupation of the wage economy. It is essentially a hierarchical relationship between the employer and the domestic worker that is constitutive of subordination and dependency which has been preserved, naturalized and humanized by being interspersed into everyday practices, customs and symbols. Through an intricate theoretical framework, the aim is to highlight how domestic servitude is premised on a collation of several structures of oppression ranging from gender to caste, class and race. In the Indian context, the caste system provided an indigenous culture of servitude where occupations were hierarchically arranged and tied to certain social groups who had negligible opportunity of upward social or economic mobility and was rendered functional through control and subordination of the female subject. Gender then becomes an important starting point for an analysis of culture of servitude. The article thus endeavours to put into a coherent theoretical perspective how persistence of domestic work occurs within a larger culture of domestic servitude that is itself made of convergence of gender, class and caste.

Keywords: *Domestic Work, Sexual Division of Labour, Caste, Capitalism, Domestic Servitude*

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1 Ray, Raka Qayum, Seemin. *Cultures of Servitude: Modernity, domesticity, and Class in India,* Stanford University Press (2009)

INTRODUCTION

"We strongly condemn the incident...this is a matter of India's honour and the country's prestige is involved in this. We will do the needful to protect India's interests. It is no longer an issue of an individual, but the sovereignty of a nation is involved. The country will not be let down. Today, our paramount concern is to ensure that the dignity of our officer is preserved. The tragedy is that this is not an incident in which two countries are involved. This is an incident in which individuals are involved. It is not illegality that she is accused of, but the illegality she refused to oblige"[2]

This is what the former External Affairs Minister Salman Khurshid had to say about the arrest and strip search of Devyani Khobragade. Khobragade, senior Indian diplomat, had been arrested on the charge of underpaying and exploiting her domestic worker and was later indicted on fraud visa charges. Her arrest and cavity search had evoked strong response from all quarters of Indian politics and media who accused the American government of hurting the honour of the country. The end result of this entire episode was that Devyani Khobragade got shifted to the permanent mission of India to the United Nations. In the midst of extended television debates on racism of the American state, one person who was completely forgotten was Khobragade's domestic worker. Neither the state nor the media ever tried asking whatever happened to her domestic worker who had apparently been underpaid and ill treated. Her father hinted towards a foreign conspiracy when he was questioned about his daughter abusing Sangeetha Richardson, her domestic worker[3]. This difference in the attitude of the Indian state towards its two citizens, one an Indian diplomat and the other her allegedly exploited domestic worker was vastly different. While arrest of Khobragade amounted to national shame, accusation of exploitation against Khobragade by Richardson did not. The Indian state made its stand very clear as to who it thinks is worthy of being considered as a citizen and on whom ideas of national shame and honour could be constructed. While this attitude may be explained along the lines of the class bias of the state, it reveals a very congenital element of our social and political landscape, the invisibility of the domestic worker.

Domestic work is a quintessential feature of middle and upper classes' household in cities and metros[4]. The number of women working as domestic worker all

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2 http://www.hindustantimes.com/india-news/devyani-s-arrest-a-matter-of-india-s-honour-says-khurshid/article1-1163825.aspx (accessed on 24/03/2014)

3 http://news.oneindia.in/new-delhi/uttam-khobragade-sangeeta-richard-could-be-a-cia-aagent-1363433.html (accessed on 1/04/2014)

4 Anderson, Bridget, *Doing the Dirty Work? The Global Politics of Domestic Labour,* Zed Books, New York (2000); Ray, Raka Qayum, Seemin. *Cultures of Servitude: Modernity, domesticity, and Class in India*, Stanford University Press (2009); Neetha, N, "Contours of Domestic Service in India": *Indian Journal of Labour Economic*, Vol 52, No.3 (2009)

over the country easily crosses a million[5]. In spite of that domestic workers, as part of the informal economy, are overworked, underpaid and work under some of the most exploitative working conditions while barely managing a living. Despite its prevalence in modern times, paid domestic work is still miles away from being considered as a formal occupational category and still needs regulation by and recognition from the State. Paid domestic work also becomes the medium through which differences rooted in identity that intersect with each other at various junctures, be it class, gender or as in the case of India, caste, get reflected. The continued negligence of paid domestic work can be understood from the fact that it takes place inside the home, an innate feature of the private sphere which has traditionally never been considered as a site for work. And the fact that the private sphere deals with, what Glenn calls, social reproduction, "social reproduction here refers to an array of relationships and activities involved in maintaining people both on a daily basis and intergenerationally"[6]. Since social reproduction does not result in "production" of commodities that can be consumed in the market while "existing independent of the worker"[7], it has often been neglected or shunned by political theorists and economists alike. It is this imagination of the public and the private as two mutually exclusive spheres that becomes the crucial reason behind paid domestic labour not being recognized as work. This ideological distinction also happens to be gendered as it results in the feminization of the private realm. Anderson believes that paid domestic work is indeed dirty work, not only because it is snubbed by the state but also because it is demeaned the world over and carried out under conditions of extreme degradation and humiliation. There is heterogeneity of experiences and not all domestic workers may feel abused or humiliated but the lack of authority and control that a domestic workers exercises vis-a-vis her work and in terms of setting limits to her tasks is a quintessential feature of paid domestic labour[8].

Through this article I will construct a theoretical framework within which I will perform a historical and social analysis of domestic work. I will begin with Coser's analysis of domestic work to highlight the paradox that despite the ideological incompatibility between capitalism and domestic work, the latter continues to exist in contemporary times. To streamline perspective and elaborate upon the aforementioned point, I will further situate domestic work in a historical perspective using the writings of Glenn. For my analysis of domestic work in India, I have relied on the writings of Banoerjee and Chatterjee. Domestic work

5 Neetha, N. "Contours of Domestic Service in India" *Indian Journal of Labour Economic*, Vol.s 52, No.3 (2009)

6 Glenn, Evelyn Nakano, "From Servitude to Service Work: Historical Continuities In the Racial Division of Paid Reproductive Labor" *Signs*, Vol. 18, No.1, (1992) pp. 1-43

7 *Ibid* at 5

8 Anderson, Bridget. *Doing the Dirty Work? The Global Politics of Domestic Labour*, Zed Books, New York (2000)

in India emerges as a complex convergence of class, caste and gender hierarchies which is based on subordination and unequal power relationship. It is here that I have employed the term "culture of domestic servitude" to talk about the way in which domestic work needs to be looked at in the Indian context. I then introduce the Hegelian framework of master slave dialectic to further complicate this culture of domestic servitude[9]. The conclusion of my chapter is essentially a plethora of questions through which I have tried to analyze if an intersection of caste and class hierarchies along with gender is the way forward for understanding the nature of domestic work in India.

The "redundancy" of domestic work: an analysis of domestic work

Coser's analysis on how the role of the "servant" was incompatible with the tenets of the modern society stems from a particular understanding of the master servant relationship. Arguing that the master servant relationship had primordial, feudal roots, he argued that "the master-servant relationship has been one of the primordial relationships in all of Western culture". It was, "the prototypical relationship between a superior and an inferior"[10]. This relationship between two unequals was grounded in benevolent paternalism that constantly infantilized and asexualized the servant. Coser also believed that the occupational role of the servant was marked with particularism and that the family always sought to "absorb the total personality of the servant" and tie him to the household in a "totalistic manner", something that ultimately resulted in the objectification of the servant[11]. Further, he claimed that,

"The servant's role is pre modern in still another respect; it is highly diffuse and non-specific, and it involves only tasks that are de-fined as menial and hence below the dignity of the master and his wife. To be sure, large households might have a division of labour among its servants and assign separate tasks to cooks, pastry-makers, butlers and the like. The more specialized the work, the higher the rank of the servant in the internal hierarchy of the household. But the tasks of most servants continued to be characterized by functional diffuseness." (Coser 1973: 32)

Coser opined that these characteristics formed the basis of domestic work and therefore by its very nature, it was incompatible with modern capitalism. He believed that the maxim on which domestic work as an occupation was premised

9 Ray, Raka Qayum, Seemin. *Cultures of Servitude: Modernity, domesticity, and Class in India*, Stanford University Press, (2009)

10 Coser, L. Servants: "The Obsolescence of an Occupational Role", *Social Forces, Oxford Journals, Vol 52, No1*. (1973) p. 31

11 *Ibid* at 32

had either ceased to exist or undergone massive transformation. Thus the ideological legitimation that once existed in the form of a religious authority that exhorted the necessity to stay within one's calling and adherence to the duty of obedience clashed with modern principles. These ideas declined further in prevalence "when philosophical radicalism, liberal protestantism, and equalitarianism began to seep into the lower strata, if often in somewhat distorted forms"[12]. Most importantly, nineteenth century also experienced rapid expansion of industrial capitalism that brought about contractual form of labour, thereby debasing moral obligation which earlier formed the edifice of domestic work. In fact, "The anomalous position of the servant in the modern occupational structure becomes apparent if it is compared to two key characteristics that distinguish the modern worker from his forebears in the preindustrial world: his abode is typically separated from that of his employers, and his labour commitment to that employer is limited to a specified number of hours" (Coser, 1973: 32)

Coser argued that this blurring of boundary between the place of residence and the place of the worker went against the nature of the work of a domestic worker. Without every explicitly saying it so, Coser believed that capitalism had brought about major changes within the occupation of domestic work. It was precisely over here that Coser introduced an extremely important insight. He argued that:

"Such premodern relationships between superior and inferior can exist only as long as religious legitimations for it are accepted by the servant, and no alternative employment opportunities are available. When this is no longer the case, the role becomes obsolescent and only persons suffering from marked inferiorities and peculiar stigmas can be induced to enter it." (Coser, 1973: 31).

Even though he does not explicitly use the term "capitalist", it is quite evident that by modern he is essentially referring to the time period post the emergence of industrial capitalism. He thinks there is something about domestic work that makes it external to the modern society despite being a part of it. For Coser, the reason is that domestic work consists of mode of production that was made redundant years ago. Thus the feudal and primordial nature of domestic work does not naturally find place in capitalism that is dominated by contractual labour and by the absence of any legitimacy by any superior religious authority. Despite domestic work being situated outside the dynamics of capitalism, it never disappeared from the scene and people continued to be part of this occupation. He implicitly points out the presence of structural constraints as the reason for

12 Coser, L., "Servants: The Obsolescence of an Occupational Role", *Social Forces, Oxford Journals, Vol. 52*, No 1 (1973) p. 37

the sustenance of domestic work within a capitalist framework. He employs the words "marked inferiorities and particular stigmas" in his explanation which could be easily interpreted to mean structural restraints in terms of gender, class or any other form of economic or social barrier which renders capital, both economic and cultural, inaccessible or creates situation of unequal accessibility of this capital for certain social categories leaving them more vulnerable and with lesser employment opportunities than the others.

One of the shortcomings of Coser, however, has been his inability to draw a causal link between capitalism and domestic work. In his historical analysis Coser has written about the roots of domestic work being firmly planted in feudalism and about its primordial nature, as well how the occupational role of the servant underwent a major expansion in the eighteenth and the nineteenth centuries. This observation has been central in understanding how domestic work has been buttressed by class and gender and in discerning the role of the servant in the maintaining the sanctity of the middle and the affluent classes. He brings to light an essential reason for the continuance of this anachronistic relationship even in times of "modernity", the refusal of the household to subject itself to the division of labour and held on to the "diffuse servant role". However, he does not raise questions about the ideological and structural reasons behind the obstinacy of the household in holding on to the diffused servant role and if that obstinacy gave rise to any other form of division of labour. This lacuna has been filled by the works of Glenn on domestic work.

Industrial Capitalism and Domestic Work

Glenn's arguments on industrial capitalism provide the perfect setting for the rise of domestic work as an occupational category[13]. Borrowing from the Marxist literature, Glenn draws a conceptual wedge between production and reproduction. While production is characterized as encompassment of "production of necessities of life and of tools and power needed for the reproduction", reproduction assumes the form of social reproduction and it is employed to refer to

"...the array of activities and relationships involved in maintaining people both on a daily basis and intergenerationally. Reproductive labour includes activities such as purchasing household goods, preparing and serving food, laundering and repairing clothing, maintaining furnishings and appliances, socializing children, providing care and emotional support for adults, and maintaining kin and community ties" (Glenn, 1992: 2)

13 Glenn, Evelyn Nakano, "From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor" *Signs*, Vol. 18, No. 1, (1992) pp. 1-43

Precisely because of the path of development that industrial capitalism took, social reproduction began to be disproportionately carried out by women. Precisely because of its demographic composition and because it took place outside the purview of market, social reproduction got relegated to a position of complete insignificance. Glenn provides an important historical narrative to show how the rise of industrial capitalism encouraged women in activities of social reproduction and ultimately proved pivotal in producing the binary distinctions of public and private sphere that demoted social reproduction to the state of unimportance. She argues that prior to industrialization; the household was the site for both production as well as reproduction. Though women were in charge of reproduction, they also engaged in production activities that were carried out at the level of consumption by the household. With the expansion of capitalism, the production based activities were appropriated by the market and thus was born the mutually distinct spheres of private and the public. Thus, "an idealized division of labour arose in which men's work was to follow production outside the home, while women's work was to remain centred in the household"[14]. Thus, with an expansion in the range of goods manufactured outside of home, "household work became increasingly focused on reproduction"[15]. The ideological conceptualization made public synonymous with the production based activities that were to be carried out solely by men while women were pushed to the private sphere, and they began to be recognized increasingly as custodians of this sphere. This ideological divide between the productive labour of the man and the non market activity of the woman was premised on the conglomeration of gender with race and class as this divide meant very little for those who were not middle class and white. These ideologically disparate categories were not applicable on the "working class households, including immigrant and racial-ethnic families, in which men seldom earned a family wage; in these households women and children were forced into income earning activities in and out of the home".[16] This divide sought to work best for the white middle class and affluent families and it is within this segment of the population that the divide was ritualistically adhered to and any deviation from it meant strict societal ostracization. After appropriating the activities of reproduction, by the twentieth century the market had turned its gaze on social reproduction so that such activities as taking care of the elderly, cooking food came within the ambit of "cash nexus"[17]. "In addition, whether impelled by a

14 Glenn, Evelyn Nakano, "From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor" *Signs*, Vol. 18, No. 1, (1992) p. 5

15 Ibid

16 Glenn, Evelyn Nakano, "From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor" *Signs*, Vol. 18, No. 1, (1992) p. 7

17 *Ibid*

need to maintain social control or in response to pressure exerted by worker and community organizations, the state has stepped in to assume minimal responsibility for some reproductive tasks, such as child protection and welfare programs"[18]. This annexation of social reproduction saw "a large army of low-wage workers, mostly women and disproportionately women of colour" supplying labour to the market[19]. However, not all reproduction based activities could be appropriated by the market precisely due to their limited potential in making profit. Nonetheless, industrial capitalism produced an ideology that was based on a rigid distinction between activities that were to be carried out by men and activities that were essentially female in character[20]. Not only did the activities get divided into market and non market on the basis of gender, within that was another level of distinction between what activities could be carried out by which category of women. This distinction was infused with racial and class hierarchies as well in such a way that it meant an expansion in the reproductive responsibilities of the white affluent/middle class woman as there were now "rising standard of cleanliness, greater emphasis on the role of the woman as the nurturing mother at the time when technology had done little to reduce the drudgery of the household work"[21]. It is here then that we find a significant increase in the number of servants employed by various households. Most notably, "domestics were employed to clean house, launder and iron clothes, scrub floors, and care for infants and children. They relieved their mistresses of the heavier and dirtier domestic chores which meant that the White middle class women were freed for supervisory tasks and for cultural, leisure, and volunteer activity or, more rarely during this period, for a career"[22].

Thus any study on the history of paid domestic work in the last few centuries cannot be done without putting it within an ideological matrix that most notably converged class and gender apart from infusing together various social categories. Essentially Glenn points out how the rise of capitalism is inextricably enmeshed into this matrix. So while the white middle class woman was expected to maintain her feminine virtues, the saddle of domesticity and the work that it entailed came in the way of the development of those feminine virtues. Domestic workers were seen as an answer to this conundrum. The ideological paradigm that had been

18 Glenn, Evelyn Nakano, "From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor" *Signs*, Vol. 18, No. 1,(1992) p. 7

19 *Ibid*

20 *Id*

21 *Id*

22 *Id* at 8

created neatly recognized home as an exclusive domain of women that had to meet a certain standard of bourgeois living. Through the evocation of gender and class (and at times racial) hierarchies, working class women were deemed ideal for performing domestic work as they did not have to carry the burden of "feminine virtues" on their shoulders.

Thus, reproductive labour was organized along class, gender and racial lines. All of this however was done in such a way that it seemed like the most natural order of life. It is this period then which sees, as Coser had analysed, a significant expansion in the field of domestic work. The sexual division of labour that emerged in the nineteenth century was unique in the way that it created the mutually exclusive categories of the public and the private or production and social reproduction and occurred along with construction of other simultaneous binary categories in the form of the familiar and the unfamiliar, home and abroad, so that a neat ideological framework converging gender, and other social categories such class and race could be generated. This existence was in the form of an ideological framework that historically constructed the labour relations in a way that social relation of inequality and domination were normalized and allowed to permeate both the public and the private sphere. Thus, it becomes important then to look at domestic work not simply through the prism of employer-employee perspective but to examine it in the form of a culture of servitude that encompasses the differences of class, caste/race and gender and which is realized essentially in the form of power relationship. A cursory glance through the Indian context will reinforce this observation.

Domestic servitude and the binary of gharre/bairre

In the Indian context, caste has always played a pregnant role in defining occupation structure and the case of the domestics has been no different. Most of the literature on domestic workers in the West considers domestic work feudal in both its origin and form that has found a revival in contemporary time because of the changes in the international labour force mainly due to increased migration of workers from the third world. It is again imperative to evoke Coser's analysis. Even at a global level, domestic workforce consists of primarily women from the poorer nation states, thereby yet again vindicating his stand on marked inferiorities, which are socially constructed, being the pull factors for many to enter domestic work[23]. In India, however, caste system made domestic work look not like a defunct mode of production superimposed from the past but s more like a seamless

23 Anderson, Bridget. *Doing the Dirty Work? The Global Politics of Domestic Labour* , Zed Books, New York (2000)

continuation from the past. Yet, the socio economic transformations brought about by British colonialism had its impact on the nature of domestic work in India too. The British perception of what constituted middle class played a significant role in determining what middle class meant in India as well so that, for the first time, domestic workers became part of the symbolic capital of the newly formed urban middle class households.

History of any occupation in India cannot be understood without looking at it through the prism of caste system. Caste system existed in the form of a hierarchical structure that sought to place various constructed social categories on that hierarchical ladder on the basis of the work that they did. However, construction of caste soon became hereditary in nature and caste in itself turned into an unalterable social status. While existing as an institution in the way of organization of social groups, it also existed as an ideology that legitimized this unequal organization in the economic and social system and operated as a closed system. The ideological legitimation of caste was evoked through the image of the body wherein the Brahman was the head of the Brahma while the Shudra came from his feet. This corresponded and normalized the real life economic and social position of various caste groups. Till the colonial period, domestic workers, many of them being slaves, were hierarchically divided along caste lines into those who worked on the fields and those who worked indoors. Field slaves generally tended to be the untouchables, whereas most in-house servants were the low caste shudras, and sometime members of the high caste[24]. Being one of the oldest occupations in the world, history of domestic work in India overlaps with that of slavery and of colonialism. Since domestic slavery officially existed in India till 19th century, domestic work was most common amongst the slaves[25]. The coming of the British colonialism in India brought about massive changes in the social landscape and witnessed not only new class entrants but also the introduction and strengthening of new perspectives. Changes brought about by the British in the political and economic landscape had far reaching ramifications in the social realm as well. Banerjee provides an elaborate account of these changes through the rise of the middle class. Talking about the middle class aspirants, she writes

"The first four decades of the nineteenth century witnessed the growth of a newly rising educated middle-class (madhyasreni, madhyabitto) who came from predominantly upper caste Hindus (Brahmans, Kayasthas, and Vaidyas) and

24 Fuchs, Stephens, *At The Bottom Of The Indian Society, The Harijan and other Low Castes, Delhi*, Munshiram Manoharlal Publishers Pvt. Ltd., New Delhi: (1980) p. 55

25 *Ibid*

called themselves bhadralok, literally meaning "respectable men" or "gentlemen." The members of this class, comprising a heterogeneous, upwardly mobile, cultural community of professionals, bureaucrats, and civil servants, were vital for the maintenance of the British rule and they claimed to represent "the native public opinion." Bhadramahila or the "respectable" lady, often referred to as the "new woman," was the female counterpart of the bhadralok representing the wives, mothers, daughters, and sisters of the urban professionals. The ideal bhadramahila, as defined by the middle-class males, embodied the help mate role of the Victorian lady with the reinvented notion of chaste, sacrificing, Hindu woman."[26]

The new model of the bhadramahila emerged as a concept and in actuality as something that had a strong edifice in social segregation. Middle-class women were now distinguished not only from the "westernized women" but also from the majority of "common" working women who were identified as loud, vulgar, coarse, and sexually promiscuous. This historical narrative appears in congruity with Chatterjee's analytical categories of the spiritual and the material. Social institutions were divided into the material and the spiritual. While the spiritual referred to the realm of the culture and tradition over which British sovereignty was to be resisted, the material corresponded with science and technology, statecraft, domains over which the colonial superiority had been accepted. The way forward then was the imitation of the British in the domain of materiality while leaving the spiritual realm free of colonial interference[27] (Chatterjee, 1993).

This spiritual realm or "inner domain" became a site for one of the most important nationalist projects. The inner domain or the home began to be increasingly seen as a private space. The middle class conceived different ideas of social respectability and much like the western counterpart, privacy of the home became one of the means of doing so. This inner domain had several components, family being one of them. Women, however, emerged as the identifiers of this inner domain. The Bhadramahila occupied an extremely pivotal position within this ideological landscape. She was expected to be chaste, sacrificing and submissive, sartorially distingnishable from both her Western and from "common woman" counterparts. Education was to be encouraged as instilled a certain degree of cultural capital within women while also equipping them with the knowledge to run the household even more efficaciously. The bhadramahila was conceived to be emancipated from her medieval counterpart as she had access to education

26 Banerjee, Swapna M., "Down Memory Lane: Representations of Domestic Workers in Middle Class Personal Narratives of Colonial Bengal", *Journal of Social History* Vol 37, Number 3, (2004) p. 695

27 Chatterjee, Partha, *The Nation and Its Fragments*, Cambridge University Press (1993)

and could even step out and operate within the public domain as long as she knew that her true place lay within the inner domain[28]. The "home" then became a political space where new gender and class roles get constituted and continually asserted.

In spite of the ideological distancing one medium of interaction between middle-and lower-class culture and relationships was the domestic service. In tandem with the analytical inferences drawn by Glenn, Bannerjee argues that as the role of the housewife became more and more elaborate and complicated, the last two decades of the 19th century consequently witnessed an increase in the employment of domestic servants[29]. She argues that domestic work in colonial Bengal was predicated on the growth of an urban wage economy that was operating within a very specific type of cultural milieu. The "servant" then served two purposes , it strengthened the middle class hegemony by giving it a veneer of paternalism and helped in defining the characteristics of the middle class woman. Thus, the domestic work was created on the foundation of both oppression and nurture. The number of domestic workers expanded rapidly in nineteenth century as it became part of the status symbol of the Bhadrolok of the 19th century. Moreover, the low wages at which they could be bought further encouraged the British families in India to employ them on a large scale. This middle class was placed in subordination to the British but in position of dominance and superiority over the "other groups". Home, while becoming the site of anti colonial oppression, also became the site where this difference based on a sense of superiority was to be exercised and the domestic worker emerged as a medium through whom this could be done.

Domestic work in India has been greatly influenced by caste system which in turn has been shaped by servitude, mutual dependence and exclusion. Thus, it would be wrong to say that only colonialism has caused an erosion of the worth of domestic work but colonialism provided a new cultural setting within which domestic work could operate, acquire new meaning and become the basis of sexual division of labour. Here, I use the word cultural rather than ideological. The word ideology pertains to a system of values, symbols and thoughts that constitute and preserve specific class interests and has power relations at its core, it does not account live experiences and hence is unable to express the social process of experience and consciousness in terms of power. It is here that

28 Chatterjee, Partha, *The Nation and Its Fragments* ,Cambridge University Press,(1993)

29 Banerjee, Swapna M., "Down Memory Lane: Representations of Domestic Workers in Middle Class Personal Narratives of Colonial Bengal": *Journal of Social History* Vol. 37, Number 3, (2004) pp. 681-708

the word "culture" comes to rescue in the sense that not only is it inclusive of class relations but is also concerned with meanings and values as they are actively lived and felt. Servitude generally refers to the multitudinous forms of unfree labour that have existed historically in pre colonial and colonial period. Thus servitude can refer to the slavery arising out of caste system to the practice of racial exclusion and discrimination that was carried out during the British rule. However, in the context of "domestic servitude", servitude can also be employed to include the persistent forms of submission, dependency and undefined, often harsh, working conditions that are the quintessential features of paid domestic work in most part of the world.

Culture of Domestic Servitude

Since I address domestic work as a form of culture of domestic servitude, I find it imperative to view it through the Hegelian master slave dialectic. It nuances the rather simplistic understanding of domestic work as patron client relationship which tends to emphasize only on the dependency of the domestic worker. While studying domestic work as a culture of servitude arising from the confluence of specific historical and material conditions, it becomes important to understand that subjectivity of one is shaped by that of the other. For the middle class woman to emerge as the paragon of virtue and culture, it is important to maintain the existence of a working class woman who is uncouth and unclean enough to perform certain tasks that are considered degrading. It is not that the work in itself is demeaning, but that the structural relations of class, gender and to a great extent caste make it a stigmatized occupation. For something to remain stigmatized, it is essential that some people are condemned to do it while others are kept out of it and the latter therefore become perversely dependent upon the other. This mimetic relationship is captured best through the Hegelian master slave dialectic.

"One is the independent consciousness whose essential nature is to be for itself, the other is the dependent consciousness whose nature is to be or live for another. The former as the lord, the other is the bondsman...the truth of the independent consciousness is accordingly the servile consciousness of the other" (Ray and Qayum, 2009: 5)

This shows that in maintaining the culture of servitude, the dominant is dependent upon the continued existence of the dominated to maintain his domination. The dominated continues to be in the position that it is to affirm the reality of the dominant or the master. The entire ideological binary distinctions between the familiar and the unfamiliar, the public and the private and between the Bhadramahila and her working class counterpart can be explained through this complex relation

of domination and dependency. In this way then culture of domestic servitude reflects not only the dependency of the domestic worker but even that of the employer upon the worker to maintain his/her position of superiority. Similarly by attributing one with independent and the other with dependant consciousness, it becomes much easier to highlight the complete absence of mutual recognition in domestic labour relations. Thus while the dominated continues to construct itself through the lens of the dominant, the recognition of the latter is not forthcoming. The reason behind this non recognition can be attributed to several social cultural, social and economic factors ranging from caste to race to gender.

Conclusions

Capitalism created new class inequalities that accommodated within its fold the already existing structural inequalities such as those based on race while creating and normalizing new inequalities based on gender. Consequently when colonialism came to India, the new middle class which was ultimately created mirrored the same class inequalities that were prevalent in Europe. Thus, while the caste system had ensured degradation of certain type of work, the emergence of middle class meant that the same caste hierarchies were to be now echoed through the language of class inequality so that domestic work ceased to be a caste duty but evolved into a status symbol for certain classes. In this process, class conciliated the caste inequality and gave it a veneer of modernity by making domestic work seem like just any other occupation of the wage labour economy.

Can adam Plead Abortion as a Gronnd for Divorce Against Eve?: Aurisprodentiai Analysis

Renjith Thomas* and Devi Jagani**

ABSTRACT

Marriage is a basic institution of every society. The construction of the concept of marriage in the Hindu society was purely religious in ancient times but through the process of legislation we codified and made absolutely binding the rules governing marriage. This codification of rules becomes extremely problematic when it perpetuates patriarchal draconian norms without giving due consideration to the human rights, legal rights, constitutional claims and philosophical eonsiderations of the parties. The right to abortion, one of the several reproductive rights of a woman, when treated by the judiciary as constituting mental cruelty to husband and awarding a decree of divorce based thereon raises serious academic issues such as questions relating to the sexual rights of women within a marriage, gender equality of the law relating to divorce, existence and extent of absoluteness of the right to fatherhood etc. This research paper is an attempt to analyze the above issues from a jurisprudential perspective. The focus of the paper shall be on evaluating how the views of the mainstream society have influenced the judicial interpretation/construction of the concept of cruelty as a ground for divorce in favor of husband by disregarding the larger considerations of the rights of the wife and how far suck attitude of the judiciary delivers justice and adheres to the constitutional ideals.

Keywords: *divorce, cruelty, abortiou, reproductive rights, feminist jurisprudence, right to privacy*

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Introduction

Marriage, as had been reiterated on several occasions, is a basic social institution and it is the foundation of a stable family and a civilized society.[1] It is universal in the sense it is present in all human societies in one form or the other. For Hindus, marriage is one of the 16 *samskaras* or sacraments that a person has to perform in his/her life[2] and therefore it follows that the marital union in the Hindu society has a sense of sanctity attached to it. The marriage bond was primarily meant for the performance of religious and spiritual duties ordained by the scriptures and it is assumed to play an important role in allowing a person to fulfill all the four goals of his life – those of *dharma, artha, kama* and *moksha*.[3] In ancient society, the various religious scriptures strictly regulated marriage among Hindus and until 1955 there was no codified personal law for the community. In this time period, the marital union was seen as being indissoluble/permanent and no concept of divorce existed in the strict sense of the term and the husband and wife could be separated from one another in certain exceptional circumstances only. This rule particularly became rigid in the post Smriti period.[4] The husband as per Manu could not abandon his wife nor sell her, and this implied that the marital bond among Hindus was unbreakable and divorce was not religiously recognized.[5] The ancient scriptures assigned several duties and responsibilities on a woman as a wife and these continued beyond the life of the husband and she was not to displease her husband during his lifetime and she was ordained to carry out no task independently.[6] As per the Manusmriti a woman was born to become a mother and a man to be a father.[7]

In this context, where the religious codes have strictly defined the social roles for men and women based on their gender, the interplay of gender stereotypes is in itself a powerful social force that determines the status, position, rights, duties and obligations of parties of a Hindu marriage even today. This research paper

1 Kusum, *Cases and Materials on Family Law*, 4th ed., Universal Law Publishing Pvt. Ltd., 2015, 1.

2 Paras Diwan, *Law of Marriage and Divorce*, 5th ed., Universal Law Publishing Pvt. Ltd., 2008, 15.

3 *Id.* at 15.

4 Diwan, *supra* note 2, at 3, 4.

5 Priya Nath Sen, *Tagore Law Lectures – General Principle of Hindu Jurisprudence*, 1st ed., Kamal Law House, New Delhi, 1984, 276-277.

6 Patrick Olivelle, *Manu's Code of Law*, 1st ed., Oxford University Press, 2006, 146-147.

7 Diwan, *supra* note 2, at 2.

seeks to explore the suggestion put forward by several feminist theories as noted down by Flavia Agnes that it is too simplistic to presume that law is a tool that plays a role in the transformation of society – its interpretation and contents reflect that "*it is a crude device and is circumscribed by the ideologies of the society in which it is produced*"[8] in the context of the treatment of abortion by women without the consent of their hasband as constituting mental cruelty which is subsequently a ground for divorce as per Sec. 13 of the Hindu Marriage Act, 1955 (HMA, 1955), which reflects perpetuation of patriarchal notions through the law. This paper is divided into five sections that aim at critically analyzing the above issue keeping in mind the jurisprudential concepts and constitutional claims of the parties to the marriage. Part I outlines in brief the settled position of law as regards cruelty as a ground for divorce and in specific Part II outlines the abortion rights as granted to women in India as per the Medical Termination of Pregnancy Act, 1971 and Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse Act), 1994. Part III provides an insight into the trends of judicial interpretation of a woman's right to abortion in context of it constituting cruelty to the husband and criticizes the manner in which the courts have appraised the issue. Part IV goes on to mention the jurisprudential concept of and the constitutional right of women over their bodies, the exercise of their autonomy and the argument of women having the independence to make the choice related to abortion as arising therefrom. Part V analyzes the absoluteness of the right to fatherhood and whether the right has an overriding effect over the reproductive rights of a wife, which are perceived across the world to be a part of their human rights.

In writing this research article, the author has primarily relied on the doctrinal method of research, which focuses on analyzing the available data on a particular topic. The research is based on a comprehensive and detailed study of secondary sources including research papers, case laws, articles from various journals, books, legal encyclopedias, other web sources and commentaries.

I. Cruelty as a ground for divorce under the Hindu Marriage Act, 1955

Divorce only came to be recognized as legally acceptable under Sec. 13 of the HMA, 1955 and this right to dissolve the marriage by obtaining a judicial decree to that effect is one of the crucial facets of a Hindu marriage being treated as a contract instead of the notion of its arising out of the status of parties.[9] When the

8 Flavia Agnes, *Family Law – Volume I: Family Law and Constitutional Claims*, 1st ed., Oxford University Press India, 2011, xxiii.

9 Flavia Agnes, *Family Law – Volume II: Marriage, Divorce, and Matrimonial Litigation*, 1st ed., Oxford University Press India, 2011, p. 29.

codified personal law for Hindus first recognized the right to end the marital bond by way of divorce, it was based on the 'guilt/fault theory' which assumes that a spouse has a right to claim divorce only when his/her partner is guilty of committing a matrimonial offence or in any way breaching the terms of the marriage bond and this theory presumes that deprivation from enjoying conjugal rights is the punishment for the erring spouse. The theory comes into play when there firstly exists a party to a marriage guilty of committing a matrimonial offence, secondly, an innocent spouse has suffered from such act of the guilty party and finally, the innocent spouse should have no involvement in the cause of the misconduct of his/her partner – i.e. all elements of complicity must be absent.[10]

Sec. 13 (1) of the HMA, 1955 recognizes and lists out the grounds that can be taken up by both the spouses – the husband and the wife to claim divorce against the other. Sec. 13(1)(i-a)[11] that deals with cruelty as a ground for divorce was added only by the Marriage Laws (Amendment) Act, 1976 to the HMA, 1955. Under the HMA, 1955 as originally enacted, the ground of cruelty was only a basis to seek judicial separation under Sec. 10(1)(b) but in 1976 it came to be recognized as a valid and independent ground[12] for seeking divorce.[13] The 1976 amendment apart from introducing cruelty as an additional ground for seeking divorce, also gave a broader and wider interpretation to the term than as existed before. Initially cruelty was confined to the class of acts/omissions 'so as to cause reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party'. Now as is reflective from the bare text of Sec. 13(1)(i-a), it is only necessary to prove that the petitioner was treated with cruelty, and the nature of fear/injury resultant therefrom is redundant and need not be proven to attract the application of the said section.[14]

10 *Id.* at 29.

11 Sec. 13(1)(i-a) of the Hindu Marriage Act, 1955 reads as follows – "*Sec. 13(1)(i-a) – has, after the solemnization of the marriage, treated the petitioner with cruelty...*"

12 Uttam Soni v. Kiran Soni, (2005) 2 HLR 439 (MP) – wherein the court decided that the adultery committed by a wife does not deprive her from exercising her right to divorce her husband on the grounds of cruelty.

13 Ramesh Chandra Nagpal, *Modern Hindu Law* 2nd ed., Eastern Book Company, 2011 p. 187. Derrett commented that "The absence of desertion and cruelty from the grounds of divorce (prior to 1976)" reflects not the inhumanity of the lawmakers but rather their belief that Hindu spouses, given the chance, will reconcile with their spouses who they deserve because of their deeds in previous births irrespective of their merits and demerits – J. Duncan M. Derrett, *Critique of Modern Hindu Law, (1970)* at 351 as quoted by Professor Kusum in her book Family Law Lectures – Family Law I at p. 59.

14 Kusum, *Family Law Lectures - Family Law I.* 3rd ed., Lexis Nexis Butterworths Wadhwa, Nagpur, 2014, Pp. 58-59.

The term cruelty has no where been defined in the HMA, 1955[15] or by any judgment/law and confining its boundaries by a definition have constantly been considered as undesirable by the courts.[16] This allows for the judiciary to interpret the contents of the term and to decide as to what constitutes cruelty keeping in mind the changing social, economic and political conditions and their effect on the attitudes held by the people especially in the present times where the marital ties are under a strain as the Indian society in its transitional phase is struggling to maintain balance between the strong bonds uniting joint families and demanding strong allegiance to traditional values and the liberalizing and individualistic rights and roles created by the forces of industrialization, globalization, modernization etc. and their effect on erosion of traditional familial values, which are a part of our culture.[17] So an act/omission, which is treated by the courts as amounting to cruelty today, may not be so treated in history and in future new further grounds amounting to cruelty may emerge in addition to those already existing.[18]

However, in the most general terms we can say that it is conduct of one spouse that causes physical/mental harm whether intentionally or not to the other.[19] The phrase 'treated with cruelty' is wide enough to include both types of cruelty – physical and mental. While it is relatively easier to prove the former in court due to the availability of material evidence however, deciphering the incidence of mental cruelty is tricky. The Supreme Court in the case of *G.V.N. Kameswara Rao v. G. Jabilli* has held that "*The mental cruelty are to be assessed bearing in mind the social status of the parties, their customs and traditions, their educational level and their living environments*".[20] The occurrence of mental cruelty has to be therefore appreciated in a holistic manner and there is no exhaustive list of acts/omissions that amount to mental cruelty – the Apex court has time and again reiterated that what constitutes mental cruelty is to be determined depending on the facts and circumstances of each case that arises for judgment as it is a state of mind which needs to be inferred as noted distinctly in the case of *Praveen Mehta v. Indrajit Mehta*.[21] In *V. Bhagat v. D. Bhagat*,

15 Dr. Gurbax Singh, *The Principles Of Hindu Law*. 1st ed., 2009, 487.

16 Ravi Kumar v. Julmi Devi, (2010) 1 DMC 411 SC.

17 Diwan, *supra* note 2, at 415.

18 Gurdev Kaur v. Sarwan Singh, AIR 1959 Punj 162.

19 Shobha Rani v. Madhukar Reddy, AIR 1988 SC 121 – The court remarked that the actions of men and women being so diverse and indefinite that it will be nearly impossible to expect a general and exhaustive definition to cover all types and instances of cruelty. Same position was reiterated in Praveen Mehta v. Indrajit Mehta, (2002) 5 SCC 706, Savitri Pandey v. Prem Chand Pandey, (2002) 2 SCC 73 and V. Bhagat v. D. Bhagat, (1994) 1 SCC 337.

20 (2002) 2 SCC 296.

21 AIR 2002 SC 2582.

the Supreme Court said that cruelty broadly denotes the conduct of a spouse which inflicts upon his/her partner such mental pain and suffering which would make it impossible to reasonably expect the other party to live together with the erring spouse though the nature of the resultant injury on the health of the petitioner need not be specifically proven – and this assessment is to made taking into account several factors (list not being exhaustive) such as social status and educational level of parties, type of society they live in etc.[22] For qualifying as mental cruelty the act/omission must be beyond the normal wear and tear of married life and the conduct complained of to be cruel must be so grave and weighty that no reasonable person can be expected to tolerate it.[23] This implies that the number of incidents exhibiting cruel conduct is not of any importance but their effect on the mind of the petitioner and the grave nature of the act are useful in determining the factum of mental cruelty. Also, as clarified by Mulla, the phrase 'treated with cruelty' does not require the alleged act of cruelty to be a direct action against the petitioner – but it can be misconduct that indirectly affects the other innocent spouse.[24]

In the landmark case of *N.G Dastane v. S. Dastane*[25] it was clarified that in case of mental cruelty the petitioner cannot be reasonably expected to live with the respondent without fear of injury or harm being caused to himself/herself and cruelty being a cumulative charge has to be assessed taking all acts of the respondent together and although in isolation they may not amount to cruelty together they may. Justice Chandrachud also observed that we are not dealing with ideal spouses in cases of matrimonial disputes but with particular parties who have approached the court and so keeping their individual sensibilities in mind the court has to decide the case and interpret their behavior and its consequences.[26] This implies that the court when deciding on the incidence of cruelty does not have to employ the yardstick of a reasonable man as is done in the cases of negligence but has to consider the sensibilities of the parties before it because what is perceived by one person as being cruel may not be so for another and hence, no *a priori* assumptions can be made by the court using the standard of the reasonable man and nor can the judge evaluate the facts from his own viewpoint as this may be biased/tainted due to existence of generation gap.[27]

22 AIR 1994 SC 710.

23 Naveen Kohli v. Neelu Kohli, AIR 2006 SC 1675.

24 Mulla, *Hindu Law Volume II*, 20th ed., Lexis Nexis India, 2007, p. 119.

25 (1975) 2 SCC 326.

26 Nagpal, *supra* note 14, at 191.

27 Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778.

The final and crucial consideration regarding the law on cruelty as a ground for divorce is the requirement of intention (?) as a constituent element of cruelty. It has been decided by the leading cases in England[28] and followed subsequently in India[29] that intention is not an essential element of cruelty the main aim of the legislature being to protect the innocent spouse and not that of punishing the erring spouse[30] and the courts have consistently held that what is important is the conduct of the respondent and not his state of mind. The conduct, which is backed by the intention to hurt strikes with a sharper edge than one done with total indifference or mere ignorance/carelessness[31] and therefore although intention is not a necessary ingredient of cruelty, a act done with an intention of causing harm/hurt to the other party will certainly amount to cruelty.[32] Some illustrative cases where the court made a finding as to existence of mental cruelty include compelling the wife to become a prostitute,[33] marrying a second woman during subsistence of first marriage,[34] making false charges of bigamy by the wife continuously against the husband,[35] causing injury to near relatives[36] etc. Among these the courts have also included a ethically, politically and jurisprudentially controversial issue of abortion by a wife without the consent of a husband as being mental cruelty to husband and it is this judicial approach and attitude which is the subject matter of scrutiny in this research paper.

II. Right to Abortion as recognized in India

Before entering into the question of whether the wife's unilateral decision to abort her child amounts to mental cruelty against the husband, it is necessary to set out in brief the right to abortion as is granted by the Indian laws for females as a facet of their reproductive rights. It is also a matter of international concern because several international treaties and conventions deal with a woman's right to abortion for instance, Article 1 of the American Declaration of the Rights and Duties of Man and the Inter-American Commission of Human Rights recognizes abortion to be legalized until the end of the first trimester.[37] However, Article 6(1)

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28 Refer the cases of Jamieson v. Jamieson, (1952) AC 525; Williams v. Williams, (1963) 2 All ER 994 and Gollins v. Gollins, (1963) 2 All ER 966.

29 P.L. Sayal v. Sarla, AIR 1961 Punj 125 and Trimbak Narayan Bhagwat v. Kumudevi Trimbak Bhagwat, AIR 1967 Bom 80.

30 Mulla, *supra* note 25, at 118.

31 Gopal v. Mithilesh, AIR 1979 All 316.

32 Diwan, *supra* note 2, at 423.

33 Henderson v. Henderson, AIR 1970 Mad 104 (SB).

34 Sunder Sharma v. Madhulata Sharma, (2000) I HLR 290 (Ker).

35 Shingara Singh v. Sukhwinder Kaur, 1980 HLR 644 (P&H).

36 Gurcharan Singh v. Sukhdev Kaur, AIR 1979 P&H 98.

37 Manisha Garg, Right to Abortion, http://www.legalserviceindia.com/articles/adp_tion.htm, last (accessed on September 9, 2015, at 05:35.)

of the International Convention on Civil and Political Rights (ICCPR), 1966[38] and Article 2 of European Convention on Human Rights[39] are interpreted to mean that every person has an inherent right to life from the moment of conception, which cannot be taken away arbitrarily. It is pertinent to note that Article 16(e) of the Convention on Elimination of Discrimination Against Women (CEDAW)[40] grants both males and females equal rights with respect to making family planning decisions.

In India, the right to get an abortion is not the constitutional right of a woman, however abortion has been legalized by the enactment of the Medical Termination of Pregnancy (MTP) Act, 1971.[41] Termination of pregnancy on any other ground except as recognized in the Act is an offence punishable under the Indian Penal Code, 1860.[42] The Act clearly lays down the conditions and procedure by which

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38 Article 6(1) – Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." – United Nations Publication, International Covenant on Civil and Political Rights, https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf, (last accessed on September 9, 2015 at 05:38).

39 Article 2 · Right to life – 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection." – European Court of Human Rights, European Convention on Human Rights, http://www.echr.coe.int/Documents/Convention_ENG.pdf, (last accessed on September 9, 2015 at 05:41).

40 Article 16 – 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights..." – UN Women, Convention on Elimination of all forms of Discrimination Against Women, http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm, (last accessed on September 9, 2015 at 05:44).

41 Mallika Kaur Sarkaria, *Lessons from Punjab's Missing Girls: Toward a Global Feminist Perspective on "Choice" in Abortion*, California Law Rev., Vol. 97, No. 3, June 2009. 905, 918 (June 2009).

42 *Id.* at 3(1).

the legal right of abortion can be exercised.[43] The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 was enacted with the primary object to regulate and restrict the practice of sex-selective abortion and it hence, criminalizes the use of genetic counseling centers for the purpose of sex-determination and these centers can only be used to detect the five types genetic abnormalities specifically listed in Chapter III Clause (2), to which the Central Supervisory Board can after following the due procedure add names of other genetic conditions.[44]

III. Judicial Interpretation of Wife's Unilateral Decision to Abort as Constituting Mental Cruelty towards the Husband

In a common law country like India, judicial interpretation is occupying an important place in expanding the scope and ambit of the legislative enactments. Judicial interpretation is the way in which the words of a statute come to life and are made applicable in a practical scenario. The interpretation of the law by the judiciary becomes even more crucial in areas where the subject matter of controversy is not governed by strictly defined rules as in the case of mental cruelty. Mental cruelty as noted above is a factum to be determined on the facts and circumstances of each case and it is impossible to give an exhaustive list of instances which amount to mental cruelty. In this light, the judiciary of our country got several opportunities (?) to consider the question of whether a wife's unilateral decision to terminate her pregnancy amounts to mental cruelty towards the husband, but the author respectfully submits that the courts have miserably failed to probe deep into the issue analyzing it holistically considering the jurisprudential concepts, philosophical notions, constitutional claims, legal and human rights of the parties involved and have consequently failed to deliver justice in the true sense.

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43 Under the MTP Act, the right of abortion available to a female is limited and can be exercised only up to 20 weeks of the pregnancy with the assent of the doctor in all cases before 12 weeks, with the assent of two medical practitioners if performed between 12 and 20 weeks. However, a registered medical practitioner can make such termination of pregnancy only if he believes in good faith that there exist reasonable grounds to show that (i) continuation of such pregnancy involves risk to the life of the mother or scope of causing grave physical and mental injury to her or (ii) substantial risk of the child being born with physical or mental abnormalities, which would seriously handicap him/her. The explanations in the act clearly recognize that pregnancy arising out of rape or contraceptive failure shall be deemed to cause grave injury to the mental health of the woman. In all of the above cases unless the female wanting to terminate her pregnancy is a minor, her own consent is sufficient however, in the case of a minor the consent of the parent/guardian is mandated by law.

44 Sarkaria, *supra* note 42, at 918-919.

For the first time this issue came before the Punjab and Haryana High Court in the case of *Satya v. Siri Ram*,[45] where divorce was granted by the lower conrt as it perceived that the wife inflicted mental cruelty on the hushand when despite his persuasion and the fact of being impregnated twice after their marriage between 1975-1977, she unilaterally decided and aborted the foetus on both occasions. The court, despite being offered a chance to determine such a controversial and complex issue of law related to abortion on unilateral decision of wife as constituting mental cruelty towards husband or not, which in multilateral ways affects the rights of the parties, merely quoting a line from an English case *Forbes v. Forbes*,[46] after listing the bare provision of the HMA, 1955 stated that the act of the wife amounts to mental if not physical cruelty and husband is entitled to a decree of divorce as the actions of the wife where "*she deliberately and consistently refuses to satisfy husband's natural and legitimate craving to have a child, the deprivation reduces him to despair and it maturely affects his mental health.*"[47] The justification for this interpretation was by reference of principles of ancient Hindu law where great importance was attached to marriage and sonship – and liberation or *moksha* was onty possible when a son offered food and libation of water to his ancestors. The court also made an overencompassing statement that it is no defence to say tbat a son can be adopted. There was no discussion on the rights of the wife or the effeet on her physical & mental health and also the conduct deemed to be amounting to mental cruelty was not assesed keeping in mind the several factors such as status and educational background of parties etc. which are required by the law as noted above.

Next in the line of cases is that of *Sushil Kumar Verma v. Smt. Usha*,[48] a decision of the Delhi High Court in the case where the wife wbo left her matrimonial home one year after the marriage at that time being pregnant with the child of the appellant, and got ber pregnancy terminated in a nursing home in Agra after the preseription of certain medicines without the consent of her husband, and this was alleged by the busband to be mental cruelty but the same argument was rejected by tbe Additional District Jndge, Delbi and divorce was not granted. But the High Court in appeal, on finding tbat the pregancy was so terminated despite denial by the wife througb evidence rendered by some documents and on referring to an obiter statement in the case of *Deepak Kumar Arora v. Sampuran Arora*,[49] that such unilateral decision of the wife to abort

45 AIR 1983 P&H 252.

46 (1955) 2 All ER 311.

47 Satya v. Siri Ram, AIR 1983 P&H 252 at paragraph 3.

48 AIR 1987 Del 86.

49 (1983) I DMC 182.

under some circumstances may be said to result in cruelty granted divorce in the present case. The circnmstances which justified in this case the treatment of the act of the wife to be treated as cruelty were not dealt with.

In a landmark ruling, whieh has had considerable impact on future cases, being a decision of the Apex Court in the case of *Samar Ghosh v. Jaya Ghosh,*[50] which was a dispute between a husband and wife, both IAS officers, where husband sought divorce on the ground of mental cruelty inflicted on him by the constunt denial of his wife to have a chiid (as sbe was afraid her danghter from her first marriage would be neglected) despite his desire, lack of concern and failure to visit ailing bnsband wheu he underwent a by-pass surgery etc. The relations bad become so strained that the couple lived separately for approximately around 16 years. The conrt in this case discussed in detail the appropriateness of including the irretrievable breakdown theory of divorce under the HMA, 1955 however, as it was not a statutory ground for divorce considered wife's refusal to bear a child as mental cruelty and granted divorce on that ground. The court recognized that mental cruelty is a changing concept and is subjective (depending on the social status, values, cultural backgronnd etc. of the parties) hence, what may amount to cruelty in one case may not be so in another (?). While providing a note of caution that it is providing a illustrious and not exhaustive list of acts amounting to mental cruelty the court included amongst it without any detailed deliberation as to the jurisprudential justification or constitutional validity neither considering its effect on the rights of parties an instance to this effect – "*If a husband undergoes operation of sterilization and wife undergoes vasectomy or abortion without medical reasons and without consent or knowledge of other spouse it is cruelty.*"[51] This illustrious list ideally ought to be perceived only as obiter dicta and not ratio decidendi.

The Supreme Court two years later came across a similar issue in the case of *Suman Kapur v. Sudhir Kapur,*[52] wbere the wife nnderwent abortion on three occassions withont the consent of the hushand for different reasons which as narrated by her, included for all three terminations respectively – the threat of exposing the foetus to radioactive rays at the lab wbere she was working for her PhD, she bad to undergo a surgery as she was diagnosed with acute kidney infection which inciuded some 6 abdominal X-rays and radioaetive uterine tests and the third one being an instanee of miscarriage. The trial court and tbe High Court both following the judicial precedent in the above case of Samar Ghosh

50 (2007) 4 SCC 511.

51 *Id.*

52 AIR 2009 SC 589.

held the acts of the wife as constituting cruelty. The SC on hearing the appeal reiterated the same guidelines and instead of evaluating and assessing the correctness of the decisions of the courts below accepted the above guidelines in effect acting as ratio decidendi and also avoided into considering the said element of mental cruelty and rather took its contribution to the existence of cruelty for granted in addition to the cruelty inflicted by her desire to end the marital bond as was evident from certain letters and false allegations of her husband having a second wife on the basis of a typographical error by him of her social security number. The court importantly noted that mens rea is not an essential ingredient to prove the existence of mental cruelty (?) and that the husband could not be denied relief merely because willful or deliberate misconduct on the part of the wife wasn't proven. The media perceived the SC granting the divorce decree on the factum of wife's unilateral decision to abort[53] when the Apex Court has in its judgment evasively dealt with the issue without considering its implications on the existing legal rights of parties and other jurisprudential concepts.

Next in *Anjali Bhan v. Ajay Kumar Bhan,*[54] a decision by the Jammu and Kashmir High Court, where divorce was sought under Sec. 13 of the Jammu and Kashmir Hindu Marriage Act (4 of 1980) by the husband on ground of mental cruelty by wife who in addition to undergoing an abortion *without his knowledge and consent* (?), the most crucial and important ground as stressed on by the husband, also misbehaved with him and other family members, repeatedly insulted the friends of the husband, neglecting household duties, filing false charges etc. The wife also after the alleged act of cruelty by unilaterally deciding to terminate her pregnancy lived with the husband and also had a child thereafter – so the question before the court was whether this amounted to condonation on part of the husband to which it decided that it was not as the mental scar left on his mind was deep and so grave as to leave him shattered and a temporary reapproachment on the insistence of elders with the hope to establish peace, which was nonetheless unsuccessful would not amount to condonation. In this case also there was no discussion on the aspect of the rights of the wife, and even the material fact of a child being born after the parties stayed together was also ignored when granting divorce on grounds of mental cruelty which stood established by the act of abortion coupled with her justifying her conduct by leveling serious counter charges against the respondent.

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53 Anonymous Legal Correspondent, *Court: abortion without husband's knowledge is ground for divorce*, The Hindu, November 9, 2008, *available at* http://www.thehindu.com/todays-paper/court-abortion-without-husbands-knowledge-is-ground-for-divorce/article1372718.ece, (last accessed on September 9, 2015 at 20:56).

54 AIR 2011 J&K 54.

In the case of *Smt. Kavita v. Shri Rakesh Raman,*[55] the husband filed a petition for divorce on ground of mental cruelty by his wife due to her acts consisting of an unilateral decision to abort, constant demands for a separate residence, locking him outside his own house, making statements to the effect that her life was destroyed by marrying a simple clerk etc. Divorce was granted by the trial court but the High Court in appeal decided otherwise and set aside the decree of divorce, and although the case of Samar Ghosh was cited to discuss the point of abortion by the wife as amounting to cruelty, the factum of termination of pregnancy by wife as an element of mental cruelty was totally ignored by the court when giving its judgment on the issue of divorce. Divorce was not granted as mere taking back of civil suit by husband filed to regain entry into his own house could not by itself prove fault on part of the wife, and allegations of extra-marital affairs which were groundless and claims of life having been destroyed by marrying a clerk etc. were not cumulatively sufficient to show that the marriage had irretrivably broken down.

Now we shall critically review the judicial approach taken by the Indian courts on the issue of whether a unilateral decision by the wife to abort her child, an exercise of one of her legal rights, shall amount to mental cruelty against the husband so as to justify a decree for divorce being granted on that ground. The author humbly submits that the discussion in all of the above cases where this issue came up before the judiciary, it has failed to critically review the various dimensions related to the jurisprudential concepts, legal and human rights of parties, constitutional claims and philosophical notions surrounding the notion of abortion and which have stimulated a debate globally. Rakesh Shukla, a SC lawyer, also observed that in a gender-unequal society such as India we cannot mechanically equate the consequences of a husband undergoing sterilization without the knowledge and consent of his wife with that of the same act undergone by the wife without her husband's consent as such an interpretation will have an adverse impact on the already restricted rights of women to make the choice regarding their own bodies, and so when constructing the concept of mental cruelty, the court needs to engage deeply with several questions and then deliver a judgment after critical analysis and careful consideration of the same.[56]

The prima facie failure of the courts, in the opinion of the author, arises in its construction of the concept of mental cruelty, whose existence is totally determined by social factors such as social status, nature of society, cultural values of parties

55 Supreme Court of India, Matrimonial Appeal Number 52 of 2009, decided on 8th April 2011.

56 Rakesh Shukla, Defining mental cruelty (April 2007), http://infochangeindia.org/women/judicial-interventions-and-women/defining-mental-cruelty.html, (last accessed on September 9, 2015)

etc. and there is no consideration of the legally or constitutionally recognized rights of the wife primarily her right over her body as a facet of the right to privacy recognized under under Article 21 of the Indian Constitution. Such an approach appears to be biased/tainted and it does not objectively and neutrally assess the issue but rather seeks to perpetuate the notions of a patriarchal society through judicial interpretation of law as is noted by Indira Jaisingh, a renowned Supreme Court lawyer, says that the judicial trend perpetuated elements of patriarchy which equate the institution of marriage with sexual intercourse for the purpose of child bearing, which may not exactly be in sync with both the purpose of marriage and the prevailing social ethos.[57]

In the opinion of the author, the most important point where the judiciary failed in the construction of mental cruelty is as regarding the element of intention. It is a settled position of law that intention or mens rea is not an essential element (?) in constructing the factum of mental cruelty which is ground for divorce, however, if we carefully scrutinize the context in which the relevancy of making intention an essential ingredient of mental cruelty is discussed so far by the courts, we will realise that it is usually in the context of insanity of the erring spouse, or irrational basis for his behavior such as jealously etc. where the adverse impact of the alleged act/ommission is only on the innocent spouse. However, in the context of wife's unilateral decision regarding abortion being construed as cruelty we need to realise that in case of forced pregnancy, the adverse impact being on the mental and physical health of the mother, will constitute mental suffering to her – so in the exercise of either option by the courts to declare the alleged act as mental cruelty or not, adverse impact is assured on one of the parties of the marriage and hence, before making the decision as to its existence a deep and

57 "The judgment is based on an understanding of marriages which is highly patriarchal and conflates sexual intercourse and child bearing with marriage, the two seeming synonymous. This is simply not how many people perceive and negotiate their own relationships. The law cannot create a template of a perfect legal relationship called marriage. In today's complex world people have different expectations from each other, which are not necessarily relationships of hierarchy or dependency. Companionship and friendship is the basis of a sound relationship, consent and not coercion is what gives sexual satisfaction. Sex after all is not only for procreation, but also for pleasure. The judgment does not take note of the newly enacted Protection of Women from Domestic Violence Law, which defines domestic violence in a manner consistent with the dignity of women. This requires that sexual intercourse be with the consent of the woman and a child must feel wanted when born, not born because its father wanted a child without the mother wanting it." – Indira Jaisingh, SC ruling on cruelty in marriage hurts women (April 2, 2007), http://www.rediff.com/news/2007/apr/02indira.htm, (last accessed on September 9, 2015 at 23:30).

critical analysis is needed and an attempt has to be made by the court to balance the rights of both spouses if justice is to be done.[58]

It becomes more and more complicated when we are trying to analyze mental cruelty in context of abortion without the consent of the husband because, it is having a link with so many other dimensions like women's rights over her body, human rights, legal rights etc. Especially, if you are analysing the law and the judicial interpretation under what circumstances a woman is undergoing abortion (why is taking that decision unilaterally) this aspect of intention is occupying no importance. Hence, the issue is becoming problematic especially when a right like this is under peril and you are not giving due importanee to the concept of intention. In the light of the settled position of law, the author humbly submits that it is the high time for the legislature to take into account this aspect and to bring changes to the law and at the same time, the judiciary should approach the issue philosophically and jurisprudentially and to read intention in this context.

Judicial interpretation Is unclear as to the requirements of the alleged act to amount to mental cruelty precisely as to whether the unilateral decision of the wife to abort her child for being termed as mental cruelty requires absence or mere knowledge or consent or both? Explaining consent in *Satpal Singh v. State of Haryana*,[59] it was stated that consent implies exercise of free and untramnelled right to forbid or withhold what is being consented to. It is always a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former. Whereas knowledge is merely referring to awareness of the fact.[60] The courts in all of the cases have interchangably used the words or have made both as necessary to be obtained by the wife (as in the ease of *Anjali Bhan v Ajay Kumar Bhan)* making her exercise of choiee even more problematie. As noted down by the famous women's rights lawyer, Flavia Agnes, the implications of the requirement knowledge and eonsent are two different things and if consent were mandated by way of judicial interpretation, such precedents can be misued to abrogate the rights of a woman over her own body. The

58 Fowler v. Fowler, (1952) 2 TLR 143 where the court observed that "If a man takes contraceptive measures against the will of his wife...so as to prevent her having children without reasonable excuse for so doing, then it is easy to infer that he does it with intent to inflict misery on her...But when a wife herself takes contraceptive measures, or asks her husband to take them, her conduct can often be attributed to fear for the consequences to herself, without any intention of Injuring him. She fears the pain and risk of child birth. This is very unnatural and unfortunate, but it is not cruelty unless she has also an intention to inflict misery on her husband."

59 (2010) 8 SCC 714.

60 K.I. Vibhute, *P.S.A. Pillai's Criminal Law*, 12th ed., Lexis Nexis Butterworths Wadhwa, Nagpur, 2014, p. 46.

judiciary should be careful on the consequences of its use of words on the exercise of rights and freedom of the parties.[61]

Judicial interpreration is not only ambiguous and superficial as noted, but it's also taking away from women the legal rights they have been granted under the MTP Act, 1971 and is going against the rules of medical practice and such an interpretation strikes at the very root of the reproductive rights of women and nullifies their effects, which essentially seek to empower women to access certain health services voluntarily without any kind of fear or coercion from her spouse.[62]

IV. Right to abortion – jurisprudential analysis and a feminist critique

Although the judicial attitude[63] has been apathetic towards considering the impact of terming a wife's unilateral decision to undergo abortion as mental cruelty on the husband on the woman's rights over her body, the author submits that the existence of this form of judicial silence on the issue leads us to ask whether a woman in India has right over her body? If yes, how can we read this right into the law? And finally, to what extent is this right absolute?

In India, the right to abortion is a legal right granted by the MTP Act, 1971 and Article 21 of the Indian Constitution guarantees to all people, male and female alike, the inalienable and unconditional right to life and personal liberty, which can only be taken away by following a due procedure, which is fair, just and reasonable.[64] Article 21 is interpreted by people who argue against the legalization

61 Does the verdict mean that marriage is only for sex? asks Flavia Agnes, Mumbai based lawyer and activist. "In an earlier judgement, the court had ruled that marriage is also for companionship." This new verdict reduces marriage to just sex and procreation, she holds. "Doesn't a woman have any right over her own body? The court is almost endorsing that a man can impose sex on his wife." Admittedly it is only fair that a spouse should know if one does not want to have children. "But what if the spouse does not agree?" Would it then be an imperative to go against one's wishes and have a child? Both Jaiswal and Agnes feel apprehensive about the probable misuse of a precedent like this." - Damayanti Datta, *Thorny Issue: SC law on 'mental cruelty' confuses couples filing for divorce,* India Today, April 16, 2007, *available at* http://indiatoday.intoday.in/story/rapid-breakdown-of-marriage-divorce/1/155987.html, (last accessed on September 9, 2015 at 23:26).

62 Rajalakshmi, *Reducing reproductive rights: spousal consent for abortion and sterilization,* Indian Journal of Medical Ethics Vol. IV (No. 3) 102, 103 (September 2007), *available at* www.ijme.in/index.php/ijme/article/download/559/1439, (last accessed on September 9, 2015 at 23:20).

63 Satya v. Siri Ram, AIR 1983 P&H 252, *Sushil Kumar Verma v. Smt. Usha,* AIR 1987 Del 86, Deepak Kumar Arora v. Sampuran Arora, (1983) 1 DMC 182, Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511, Suman Kapur v. Sudhir Kapur, AIR 2009 SC 589, Anjali Bhan v. Ajay Kumar Bhan, AIR 2011 J&K 54, Smt. Kavita v. Shri Rakesh Raman, Supreme Court of India, Matrimonial Appeal Number 52 of 2009.

64 Maneka Gandhi v. Union of India, AIR 1978 SC 597.

of abortion that even the foetus has a right to life. When testing the unconditionality of the right to life as guaranteed under Article 21 in the backdrop of the right to equality guaranteed by Article 14, we see that from the moment of conception of the foetus having a right to life, the woman's right to life and personal liberty are compromised in favor of those of the foetus but there is no similar effect on their males counterparts thereby indirectly violating the right to equality guaranteed under Article 14.[65]

However, considering the state's interests in protecting the right to life of the foetus following the landmark decision in the U.S. case of *Roe v. Wades*,[66] we realize that when giving legal recognition to the right to abortion the rights of the mother over her body must be balanced against the state's interest in her mental and physical health and in the survival of the child – and this can be ensured as was proposed in that case by following a trimester system, where in each trimester of the pregnancy, state control over the exercise of the right to abortion by a female varies depending on the conflicting interests of the foetus and factors of maternal health. While the author concedes that such a method of regulating the right to abortion as is also reflected in the MTP Act, can be justified on grounds of public policy and will pass the test of reasonable classification laid

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65 This interpretation of the author is based on a similar approach by the scholars when analyzing the right to abortion in other foreign countries where the Constitution guarantees similar rights to the parties. For an analysis to this effect refer – Linda Makatini, "Abortion as a Human Rights Issue", Recreation and Leisure, Published by Taylor & Francis Ltd. on behalf of Agenda Feminist Media, No. 17, 1993, 18, 22.

66 410 U.S. 113 (1973).

In the case of Roe v. Wade, a pregnant single woman, brought a class action suit challenging the constitutionality of the Texas abortion laws. These laws made it a crime to obtain or attempt an abortion except on medical advice to save the life of the mother. The issues framed by the court were – (1) Do abortion laws that criminalize all abortions, except those required on medical advice to save the life of the mother, violate the Constitution of the United States? (2) Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution protect the right to privacy, including the right to obtain an abortion? (3)Are there any circumstances where a state may enact laws prohibiting abortion? The court replied in the following manner to each of the above issues:(1)Yes. State criminal abortion laws that except from criminality only life-saving procedures on the mother's behalf, and that do not take into consideration the stage of pregnancy and other interests, are unconstitutional for violating the Due Process Clause of the Fourteenth Amendment. (2) Yes. The Due Process Clause protects the right to privacy, including a woman's right to terminate her pregnancy, against state action. (3)Yes. Though a state cannot completely deny a woman the right to terminate her pregnancy, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life at various stages of pregnancy.

For a detailed analysis on the trimester framework developed by the court in the case of Roe v. Wade refer – Anonymous, "Abortion", The Journal of Criminal Law and Criminology Vol. 64, No. 4, December 1973, 393, 393-396.

down under Article 14 of the Indian Constitution,[67] and thereby be constitutionally valid due to the inherent biological differences between male and female in context of capacity of giving birth to a child. But it is disturbing to observe that when the right to abortion was legalized in India under the MTP Act, the legislature did not evaluate these constitutional claims of the parties to the marriage but rather the rights were reflective of a patriarchal and statistic notion where women's bodies were regulated to achieve the goal of population control.[68] When we study the social attitudes and the manner in which the right to abortion has been accepted in India, we can reflect that abortion in some situations are more acceptable than in the rest[69] – for instance as shown by Explanations 1 and 2 of Sec. 3(2) of the MTP Act,[70] but this distinction does not fit well with the notion of the right to abortion as a facet of women's human rights, a concept which would jurisprudentially allow no distinction to be made in between the reasons for which a woman chooses to terminate her pregnancy for the purpose of granting the right to abortion is enabling the woman to deal with an unwanted pregnancy, whatever be the cause, and assuming that she is best fit to make the choice as to the circumstances when the right should be exercised having first hand knowledge of the impact of the pregnancy on firstly her mental and physical health (i.e. to what extent her body can cope up with the fact of childbirth) and the socio-economic consequences of childbirth.[71]

Next we need to ascertain as to what type of right is the right to control over one's own body specifically the right to exclude others from sexual or physical contact or regulating the effects therefrom. Analysing this issue, in the light of the often cited argument in favor of abortion, that women should have the choice to decide whether they want to undergo abortion or not as they have a control over their body. The obvious question which then arises is what is the nature of this right of control over her own body? The answer to this would largely depend on

67 M.P. Jain, *Indian Constitutional Law*, 7th ed., Lexis Nexis, 2014, 876-887.

68 Nivedita Menon, *Sexuality, Caste, Governmentality: Contests Over 'Gender' In India*, Feminist Review, Vol. 91, 2009, 94, 107.

69 Marge Berer, *Making Abortion a Woman's Right Worldwide*, Reproductive Health Matters, Vol. 10, No. 19, May 2002, 1, 4.

70 Sec. 3(2) Explanation 1.-Where any, pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.
Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman. - Medical Termination of Pregnancy Act, 1971.

71 *Supra* note 69, at 4.

reply to another question – does the right accure to us because we own our bodies – i.e. is the right in the nature of a proprietory right or a personal right? Property, a jurisprudential concept, as explained by Honore is a bundle of rights which are jointly though not individually sufficient to show existence of proprietory rights in an object – and these include the claim-rights to possess, use, dispose, the power of transferring it to another, duty not to use in a manner that is harmful to another etc.[72] As per Munzer, a noted jurist, it is the presence or absence of the power of transfer which distinguishes between personal and proprietory rights, being absent in the former class of rights which inlude inter alia the freedom of speech and expression, right against torture, right over one's own body in the sense right to exclude others from sexual or physical contact etc. Each person inherently possesses certain personal rights granted by the law to which he is subjected to and which are non-transferable and which can be exercised by each person together with all others. Hence, for Munzer, even if we do not own our bodies as we are not legally allowed to sell them (and the element of transferability being absent it is implied that we have limited property rights over our own body), it is the law that confers on us certain personal rights, including inter alia, the right over one's own body an extension of which implies that all women have a right to abortion.[73] In India, the right to privacy recognized as a facet of Article 21 (right to life and personal liberty) clearly reflects the existence of the abovementioned position.

As noted above, the right to privacy being a facet of right to life and personal liberty is a justification for granting to women the right to abortion and the freedom to execise their choice in this regard. It is this regard, it is pertiuent to note that the Supreme Court in the case of *Suchita Srivastava v. Chandigarh Administration*[74] observed that a woman's reproductive choice should be fully respected even in cases where because of her mental illness not in a position to understand the full import of the sexual act and notwithstanding her anxiety and apprehensions regarding her ability to deliver the child and assume subsequent responsibilities because the statute (MTP Act) clearly contemplates that even the consent of a mentally retarded woman is an essential ingredient for the termination of her pregnancy.[75] The court recognized the woman's right to make reproductive choices as an additional dimension of the term right to personal liberty covered by Article 21 and noted that a woman can *exercise this choice to procreate or*

72 Hugh V. McLachlan, *Bodies, Rights and Abortion*, Journal of Medical Ethics, Vol. 23, No. 3, June 1997, 176, 178.

73 *Id.* at 178.

74 AIR 2010 SC 235.

75 *Id.* at paragraph 10.

abstain from procreating and *considering the State's interest in protecting the rights of the unborn child, termination of pregnancy is permissible only under the conditions mentioned in the MTP Act and the Act can be viewed as a reasonable restriction on the exercise of reproductive rights by women,*[76] which undoubtedly include the use of birth control methods such as sterilization and abortion. In this light, when delivering the judgment in the case of *Samar Ghosh v. Jaya Ghosh,*[77] completely failed to consider this argument pertaining to right to choice, and thereby setting a dangerous precedent that indirectly disregarded the woman's constitutional rights as already recognized in law and perpetuating patriarchal norms by a superficial consideration of the issue and constructing the concept of mental cruelty totally in a social light.

Recognizing a woman's right to abortion implies giving her a freedom of choice on whether to bear the child or not as she has certain personal rights that grant her autonomy over her body. The legal recognition of this right is consistently opposed all in all patriarchal societies where the social order demands women to act as passive creatures especially with respect to motherhood as men necessarily depend on women for their reproductive capacities. It is only through the children women give birth to that the continuance of the male lineage will be possible and this reason is sufficient to control the reproductive rights which inhere in women per se. The fear of men, whereby the women if given a choice may not carry *their* child, is ultimately suppressed through the exercise of social, economic and political power and this reflective of the enormous personal and social sacrifices a woman has to make just to maintain the male identity which is largely based on the show of power over females. The right to abortion empowers women to make an independent choice regarding childbirth, and since this necessarily implies changes in the power structure of the society it deeply disturbs the males. Mary Daly suggests that when law enforces such submisiveness it kills the autonomous will of women and is nothing short of a gynocide.[78]

Now, let us for the sake of argument, assume, that the social barriers which exist in a patriarchal society and which oppose the legal recognition of the right of abortion have been overcome and the right is both codified by the legislature and judicially recognized. Now, even if the said right of abortion that entails with it the right of women to choose whether to bear the child or not is legally recognized, the social structure will operate in such a way to inhibit/prohibit or we may say restrict to a great degree the exercise of free and independent choice by women

76 Suchita Srivastava v. Chandigarh Administration, AIR 2010 SC 235 at paragraph 11.

77 (2007) 4 SCC 511.

78 Barbara Hayler, *Abortion*, Signs, Vol. 5, No. 2, Winter 1979, 307, 322-323.

which is a *sine qua non* for the effeetive use of the right. This is because as is noted by Susam Himmelweit[79] in her article, reproductive choices made by the exercise of these rights are always made in a material and cultural context and the patriarchal forces are responsible for construeting the choices whieh are available to the woman. This simply means that the ehoices available to a woman are socially constructed and determined and each option, when chosen, is coupled with several economic, social and political consequences which are beyond the control of any single woman and in this context when the woman exercises her legal right of abortion it is not the free and autonomous will of the woman which is responsible for the making of the choiee but rather the decision ean be seen to be a dictate of eireumstances of the life of the woman, which are in the nltimate analysis a product of the patriarchal norms.[80]

To illnstrate this analysis we can take the case study of the state of Punjab, where the rate of female foeticide is amongst the highest in the nation – so when we say that women in Punjab are exercising their right to abort a female child, it is not in reality their own free will that makes them deeide in favor of abortion rather it is the pressnre created by cumnlative social factors such as ridicule associated with the birth of a daughter, costs of raising a daughter especially the payment of dowry, possible chances of domestic violence being exhibitted by male members of the family over the female child etc. that compels the woman to make the decision related to abortion.[81] Another useful illustration can be taken from the state of Tamil Nadn, where the weak economic conditions of women who work in pharmaceutieal companies where they are sexually exploited by the male snpervisors, wages are so low and insufficient to ensnre survival for both the mother and a healthy child – in such stringent financial conditions if a woman undergoes abortion ber choice is eircumscribed by her condition in life and not her free will.[82]

So we realize that the pro-choiee argument in favor of abortion which is reflective of the liberal political ideology fails to explain the complexities involved in the exercise of the right to abortion in a country like India primarily due to some defects within the liberal paradigm itself. Firstly the subject of liberal political theory is an individual and all tbe rights conferred are individualistic in nature – however, tho right to abortion is having a social dimension as its exercise affects

79 Sosan Himmelweit, More Than 'A Woman's Right To Choose'?, Feminist Review, No. 29, Summer 1988, 38, 41-47.

80 *Id.* at 42.

81 Sarkaria, *supra* note 42, at 908.

82 Anandhi S, *Women, Work and Abortion – A Case Study from Tamil Nadu*, Economic and Political Weekly, Vol. 42, No. 12, March 2007, 1054, 1056-1058.

not only the concerned woman bnt also her husband and the society around her. The individual contemplated by liberal political theory has impliedly always been a male who is independent and acts according to his own self-interests with the purpose to maximise their enjoyment and the decisions laken by snch an individual are not dependent on considerations of others and is capable of bearing the responsibilites for his choices. In the context of the right to abortion of women, which is one of their reproductive right, it is always exercised by considering multiple factors, which includes inter alia a concern for the expectations of other people in the society especially the family members – hence, a woman for the interdependenee created by her exercise of reproductive rights cannot be the individual whose rights are discussed by the liberal political theory, however, the catch is that the theory which presumes equality between adult individuals irrespective of their sexes cannot restrict the woman to the domestic sphere and confine her to be bound by the wishes and desires of her husband.[83]

Heuce, we realise that the liberal approach towards understanding the exercise of the woman's right to abortion and the associated freedom of choice, which when followed in western societies such as the USA provides a binary choice of whether to procreate or go for abortion, is inadequate to explain the mechanism in which the right is exercised in the Indian context. As correctly identified by the theory of socialist feminism complete liberation of women is not possible only by way of granting legal individualistic rights, bnt structural transformation of the society is needed if the right is to have any meaning at all. We must organize our social programs, educational policies, political campaigns etc. in a manner to empower women by granting then equal status with that of males in all aspects of life so that they can freely and effectively make independent decisions and thereby exercise their own autonomous will as is required by the right of abortion.[84]

So when the judiciary in India is failing to recongnise the legal right of abortion of women, it is too much to expect of them to partieipate in this process of bringing structural change, however, the author humbly submits that this is the direetion in which we as a society, including all state organs, first amongst them the judiciary should proceed if we were to ensure effective recognition and exercise of a woman's reproductive rights.

V. Right to Fatherhood *vis-à-vis* Right to Motherhood

The right to fatherhood is another concept, which occupies or needs a major discussion in the context of wife's unilateral decision to abort her child as amounting

83 Himmelweit, *supra* note 79, at 40, 48-50.

84 Sarkaria, *supra* note 42, at 934-941.

to mental cruelty against the husband. Why this is important is because of the ambignity, which exists while applying the eoneept in this particular situation. From a societal point of view, we ean understand the craving of a man to become a father and if the woman is not ready to satisfy that urge without any reasonable exuse, it can be termed as one of the instanees of mental cruelty. But according to the author, this also complicates the issue sometimes because the judciary in its judgments or interpretation never tried to give clarity to this concept – what is right to fatherhood, whether the right to fatherhood means the right to become a father or does this right extend to decide how many children he desires? If you are elosely analysing the above two statements – the former is acceptable but the latter does not deprive the man from parenthood and so this raises a crucial question because it is directly clashing with woman's rights (right to motherhood, right over her own body etc.) – and this is one of the grey areas in which the legislature while enacting the law or the judiciary when interpretting throngh its jndgments never tried to look into.

From a feminist perspective, when we are approaching this issne under the ambit of right to fatherhood we are allowing and aeeepting the right to fatherhood to the extent of becoming a father of end number of children according to whims and faneies – including the decision as to spacing of the childbirths, the number of children etc. This is not only sabotaging the woman's right over her body but we are allowing the man to use her body as a means to an end by the legislative sanction and this is directly in conflict with the dignity, self respect and bodily antonomy of the woman which, when recognized as a facet of her right to life nnder Article 21 of the Constitntion includes both her choice to procreate and not to procreate as recognized by the Supreme Conrt in the case of *Suchita Srivastava v. Chandigarh Administration.*[85] To deprive a person of his/her right to life and liberty guaranteed under Article 21 of the Indian Constitution – a due procedure needs to be prescribed by the law and a procedure only when it is just, fair and reasonable can be used to deprive a person of his/her right of privacy and personal liberty.[86] On one side we are aeeepting the woman's right to proereate and not to procreate as a dimension of Article 21 and at the same time without a due procedure or without any legal procedure at all we are depriving the woman of her rights and considering her exercise of it as violating the so colled innate right of fatherhood and hence, amounting to mental cruelty whieh is a ground for divorce. The author hombly snbmits that such a arbitrary execise of state power by putting the act of the woman under the ambit of mental cruelty

85 AIR 2010 SC 235.

86 Maneka Gandhi v. Union of India, AIR 1978 SC 597.

against the husband, the state is not only perpetuating the patriarchal norms bnt is also undercutting the human, legal and constitutional rights of a wife.

Conclusion and Suggestions

The relationship of marriage is delicate and marital peace can be ensured only when both the spouses respect the rights of their partners and perform their own duties. In India, the judiciary has constructed (?) the concept of mental cruelty, which is a ground for divorce, to include within its purview the anilateral decision of the wife to undergo abortion and has graoted divorce on that ground withont critically evaluating the impact of such an interpretation on the constitutional, legal and human rights of the wife. The courts have failed in the opinion of the author to construct the concept of mental cruelty especially with regard to the element of intention, and have only considered social factors in eonstructing the notion of mental cruelty and thereby perpetuating patriarchal norms through the law and whereby consistently sidelining and ignoring the woman's right over her own body. The justification for legalizing abortion proposed worldwide relating to the woman's freedom of choice on whether to give birth to a child or not, is an idea rooted within the liberal political ideology and inasmuch as it provides only a binary choice for women to make, it is as discussed insnfficient to correctly explain the practical aspect of how effectively the choice is exercised in the social sphere. There needs to be a struetural change in the Indian society, for ensuring effective exercise of the legal right to abortion as recognized in the MTP Act, 1971. It is high time for the judiciary and the legislature to clarify the concept of deprivation of parenthood in the context of the right to fatherhood and its degree of absoluteness. At the same time it must be considered by the members of the legal fraternity that after attaining parenthood to what extent can a person can use the unilateral decision of a woman to nndergo abortion as an instance of mental cruelty towards the husband. The anthor has attempted to identify the philosophical and jurisprudential concerns surrounding the construction of the concept of mental cruelty with regard to a woman's right of abortion and these questions raise serious concerns, which legal fraternity must discnss and debate upon.

Case Comment

on

What Turns the Good Samaritan Better after Road Disaster? Reading a Jndicial Cynieism over Legalism

Debasis Poddar*

And a lawyer stood up and put Him (Jesus) to the test, saying, "Teacher, what shall I do to inherit eternal life?" And He said to him, "What is written in the law? How does it read to you?"

- *Parable of the Good Samaritan (Luke 10: 25-37)*[1]

I. Introduction

Thus spoke Christ to question the law of the land and thereby put its inbuilt character- of social, and albeit moral, relevance- to test. Two thousand years thereafter, and four thousand kilometres away from His place, the Apex Court of India at New Delhi follows the same legacy while striving to transcend hyper-legalistic face of its procedural law and thereby giving the law social relevance through safeguards for 'Good Samaritans' after road disaster and thereby fortifying the essence of the law as a cementing element to strengthen solidarity among stakeholders of the society irrespective of apparent external differences *inter se* within its infiuitely heterogenous community. A silver line indeed, the judgment initiating guidelines for protection of Good Samaritans deserves apposite positioning; not only in given context of road safety rules, but even beyond. A jurisprudent message underlying in the pronouncement thereby declines recent trend for blind rush to the law and courts as panacea to cure every sundry evil under the Sun. Rather than getting stuck to court birds, the Apex Court extends a suggestion to return to social solidarity- as outlined by *Duguit*- through other routes.

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1 *Available at:* http://www.johndubler.com/Parables_18_WEB_The_Good_Samaritan--edited.pdf (last visited on November 24, 2016).

II. Fact & Issue(s)

The matter was initiated by 'Savelife Foundation'- a non-profit nongovernmental outfit as the petitioner- through public interest litigation under Article 32 of the Constitution. Therefore, there was no specific fact to prompt the Foundation move to the Court. But, the statistical database in general moved the Court to entertain this matter accordingly. As per the given World Health Organization (WHO) record, estimated number of road traffic deaths of India stands 207551 in 2013 and the rate (per 100000 population) stands 16.6.[2] Also, India stands one among those states with worst record on this count across the world[3] and has had a long way to march for Sustainable Development Goal 3.6 (road traffic injuries) of 2015.[4] Estimated GDP lost due to road traffic crashes stands 3.0% for India.[5] Some 1.25 million people die worldwide each year as a result of road traffic crashes.[6] In the wake of compelling database issued by a neutral agency like WHO, the cause received due cognizance of the Court since issues involved therein constitute a concern for public interest. Also, increase in diverse heads of the menace vis-à-vis road disaster, viz. drink-n-drive, sleep drive, speed drive, drive by underage, non-use of helmet for two-wheelers, non-use of seatbelt for four-wheelers, and so on, perhaps played critical role for the Court to entertain the matter with due diligence. A call of the hour, the judgment laid down a set of guidelines.[7] Also, relevant notification was issued by Ministry of Road Transport and Highways, Government of India, prior to the judgment mentioned above on road rules to supplement existing corpus of rules under the Motor Vehicles Act of

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2 *Available at:* http://apps.who.int/gho/data/node.main.A997)last visited on November 24, 2016).

3 *Available at:* http://gamapserver.who.int/ mapLibrary/ Files/Maps/ Global_Road Traffic_ Mortality_ 2013. png (last visited on November 24, 2016).

4 Sustainable Development Goal (SDG) 3.6 of 2015. By 2020, halve the number of global deaths and injuries from road traffic accidents. For details, refer to 'Transforming Our World: The 2030 Agenda for Sustainable Development', dated 12 August 2015. *Available at:* http://www.un.org/pga/wp-content/uploads/sites/3/2015/08/120815_outcome-document-of-Summit-for-adoption-of-the-post-2015-development-agenda.pdf (last visited on November 24, 2016).

5 *Available at:* http://www.who.int/violence_injury_prevention/road safety status/2015/ country_profiles/India.pdf?ua=1 (last visited on November 24, 2016).

6 *Vide* Global Status Report on Road Safety 2015, World Health Organization, Geneva (WHO), p. 1. *Available at:* http://www.who.int/violence_injury_prevention/road_safety_status/2015/ GSRRS2015_Summary EN final2.pdf?ua 1 (last visited on November 24, 2016).

7 *Available at:* http://judis.nic.in/supremecourt/imgs1.aspx?filename=43521 (last visited on November 25, 2016).

1988.[8] Together these two instruments appear better for road governance in India though it seems too premature to anticipate them ascertain road safety overnight. However, due to want of plenty other things beyond the law, even the best legislative regime is unlikely to attain the same.

III. Judgment

While looking into text of the judgment what are there may get arranged in an inventory: (i) characterizing the petitioner; (ii) taking into cognizance relevant statistical database- both worldwide and country specific- published by WHO as the UN health wing; (iii) best practices in the developed hemisphere vis-à-vis road safety legislative framework; (iv) aftercare mechanism as part of disaster management; (v) procedural nitty-gritty along with its deterrent effect to Good Samaritans around; (vi) pervasive public apathy to get stuck to police process out of otherwise bona fide initiative to save human life; (vii) prior judicial pronouncements with underpinning on the issues involved herein to draw background for the Court and thereby issue guidelines for road safety; (viii) jndicial endorsement on the road rules notification issued by the Ministry of Transport, dated 12.05.2015 to get the same implemented at par with decisions of the Apex Court; and the like. Indeed, no guideline got issned by the Court on its own, these road rules as notified by the Ministry served the purpose since the same has had craftsmanship with administrative experience required for road governance.

Interestingly enough, in course of its deliberation, the Court has interpolated a triangle with three otherwise independent yet interconnected Articles, e.g. 141, 142 and 144 respectively, to recreate imagery of the Union Judiciary as a stakeholder of the State under Chapter IV, Part V, of the Constitution while grappling with the rule of law genre for countless victims of road disaster. Whether and how far the Court thereby usurped more mileage in the power corridor over and above other powerhouses is a point apart. Within the given context of road safety, this may be presumed that, in the wake of lapse for leadership edge on the part of executive, the Court thereby emerges like statesman rather than mere an august house meant for peaceful settlement of legal disputes alone. As the most powerful Court of the world, albeit arguably, the Supreme Court has put its signature through roadmap for better road governance and the same is accomplished being well within its own domain of social engineering as suggested by Roscoe Pound. The court issued nothing on its own to usurp the

8 *Available at:* http://egazene.nic.in/WriteReadData/2015/164095.pdf (last visited on November 25, 2016).

role of legislature. It merely made relevant miuistry act what the same otherwise ought to do on its own:

"In view of the aforesaid discussion, it is apparent that guidelines and directions ean be issued by this Court including a command for compliance of guidelines and standard operating procedure issued by Government of India, Ministry of Road Transport and Highways, till such time as the legislature steps in to substitute them by proper legislation". (paragraph 18)

Through judicial endorsement on the executive notification with default status of "law" under Article 13(3)(a) of the Constitution, the Court employs its management strategy to resurface the same old executive law in public since 12.05.2015 with judicial robe to bring the same in practice. On one side, the same demonstrates potential of the Court. On other side, the same also exposes poverty of the Ministry that need judicial support to bring in effect for its own notification despite the same being "law" in technical sense of the term. Introspection is indeed overdue to the Union Executive.

Last but not least, draftsmen of the Notification deserves eredit for care and caution while formulating these fifteen directions toward legal protection of Good Samaritans from drudgery- if not vagary- either of the police process or of the medico legal process to their inconvenience. Now onwards, they ought to get construed in fiduciary terms. All relevant provisions of criminal procedure are scheduled to get compliant with these Ministry directions as per notification concerned by necessary amendment in the Code of Criminal Procedure,1973.[9] Besides, in furtherance of its earlier order in *Parmanand Katara v. Union of India and Others* [1989[4 SCC 286, the Court insisted due measures including few new; for instance, booking nonresponsive doctor for disciplinary action on the count of professional misconduct, do's and don`ts for public and private hospitals in like cases, etc.[10] The comprehensive notification of the Ministry played critical role for the Court to address major hurdles of aftercare with accuracy.

IV. Critique

On flip side of the eoin, few fundamental fault lines got left out. While dealing with what are not there, the foremost fallacy lies here that the Apex Court turned blind eye on prevention that is proved better than cure. Besides aftercare, therefore, little heed to prevention mechanism would have been great value addition to this

9 Paragraph 1(1-8). *Supra*, n. 8.

10 Paragraph 1(9-14). *Supra*, n. 8.

celebrated piece of judicial pronouncement. What makes affluent hands on wheels mindless to indulge in runway driving, what makes impoverished hands on wheels to impose upon slumber driving, contemplation on these inconvenient, and therefore irrelevant, issues involved therein are left to rest. Indeed, the same appears too much to claim from a court of law. But, the same appears imperative for a court of law to transcend its inbuilt limits and thereby emerge as court of justice. Also, with its profile, the Apex Court demonstrates potential to reach such great height out of its statesmanship across the power corridor in time ahead. After *Hamlet*, this may well be kept floated, "*To be or not to be- that is the question*!" Contemplation is due to sociology of road safety law along with means and methods the Court appropriates to this end.

Before one is issued driving license under Section 26 of the Motor Vehicles Act 1988, besides physical far-sight, appropriate authority should check mental foresight as well; something non-existent in the statute book. Also, the prospective driver ought to get tested in terms of human empathy (s)he has had and the same may be derived at ease through emotional quotient test that appears otherwise in practice and commonplace nowadays except where the same is imperative. Even in the proposed Motor Vehicles (Amendment) Bill of 2016, as introduced in *Lok Sabha*,[11] mental health of the driver is put to backseat to gross detriment of public interest. Consequently, life and limbs on the road remain at real stake to add on heavy burden of these Good Samaritans who are but few, too few, in their count. So also is the case in case of *pro bono* doctors who retain the soul into battered body. Unless and until these sources of road vulnerability stand guarded, *messiahs* ought to fall too short to manage the menace within threshold of the matter and thereby put the SDG no. 3.6 to fruition.

Besides driver, pedestrian and pavement dweller need to pay heed to attain road safety. In India, by courtesy pervasive mediocrity in public sphere, both railways and roadways are taken by the crowd as granted by the Almighty God to themselves; as if onus lies on driver alone to maintain their road safety. Regrettably, such a fanciful time is yet to arrive at this mortal and morbid world to allow jaywalkers on either way. Therefore, both pedestrian and pavement dweller need to walk along the road with care and caution till they reach pavement. Also, road ought not to get used by them except for crisscross over the same while required. In cases of road disaster, offensive mob outbreak toward the vehicle and its driver is bound to escalate hit-n-run cases out of desperation to escape the same

11 *Available at:* http://www.prsindia.org/uploads/media/Motor%20Vehicles,%202016/Motor%20Vehicles%20%28Amendment%29%20Bill,%202016-.pdf (last visited on November 26, 2016).

that may and does turn already fragile road safety worse. Pavement dwellers might have received relief in the Olga Tellis case.[12] However, the same cost road safety dear. Moreover there is encroachment upon pavement, less is the road safety for pedestrian and vice versa. The Court, therefore, needs to resolve self-sponsored paradox between Olga Tellis and Savelife Foundation: the former is meant for encroachment by pavement dweller while the latter for road safety of pedestrian. Both of them are but subjected to worst vulnerability due to want of road safety. Together these two pronouncements, with great grandeurs of their own, pose oxymoron for better road governance ahead. Right to residence and right to road safety, both of them jointly and severally flowing from right to life as most basic feature of the Constitution, a moot point before the Court lies in reconciliation between them without compromise with either.

V. Conclusion

Back to essence of the judgment, despite being a court of law, the Court transcended black letter law and its procedural fetters inbuilt therein and emerged as one of justice with compassion as priority since the same is superior to legislation while vulnerable human life is in real peril. Necessity knows no law and so does the Court if required to serve as trouble-shooter to further public interest. While ascertaining road safety, the law of the land ought to facilitate compassionate bystanders come forward and do what(s) he needs to as a saviour of humanity. The relevant rules issued by the Ministry under supervision of the Court put hospitals and doctors to its net. Thus, in final coant, the Court reiterated inner morality of the society that has had legitimacy sans legality. The judgment hereby adds value through insertion of legality.

The judgment deserves credit since the same addressed a long pending legal lacuna that kept the society and the state apart. The former being an informal organization and the latter being a formal institution, they have had their respective means and methods of procedure parallel to one another. At times, therefore, they thereby fall poles apart while they need to walk together hand-in-hand. A synergy between them is required to facilitate road governance better. Through this judgment, the Court attained synergy between them and thereby served the vestibular purpose *inter se* for better coordination. In the wake of humanity, the law and its procedure ought to serve as handmaid for those engaged to carry forward the cause of humanity. Through its judgment, the Court strived to ascertain

12 Olga Tellis and Others v. Bombay Municipal Corporation and Others, etc. [1985] SCC (3) 545. *Available at:* http://judis.nic.in/supremecourt/imgs1.aspx?filename=9246 (last visited on November 26, 2016).

the same and thereby transcend the legalistic jingoism in the name of law and justice. Here lies the signature of its contribution to save life from the clutch of law. By implication, the Court hereby reiterated eternal truth that court and its law is meant for life and not vice versa. As one trouble-shooter, the law ought not stand on the way of another to pat their common cause for humanity to jeopardy.

Citation :

Savelife Fondation and Auother v. Union of India and Another, Civil Original Jurisdiction, in the Supreme Court of India, Writ Petition (C) No. 235 of 2012, New Delhi, dated March 30, 2016.

Case Comment

on

the *Arbitration between the Republic of the Philippines and the People's Republic of China*

Dr. Kavitha Chalakkal*

On 12 July 2016, the Arbitral Tribunal constituted under the provision of Part XV and Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS 1982) in the Arbitration between the Republic of the Philippines and the People's Republic of China (the South China Sea Arbitration or, in short, SCS Arbitration) issued its final Award.[1]

The arbitration was initiated as a result of continuing disputes between the Philippines and People's Republic of China regarding the legal basis of maritime rights and entitlements in the South China Sea, the status of certain geographic features in the area, and the legality of certain actions taken by China in the South China Sea.

The South China Sea is a semi-enclosed marine area in the western Pacific Ocean, spanning an area of almost 3.5 million square kilometres, and lies to the south of China; to the west of the Philippines; to the east of Viet Nam; and to the north of Malaysia, Brunei, Singapore, and Indonesia. The South China Sea is a crucial shipping lane, a rich fishing ground, home to a highly bio-diverse coral reef ecosystem, and is also believed to hold substantial oil and gas resources. The southern portion of the South China Sea is also the location of the Spratly Islands, a constellation of small islands and coral reefs, existing just above or below water, that comprise the peaks of undersea mountains rising from the deep ocean floor and are the site of longstanding territorial disputes among some of the littoral States of the South China Sea. In recent years, considering the economic and strategic importance and to further its developmental ambition, China has built seven artificial islets over uninhabited reefs and shoals as well as exerted significant military control over the area surrounding them. China also holds that it controls 80 or 90 percent of the 1.35 million square-mile sea that falls within the "nine-dashed line," a feature drawn on Chinese maps by its Nationalist government since 1947.

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1 *Available at* : https://pca-cpa.org/wp-content/uploads/.../PH-CN-20160712-Award.pdf (last visited on 21 November 2016).

The basis for this arbitration were the violation of obligations under UNCLOS 1982,[2] as alleged by Philippines against China. Philippines approached the tribunal for remedies on three set of issues. First, the Philippines sought declaration that the parties' respective rights and obligations in regard to the waters, seabed, and maritime features of the South China Sea are governed by the Convention only and that any Chinese claims reflected by the so-called "nine-dash line" are inconsistent with the UNCLOS and therefore invalid. Second, the Philippines sought determinations that, under the Convention, Scarborough Shoal (Huangyan Dao) and eight maritime features in the Spratly Islands Group (Nansha Qundao), which are claimed by both China and the Philippines, are either "rocks" or "low-tide elevations" and, as such, are capable of generating only an entitlement to a 12 nautical mile territorial sea or no maritime entitlement at all. It stated in particular, that none of these features can generate an entitlement to an exclusive economic zone (EEZ) or continental shelf. Third, the Philippines requested the Tribunal to rule that China violated the Convention by interfering with the exercise of the Philippines' sovereign rights and jurisdiction, by interfering with the Philippines' freedom of navigation and by conducting construction, fishing and other activities that harm the marine environment.

However, China made it clear from the beginning of the procedure that it would neither accept nor participate in the arbitral proceedings because the disputes presented by the Philippines were outside the jurisdiction of the Tribunal. China issued a 'Position Paper' on this aspect on 7 December 2014 and raised three main objections to it. Firstly, that the subject matter of the arbitration is, in essence, "the extent of China's territorial sovereignty in the South China Sea" and, in particular, its "sovereignty over the Nonsha Islands as a whole" and that the jurisdiction of the Tribunal is, limited to "disputes concerning the interpretation or application of this Convention", and the UNCLOS does not essentially cover the disputes relating to territorial sovereignty. China's second contention was that even if it can be assumed that the subject-matter of the arbitration concerns the interpretation or application of the Convention, the subject-matter in question forms an integral part of the maritime delimitation disputes between the two countries. However, in August 2006 China had validly excluded disputes concerning maritime delimitation from the Tribunal's jurisdiction under Article 298 of the Convention. The third point forwarded by China was that any recourse to arbitration is excluded because China and the Philippines have agreed to settle their disputes in the South China Sea exclusively by negotiations.

2 Both the Philippines and China are parties to the Convention, the Philippines having ratified it on 8 May 1984, and China on 7 June 1996.

The Tribunal in a unanimous decision on 29 October 2015 rejected this position paper and claimed jurisdiction in the matter by affirming that the matter is essentially with regard to interpretation of the UNCLOS and not of territorial sovereignty. It also held that Philippines met the requirement under Article 283 of the UNCLOS that the parties exchange views regarding the settlement of their disputes.

The arbitration saw two major issues that have been existing for almost three decades with regard to the activities in South China Sea. The first one was whether China's claim to historic rights in the South China Sea is compatible with UNCLOS delimitations and can it exceed the limits of China's maritime entitlements under the latter? And secondly whether the Spratly Islands be classified as 'fully entitled islands' capable of generating an exclusive economic zone and continental shelf of their own?

China had continuously held on to the fact that it had made a permissible opt-out declaration under Article 298(1)(a)(i) UNCLOS, which meant that it did not have to accept the ordinary principle of compulsory dispute settlement under the Convention in relation to disputes concerning maritime delimitation or disputes 'involving historic bays or titles'. This had prompted the arbitrators to closely examine the history of the law of the sea and the negotiation of UNCLOS regarding 'historic bays or titles'. The key word identified was the term is 'title', which was taken in the meaning of complete ownership or in this case sovereignty. According to the international law of the sea, sovereignty in the strict sense extends only as far as the 12 nautical mile territorial sea of a State. The area beyond that, according to UNCLOS falls short of complete ownership or sovereignty of the State. In this context, the tribunal found that the historic rights China claimed in the South China Sea fell short of title, though it did appear to assert special rights in respect of the living and non-living resources of the South China Sea.

The Tribunal's award is highly favourable to the Philippines, ruling that China's nine-dash line claim and accompanying claims to historic rights have no validity under international law; that no feature in the Spratly Islands, including Taiwan-occupied Itu Aba (or Taiping Island) is an island under the United Nations Convention on the Law of the Sea (UNCLOS); and that the behaviour of Chinese ships physically obstructing Philippine vessels is unlawful and further DECLARES that the Convention superseded any historic rights, or other sovereign rights or jurisdiction, in excess of the limits imposed therein.[3]

3 *Supra* n.1 at P 495-499.

The final Award by the Tribunal authoritatively declares the limits of rights and obligations for the Parties under UNCLOS, creates an objective yardstick by which activities of these two parties, or for that matter of all states, in the South China Sea will be gauged. According to Article 11 of Annex VII the award of the Arbitral Tribunal shall be "final". The provision reiterates the general statement in Article 296(1) UNCLOS3 that any decision rendered by a court or tribunal having compulsory jurisdiction under Part XV. There's no right of appeal and the decision cannot be annulled by the UN. The Award is technically binding only upon the Philippines and China, however, it also has an *erga omnes* effect—it is recognized by virtually all states. This is evident from the fact that the finality and binding nature of the Award has not been impugned by any country, except China.

The surprising feature of the ruling was the judgment that there are no 'fully entitled' islands in the Spratly group entitled to an EEZ and continental shelf. That particular ruling has far-reaching implications. It presents challenges for other countries, including Australia, France, Japan and the US, which have claimed a full set of maritime zones from small, isolated features. Those countries are all likely to ignore the precedent established by the tribunal on 'rocks' and 'islands'.

The Award is an unequivocal declaration of the rights and limitations of States under the Law of the Seas and it appears entirely defensible. The Tribunal has not taken the compromising stand for a superpower, which is admirable. However, the bigger question in the context of China's unwillingness to accept the decision is its enforceability. Philippines would find it difficult to implement the decision immediately. Even though the Award doesn't immediately confer upon the Philippines any enforceable rights, it's created an important precedent with respect to the legality of the 'nine-dash line', the status of islands and rocks, and land reclamation and artificial island building activities. China has taken a short-term position that it will not accept the decision but will remain open to negotiations.

The Tribunal's expansive approach to certain issues, which went beyond what most legal experts anticipated, in defining the terms "rocks and islands" and the declaration that the contested rocks in the South China Sea does not generate an EEZ and continental shelf, has diminished the inherent value of these features. This aspect of the decision also presents a challenge for other countries, including Australia, France, Japan and the US, which have claimed a full set of maritime zones from small, isolated features and are all likely to ignore the precedent established by the tribunal on 'rocks' and 'islands'. For example, immediately after the decision Japan reasserted that the small feature of Okinotorishima in the Pacific Ocean is an actual island and not rock.

The Philippines and its South China Sea neighbours can rely upon the Award as a bench mark as they seek to reach settlements with China over their maritime disputes. This may prompt the coastal states to embark upon other cooperative endeavours, which may involve states outside the region and international organizations, in order to address the closely integrated issues in this semi-enclosed sea as mandated under UNCLOS.

The cautious international response to the award suggests that states are mainly concerned with its implications for their interests, and not with observing international law for its inherent legitimacy. Only the United States, Australia and Japan have expressly stated that the award is binding. Such language was absent from India, South Korea, all ten ASEAN states, the European Union and the office of the UN Secretary General. This also raises a serious question of the integrity of the UNCLOS dispute resolution regime.

The current global situation demands that international obligations are to be honoured and implemented by states in its practices. For China, its long term decision regarding the compliance with the award will be a significant test of its commitment to upholding international law, including UNCLOS, and to maintaining peace and stability in international relations, specifically in the South China Sea area. The compliance of the award will help to ensure a predictable and stable legal order in the South China Sea, which boasts important natural resources for the development of the coastal states and facilitates the movement of over 50 percent of the world's commercial ship industry.

S. A. Kader (2016)

A.M. Bhattacharjee's Muslim Law and the Constitution:

Eastern Law House, Kolkata, Pp. 303. Price - Rs. 740/- (Hard Bound)

Reviewed by : Qazi Mohd. Usmaan, Assistant Professor, *Faculty of Law, Jamia Millia Islamia, New Delhi.*

This is a welcome addition to the ever growing literature on Muslim Personal Law and its constitutionality. The book under review, authored by a renowned retired judge of Madras High Court, endeavored to have insight into some observations on Muslim Law, constitutionality of Muslim personal law, personal issues of Muslims, *i.e.*, marriage, divorce, polygamy, maintenance *etc*.

This book has become more relevant today given the issue relating to Muslim personal laws namely *triple Talaq* which is pending before the Supreme Court of India.

The book presents a very exhaustive and comprehensive discussion on different aspects of various personal laws issues in the light of Constitution. The author has attempted to capture varied facets of Muslim personal law and has analyzed them at the touchstone of the constitution. Issues like marriage, divorce, succession, guardianship, pre-emption, conversion have been dealt with elaborately.

The book is thematically segmented into eight Lectures, namely, Muslim Laws-- some General Observations; Muslim Laws- Amenability of the Constitution; Conversion & Muslim Law of Marriage and the Constitution; Conversion-Muslim Law of Succession and the Constitution; Muslim Law of Marriage and Divorce and the Constitution; Muslim Law of Maintenance and Guardianship and the Constitution; Muslim Law of Pre-emption and the Constitution and Muslim Law and the Constitution which have been imbibed into separate chapters. Further, each chapter of the book is followed by conclusion or some kind of summary, which makes the book more authentic and user friendly.

The book is an authentic document on various facets of personal laws and its validity. The decisions of different high courts and Supreme Court have been used frequently. The book has also mentioned the opinions and views of several

legal experts and scholars, which makes the book all the more relevant for academicians, law students, advocates and judges of the law courts.

In chapter I, *i.e.*, Muslim Law: Some General Observations, the author attempted to trace the origin of Muslim law. He also endeavored to settle the Islamic law as Muslim law instead of *Muhammadan* law not becaase the latter expression is misleading or inaccurate or objectionable, but the former is latest and in consonance with the most important enacunents making Islamic law a law of India passed by the government dealing with the Muslim personal law, namely the Muslim Personal Law (Shariyat) Application Act, 1937, the Dissolution of Muslim Marriage Act, 1939 and The Wakf Act, 1954. He, however, pointed out that *Islam* is generally regarded to be "the result of teaching and preaching of Propher *Mohammed* (PBUH) and to have been promulgated by the propher". According to him, the word *Islam* means 'peace' and 'submission'. In its religious sense, it denotes 'submission to the Will of God' and in its secular sense, the establishment of peace.

He also made an attempt to distinguish between public and private laws, and suggested that personal laws, i.e., both Hindu and Muslim laws, as administered since the British period, would appear to be wider as well as narrower than private law. He states that personal laws are wider than private law as they cover matters relating to, for example, Public Wakfs and Public Religious and Charitable Endowments, they are narrower as they do not cover matters relating to private contracts and private transfer of properties. He also pointed out that the applicability of personal law in India depends on religion or race and not on nationality or domicile.

While removing the controversy as to whether the Muslim Personal Law (Shariyat) Application Act, 1937 containing the Muslim Personal Law is 'law of the land' or not, he explains that the enactment is a legislative charter adopting and directing the application of the Muslim Law to the Muslims and if the enactment is a law of the land, the laws adopted and covered thereby are also the laws of the land. The expression 'law of the land' should not be confused with and need not be confined with the general laws of the land. Local laws applying to a part of the land and special laws applying to a particular snbject are also the laws of the land. Muslim Personal Laws are not local laws as they are applicable in the whole of India and not merely a particular part thereof. They may be special laws as they do not apply to all the Indians but apply only to Indian Muslims.

The author further dealt with the question whether the Quran, the Hadis, the Ijma and the Qiyas are the effective sources of Muslim Laws?, are they ceased to be

the effective sources? and what are the factors retarding the further development of Maslim Law in India?

In chapter 2, the author has been successful in proving that personal laws are 'laws in force' within the meaning of Articles 13(1) and 372(1) of the Constitution and also State actious within the meaning of Articles 14 and 15 and are accordingly subject to all the provisious of the Constitution and its Part III in particular. In this chapter, while quoting some eminent jurists, the author attempts to comprehend the making of laws and submitted that the Muslim law administered in India is obviously law, for it contained also sets of rules regulating external actions of Muslims and were enforced by the sovereign political anthority through its judicial and other organs.

The author has attempted to provide a full length discussion on the issue whether personal laws of the parties are within the scope of the Constitution of India and if yes, can Constitution provide the scriptures? The author tries to establish with the support of relevant case laws as decided by the Snpreme Court and different High Courts that personal laws are not beyoud the scope of Articles 13 and 372. These decisions also accepted the amenability of the personal laws of the Hindus and the Muslims to the provisions of the Constitution.

The striking feature of this book is that in the very initial chapters particularly chapter III, it has established that the personal laws are not the beyond the scope of the Constitution and in following chapters, the varions constitutional provisions have been ased to analyze the issues relating to personal laws.

Chapter 3 deals with the effects of conversion into the Muslim law of marriage and its constitutionality. Responding to this issue, the author has concluded that when one of spouses renounces Islam and becomes Hindu, Muslim Law would cease to apply as a matter of course as the parties are no longer Muslims and Hindu Law also cannot begin to govern to the case as a matter of course as the provisions of the relevant enactments directly dealing with Hindu Law would apply only where the parties are Hindus. However, where both the parties to a Muslim marriage renounce Islam and adopt Hinduism, then they and their marriage come out of the provisions of the Shariyat Act, 1937 and other enactments directing application of Muslim Law. The author further pointed out that the principle noted above will equally apply where one or both of the parties to a Hindu marriage renounce Hindnism and adopts or adopt Islam.

While dealing with the effect of conversion in the Muslim Law of Succession as applied by Indian Courts, the author, in chapter 4, has pointed out that the rule under earlier Maslim Law, a non-maslim convert cannot inherit from a muslim, is

still the law except to the extent that it is modified by the Caste Disabilities Removal Act, 1850 whereunder right of inheritance of a convert from Islam would not be affected, whereas his descendants born after such conversion still continued to be excluded from inheriting their ancestor's non converts relations on the ground of differences of religion as they were under the law prevailing prior to the Caste Disabilities Removal Act, 1850.

In chapter 5, the author, while dealing with the issue of Muslim Law of marriage and divorce has gone to say that polygamy for Muslim males and monogamy for Muslim female is *ultra vires* Articles 15 and 16 of the Indian Constitution and the law permitting polygamy for Muslim males having become void since the commencement of the Constitution. However, he quoted the decision in a case of *Krishna Singh* v. *Mathura Ahir*[1] where Supreme Court laid down that Part III of the Constitution does not touch upon the Personal Laws of the parties. In this chapter, the author also discussed Inter-religious marriage of the Muslims and different kinds of divorce permitted under Islamic law.

While responding to the next issue, i.e., Muslim Law of Pre-emption and the Constitution, the author pointed out that Muslim Law generally holds that the owner of undivided property and neighbor owning the adjacent property has a right of Pre-emption. However, he suggested that this right should be given to muslim as well as non-muslim equally otherwise it would be violation of Articles 14 and 15 of the Constitution.

In the last chapter of the book, the author has attempted to capture all the relevant constitutional provisions which have some ramification on issues relating to personal laws or religions, e. g., equality, justice, gender discrimination, uniform civil court and right to religion etc.

Lastly, this is a very authentic book dealing with the Muslim Personal Laws and the Constitution. There is no typing error in the book.

1. AIR 1980 SC 707.

V. K. Ahuja (2015)

Public International Law, LexisNexis, New Delhi, Pp. xxxii, 416, Price - Rs. 395/- (Paperback)

Reviewed by : Dr. Rahul J Nikam, Assistant Professor of Law, School of Law, NMIMS – Deemed to be- University, Mumbai

The book "Public International Law"- V K Ahuja, is publishedby LexisNexis Publishing Co. Pvt. Ltd. New Delhi. The book has been structured keeping in mind the recent developments in International Law and the requirements of international law scholars. The objective enshrined in the book is to educate and impart the knowledge of contemporary world law i.e. Public International Law.

The world in 21st century is confronted with new and shifting global realities and thus, there are new trends emerging within the realm of international law. These trends pose inevitable challenges to international law and gradual development of peace with it. The global economy and interconnection of States have major repercussions in their interrelation at world level. These changes are rapidly changing the international norms and raising challenges to the classic model of the development of international law. This challenging environment is increasingly placing international political commitments over the international legal commitments. Thus, these new global realities and the sectorial approach to international law raises questions like international law coming out of international events like COP21, etc. Keeping in mind this reality the international law of the 21st century should be adaptable, inclusive, effective, innovative, relevant and responsive to the current international realities. Last, but not the least, international law of the 21st century should be accountable to the State comity for their commitment for future development, peace, safety and security of world.

In the backdrop of above mentioned facts and for easy understanding, the book is divided into 19 chapters with plethora of cases related to ICJ, PCIJ, various world *ad hoc* tribunals and domestic Courts. The various topics which are thoroughly discussed through out the 19 Chapters have been dealt in 410 pages and "Index" at last. The Chapters 1- 10 have broadly brought out the basic

nnderstanding about definition, sources and subjects of international law; relationship between international law and domestic law; State -recognition, succession, jurisdiction, responsibility; law and practice of treaties; diplomatic and consular relations. The writings bring forth the latest understanding of international law from its inception and the effects on it with its deficiencies in the present day context. In the chapter titled as 'Law and practice of treaties', the writer has dealt with all aspects of treaties with emphasis on the legal effects of being signatory to the treaty and its effects on the sovereign State and international organizations in the light of their intercourse with the world comity. In the writer's view the States are bound by the treaties which they are entering into, and it becomes easier for the parties to know their rights and obligations arising out of them.

The chapters 10-11 discuses the law relating to the air, space and seas which are other emerging areas in international law. In these chapters writer has demonstrated successfully that the trade and services through navigation by air and sea are having economic implication on States and their relations with world comity. These basic rules & their implications needs to adhere with the basic principles of international law in their inter-relationship. Otherwise non adherence and breach of these basic principles would be another area which will pose great difficulties in harmony of inter State relationship and world peace and prosperity.

In its onward passage, the chapters 12-14 speaks about the various international institutions including the International Court of Justice and other important dispute settlement mechanisms. The chapter titled 'International Institutions' speaks about the need to establish international organization in the wake of growing international business, trade and services through movement of people across the globe. It was, therefore felt that there should be regulation of international intercourse by institutional means which was aptly brought by the writer in these chapters. In subsequent chapters author proceeds with in -depth discussion and importance of creation and operation of international judicial bodies that are capable of enforcing international commitments, interpreting international treaties and settling international conflicts which have facilitated the growth of international legal norms and cooperative regimes governing important areas of international law and politics, such as economic relations, human rights and armed conflicts.

The chapter titled 'Use of force' the author has taken care to address the scope and objective of coercive methods, prohibition on the use of force, UN action under UN Charter chapter VII, Uniting for Peace Resolution, right of self-defense and regional arrangements. According to the author, the set of international principles of use of force is facing new challenges across the world through the

new forms of terrorism along with some countries continuing with breach of their commitment in honoring the settled principles of international law in use of force. In discussing regional arrangements, the author has aptly mentioned the status of these regional arrangements and their status in the UN Charter and use of these regional arrangements by the Security Council of UN in the context of peacekeeping and peace enforcement. Further, the author proceeds to cite the examples in the case of 2003 the Economic Community of West African States (ECOWAS) sought to intervene in Liberia. The Security Council of UN authorized the establishment of a multinational force based upon ECOWAS to implement ceasefire. In another case, in 2004 the African Mission in Sudan was created as a part of a ceasefire monitoring arrangement together with the European Union for the purpose of implementing ceasefire in Darfur. Subsequently, the African Union force merged with the United Nations force in 2007.

In the chapters to follow i.e. 16- 19, the author has addressed the international humanitarian laws, protection of refugees and protection of human rights. The writer viewed the set of these humanitarian laws in their nut shell together with problems posed by 21st century developments. The emphasis is on all States to take all feasible measures to avoid and in any event to minimize incidental loss of civilian life, injury to civilians and damages to civilian objects. The author proceeds to cite the example of *Juan Carlos Abella v. Argentina* that there is no concept of derogation in international humanitarian law. The protection offered by human rights conventions does not cease in case of armed conflict, unless there has been a relevant derogation permitted by those conventions. In another example in the Report of the OCHR investigation on Sri Lanka (OISL) 2015 that Art. 9 of ICCPR and human right law protect all persons against unlawful or arbitrary interference with their liberty, including deprivation of liberty. On the refugee protection in India, the author has touched the India's stand and Indian judiciary response through cases like *National Human Rights Commission v. State of Arunachal Pradesh and Malavika Karlekar v. Union of India* etc. Further, the author without fail has addressed India's concerns over the potentiality for incursion into State sovereignty posed by the 1951 Convention and 1967 Protocol including the supervision of refugee processing by UNHCR.

In the last chapter, the author has extensively covered three generation human rights, human rights under UN and UDHR, promotion and protection of human rights under various Conventions like ICCPR and ICESCR, CEDAW and implementation of these rights in Indian context.

The book as a whole gives a profound understanding of Public International Law worldwide and insight in States practices and leading case laws. Being fresh in approach, it provides valuable knowledge about public international law for law students, research scholars and legal and teaching fraternity alike.

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