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FREE EXERCISE, THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION, AND THE AUSTRALIAN CONSTITUTION

Gian-Luca Stirling, Paul Babie[*]

Abstract

This essay argues that the implied freedom of political communication in the Australian Constitution includes within its protection religious speech, and that such speech may include acts of worship, such as communal public prayer, as a necessary corollary of speech. Treating religious speech in this way may have significant implications for the restrictions placed upon communal worship activities, such as those employed to control the spread of COVID-19.

Keywords: *Australian Constitution; implied freedom of political communication; freedom of religion or belief; political speech; communal public workship; reasonable limitations*

I. Introduction

The Australian Constitution contains limited protection for fundamental rights and freedoms, with five rights expressly enumerated: (i) against takings of property without just terms compensation; (ii) for trial by jury on indictment for an offence against any law of the Commonwealth; (iii) protecting freedom of trade, commerce and intercourse within the

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Commonwealth; (iv) freedom of religion; and, (v) freedom from discrimination by one state against the residents of another.[1] Of these, the protection for freedom of religion might seem the most robust; s 116 provides:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The text of s 116 appears to provide four guarantees, protecting against: the establishment of a state religion; the observance of a state religion; a prohibition of the free exercise of religion; and a religious test for the holding of a Commonwealth office or public trust. Yet, three difficulties emerge which hamper s 116 in protecting freedom of religion. First, it expressly applies only to the Commonwealth, or federal government, and not as a protection against the states.[2] Second, only two of the four express guarantees have been interpreted by the High Court, Australia's final appellate court, and, in relation to both, the interpretation has been very narrow. The High Court treats s 116 as 'not, in form, a constitutional guarantee of the rights of individuals; . . . instead[, it] takes the form of express restriction upon the exercise of Commonwealth legislative power',[3] 'a denial of legislative power to the Commonwealth, and no

[1] *Constitution of Australia*, ss 51(xxxi), 80, 92, 116, and 117, respectively.
[2] John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, Revd ed, 2015) 1162.
[3] *Attorney-General (Vic); ex rel Black v The Commonwealth* (1981) 146 CLR 559, 605 (Mason J).

more.'[4] Finally, High Court jurisprudence dealing with the third guarantee, free exercise,[5] limits its scope only to:

> prohibiting the practice of religion—the doing of acts which are done in the practice of religion. To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of [s] 116 . . . .[6]

In other words, only a law with the express purpose of restricting free exercise violates the third guarantee of s 116.[7] Thus, on this interpretation, a law of general application which applies to all people irrespective of religious observance, but has the effect, although not the express purpose of restricting or inhibiting free exercise fails to contravene s 116. As such, the free exercise protected by s 116 is limited 'to the internal forum, with no relevance to public acts.'[8]

There may be another way, however, to extend the protection for free exercise to the external forum—to one's public acts of worship rather than merely the holding of faith as a personal, internal matter—and to

[4] Ibid 653 (Wilson J).
[5] *Krygger v Williams* (1912) 15 CLR 366; *Adelaide Co of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116; *Kruger v Commonwealth* (1997) 190 CLR 1.
[6] *Krygger v Williams* (1912) 15 CLR 366, 369 (Griffith CJ).
[7] *Adelaide Co of Jehovah's Witnesses Inc* (1943) 67 CLR 116, 132 (Latham CJ); *Kruger v Commonwealth* (1997) 190 CLR 1.
[8] Michael Hogan, 'Separation of Church and State: Section 116 of the Australian Constitution' (1981) 53 *Australian Quarterly* 214, 220; see also Anthony Gray, 'Section 116 of the Australian Constitution and Dress Restrictions' (2011) 16 *Deakin Law Review* 293, 316.

extend that protection to legislative and executive action taken by both the Commonwealth and the states, whether that is the effect or the direct purpose of such action. The possible solution lies in one of the rights found to be implied by the text of the Constitution—the freedom of political communication. In this short essay, we argue that because free exercise and free speech interact, and because they both involve thought, speech *and* conduct,[9] it is possible to use the existing implied freedom of political communication to protect free exercise as against both Commonwealth and state infringement.

Why does it matter that the implied freedom of political communication provide some protection for free exercise? The answer lies in the global COVID-19 which began in 2019. Throughout 2020, as did every nation,[10] Australian states and territories placed a range of general restrictions on public gatherings; some form of these restrictions remain in effect today.[11] And while they are of general application, the restrictions have the effect of limiting free exercise in the form of public worship. But unlike every other democracy that imposed such restrictions, Australia alone has no means by which their justifiability may be tested as against a constitutional standard. Other democracies typically protect fundamental rights, including free exercise in

[9] Erwin Chemerinsky and Howard Gillman, *The Religion Clauses: The Case for Separating Church and State* (Oxford University Press, 2020) x.

[10] For examples of restrictions in other democracies, which remain in effect, see, for Canada, The Presbyterian Church in Canada, 'Information & Resources to Help Congregations During COVID-19' <https://presbyterian.ca/covid-19/>, and for the United States, Virginia Villa, 'Most states have religious exemptions to COVID-19 social distancing rules', *Pew Research Centre* (27 April 2020) <https://www.pewresearch.org/fact-tank/2020/04/27/most-states-have-religious-exemptions-to-covid-19-social-distancing-rules/>.

[11] For a current list of all Australian state and territory restrictions, see Australian Government Department of Health, 'Coronavirus (COVID-19) health alert' (11 March 2021) <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert>.

constitutional or quasi-constitutional instruments.[12] But because the interpretation of s 116—which might otherwise provide such protection as is found in other democracies—applies only to laws with the express purpose of infringement, laws of general application, such as COVID-19 restrictions, cannot successfully be challenged as encroachments on free exercise. Moreover, even if s 116 did apply, it would protect only against Commonwealth and not state restrictions. This matters because the vast majority of the Australian restrictions are imposed by the states. As such, whether free exercise can be found within the implied freedom of political communication takes on greater valence.

The essay contains four parts. Part II briefly recounts the origins and operation of the implied freedom of political communication. Part III suggests that political speech includes religious speech, and so is encompassed by the implied freedom. Part IV argues that if political speech includes religious speech, that may also cover acts of worship, for the simple reason that conduct is often a necessary corollary of speech. This may have significant implications for restrictions placed upon communal worship activities, such as those employed to control the spread of COVID-19.[13] Part V reviews the way in which the state may justifiably limit the implied freedom for legitimate public objectives.

[12] For constitutional instruments, see *Canadian Charter of Rights and Freedoms*, s 2, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11; *United States Constitution*, Amend. II; *Constitution of India, 1950*, Art 25. For quasi-constitutional protection, see *Human Rights Act 1998* (UK) s 13; *New Zealand Bill of Rights Act 1990*, s 13.

[13] See Paul T Babie & Charles J Russo 'If Beer and Wrestling are "Essential," So Is Easter: COVID-19, Freedom of Religion or Belief, and Public Health and Safety in Australia and the United States—Why Rights Matter' (2020) 55 *New England Law Review Forum* 45 <https://www.newenglrev.com/v55-special/essential-forb>.

Again, this would clearly bear relevance to COVID-19 limitations, imposed for legitimate public health reasons.[14] Part VI concludes.

II. The Implied Freedom of Political Communication

As a consequence of the federal democratic framework established by the text of the Constitution, the High Court has found 'implied' rights in the Constitution. The Court relies upon this rationale:

> Elections of federal Parliament provided for in the Constitution require freedom of movement, speech and other communication, not only between the States, but in and between every part of the Commonwealth. The proper operation of the system of representative government requires the same freedoms between elections. These are also necessary for the proper operation of the Constitutions of the States (which now derive their authority from Ch. V of the Constitution. From these provisions and from the concept of the Commonwealth arises an implication of a constitutional guarantee of such freedoms, freedoms so elementary that it was not necessary to mention them in the Constitution.[15]

This was utilised by the Court to find the implied freedom of political communication:[16] 'there is to be discerned in the doctrine of representative government which the Constitution incorporates an implication of freedom of communication of information and opinions

[14] See Babie & Russo (n 13).
[15] *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88 (Murphy J) (internal citations omitted).
[16] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power & Ors* (2004) 220 CLR 1.

about matters relating to the government of the Commonwealth.'[17]

Because this freedom has been found to be logically indivisible, drawing upon the entirety of the Constitution, it applies to protect against encroachments of both the Commonwealth and the states.[18] The question that arises is whether this freedom extends also to protect religious speech; we turn to that question in the next part.

III. Religious Speech

A. Is it Political?

Can religious speech be political communication for the purposes of the implied freedom? Arguably.[19] The primary argument for suggesting that religious speech is sufficiently 'political' to attract the protection of the implied freedom draws upon the express protection for free exercise found in s 116. If the implied freedom draws its implication from the express text of the Constitution, then the implication of a democratic structure includes, by virtue of the express text of s 116, some consideration of the place and role of religion within the community thereby established. Religious speech has an important role to play in a democratic society—it makes possible the opportunity for individuals to have open discourse about morality, ethics, values and beliefs (although, of course, not always constructively). For that reason, the implied freedom must, arguably, include, at least to some degree, the freedom to

[17] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72-3 (Deane and Toohey JJ).
[18] *See, e.g., Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; *McCloy v New South Wales* (2015) 257 CLR 178; *Brown v Tasmania* (2017) 261 CLR 328; *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171; *Spence v Queensland* [2019] HCA 15; *Unions NSW v State of New South Wales* (2019) 264 CLR 595.
[19] See Mitchell Landrigan, 'Can the Implied Freedom of Political Discourse Apply to Speech by or About Religious Leaders?' (2014) 34 *Adelaide Law Review* 427.

communicate concerning religious matters. The High Court itself has suggested that religious speech may constitute political communication. The Court has found that political speech broadly includes communication on *all* political matters.[20] Moreover, in *Attorney-General (SA) v. Corporation of the City of Adelaide*, the Court wrote, in obiter, that:

> Some "religious" speech may also be characterised as "political" communication for the purposes of the freedom. . . . Plainly enough, preaching, canvassing, haranguing and the distribution of literature are all activities which may be undertaken in order to communicate to members of the public matters which may be directly or indirectly relevant to politics or government at the Commonwealth level. The class of communication protected by the implied freedom in practical terms is wide.[21]

In *Clubb v Edwards; Preston v Avery*, the Court considered challenges to laws establishing protest-free zones around abortion clinics. While the issue of religious speech was not directly raised, the Court determined that:

[20] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power & Ors* (2004) 220 CLR 1; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; *Hogan v Hinch* (2011) 243 CLR 506; *Unions NSW v State of New South Wales* (2013) 252 CLR 530; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; *McCloy v New South Wales* (2015) 257 CLR 178; *Brown v Tasmania* (2017) 261 CLR 328; *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171; *Spence v Queensland* [2019] HCA 15; *Unions NSW v State of New South Wales* (2019) 264 CLR 595; *Smethurst v Commissioner of Police* [2020] HCA 14.

[21] *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 44 (French CJ).

> A discussion between individuals of the moral or ethical choices to be made by a particular individual is not to be equated with discussion of the political choices to be made by the people of the Commonwealth as the sovereign political authority. That is so even where the choice to be made by a particular individual may be politically controversial.[22]

Still, the Court did accept that 'the line between speech for legislative or policy change and speech directed at an individual's moral choice 'may be very fine where politically contentious issues are being discussed.'[23] And the Court left open the possibility that such speech may constitute protected speech. Yet even if the implied freedom is found to encompass religious speech, would it extend so far as to protect conduct or actions taken as part of expressing that speech, namely, public worship?

B. Does it Cover Worship?

Sometimes, conduct is necessary for the purposes of engaging in speech. There are two arguments for advancing that proposition. First, by analogy to American Constitutional jurisprudence, one might take the position, as did Justice Lionel Murphy of the High Court, that experience with the very similar language of the First Amendment could be used in interpreting the Australian Constitution.[24] If that is so, then the American experience with the interplay of free exercise and free speech may

[22] *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171, 191 (Kiefel CJ, Bell and Keane JJ).
[23] Martin Clark, 'Clubb v Edwards; Preston v Avery' (18 April 2019) *Opinions on High* <https://perma.cc/F57M-RFBA> (quoting *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171, 193 (Kiefel CJ, Bell and Keane JJ)).
[24] *Attorney-General (Vic); ex rel Black v The Commonwealth* (1981) 146 CLR 559, 619-30, 633 (Murphy J), quoting Thomas Jefferson, *Writings* (Washington ed, 1859) 506.

provide an argument for the proposition that the implied freedom of political communication may include actions *and* conduct. In American law, this is known as 'expressive conduct', and it increasingly draws the protection of the First Amendment.[25]

The second argument in support of this proposition is the fact that existing Australian law on the implied freedom may itself, at least implicitly, suggest that the freedom extends to expressive conduct. Most notably, the High Court decision in *Brown v Tasmania*,[26] dealt with a challenge to the *Workplaces (Protection from Protesters) Act 2014* (Tas), which was intended to 'send[] a strong message to protest groups that intentionally disruptive protest action that prevents or hinders lawful business activity is not acceptable to the broader Tasmanian community.'[27] The case involved environmental protestors who 'were at different times present in the Lapoinya Forest [Tasmania] to protest and raise public awareness of logging. Both were directed to move by police who believed they were protesting in an area where doing so was prohibited by the [*Workplaces (Protection from Protesters) Act 2014* (Tas)]. They were subsequently arrested and charged.'[28] The conduct of the protesters was held by the High Court to have been infringed by the legislation, and that the infringement was not a justifiable limitation upon that freedom. In other words, the political communication at issue was in fact a form of

[25] Sarah Anne L Cutler and Leslie L Lipps, 'Expressive Conduct' (1999-2000) 1 *Georgetown Journal of Gender & Law* 285; Katrina Hoch, 'Expressive Conduct' (2009) *The First Amendment Encyclopedia* <https://www.mtsu.edu/first-amendment/article/952/expressive-conduct>.
[26] *Brown v Tasmania* (2017) 261 CLR 328.
[27] *Fact Sheet: Workplace (Protection from Protestors) Bill 2014* (11 April 2015) <parliament.tas.gov.au>.
[28] Ingmar Duldig and Jasmyn Tran, 'Proportionality and Protest: *Brown v Tasmania* (2017) 261 CLR 328' (2018) 39 *Adelaide Law Review* 493, 494.

expressive conduct which, without expressly saying so, the High Court found to be protected by the implied freedom. Whether an infringement of the implied freedom will be invalidated depends, as *Brown* demonstrates, on whether the limitation is justifiable. The High Court has developed a detailed approach to assessing that issue.

IV. Justifiable Limitations

Of course, no right is absolute. In *Adelaide Co of Jehovah's Witnesses v The Commonwealth*, Latham CJ, writing of s 116, wrote that it must be 'possible to reconcile religious freedom with ordered government.'[29] And, of the implied freedoms, Justice Murphy wrote in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* that:

> The freedoms are not absolute, but nearly so. They are subject to necessary regulation (for example, freedom of movement is subject to regulation for purposes of quarantine and criminal justice; freedom of electronic media is subject to regulation to the extent made necessary by physical limits upon the number of stations which can operate simultaneously). The freedoms may not be restricted by the Parliament or State Parliaments except for such compelling reasons.[30]

[29] *Adelaide Co. of Jehovah's Witnesses v. The Commonwealth* (1943) 67 CLR 116, 132 (Latham CJ).
[30] *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88 (Murphy J).

And in *McCloy v. New South Wales*,[31] the High Court was of the opinion that the implied freedom of political communication 'is not an absolute freedom. [It] may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.'[32] Thus, the Court expounded a three-step test for testing the justifiability of infringements of political communication (see also Appendix 1):

> The freedom under the Australian Constitution is a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may "exercise a free and informed choice as electors." It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.
>
> The question whether a law exceeds the implied limitation depends upon the answers to the following questions, reflecting those propounded in *Lange* as modified in *Coleman v Power*:
>
> 1. Does the law effectively burden the freedom in its terms, operation or effect?

[31] *McCloy v New South Wales* (2015) 257 CLR 178.
[32] Ibid 193-5 (French CJ, Kiefel, Bell and Keane JJ) (footnotes and internal citations omitted).

If "no", then the law does not exceed the implied limitation and the enquiry as to validity ends.

2. If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?[33] This question reflects what is referred to in these reasons as "compatibility testing".

The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.

If the answer to question 2 is "no", then the law exceeds the implied limitation and the enquiry as to validity ends.

3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?[34] This question involves what is referred to…as "proportionality testing"

[33] This version of the question was substituted by *Brown v Tasmania* (2017) 261 CLR 328, 363-4 (Kiefel CJ, Bell and Keane JJ).
[34] Ibid.

to determine whether the restriction which the provision imposes on the freedom is justified.

The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test—these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

Suitable—as having a rational connection to the purpose of the provision;

Necessary—in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

Adequate in its balance—a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be "no" and the measure will exceed the implied limitation on legislative power.[35]

[35] *McCloy v New South Wales* (2015) 257 CLR 178, 193-5 (French CJ, Kiefel, Bell and Keane JJ) (footnotes and internal citations omitted). And see also *Brown v Tasmania* (2017) 261 CLR 328.

Thus, even should worship be characterised as expressive conduct for the purposes of finding a violation of the implied freedom of political communication, it must also be found that the legislative restrictions fail to serve a legitimate purpose compatible with the system of representative government for which the Constitution provides, or that the extent of the burden cannot be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions. Thus, in some circumstances, it may not be possible to satisfy the *McCloy* test, as may be the case with COVID-19 restrictions on worship aimed at controlling a public health crisis.

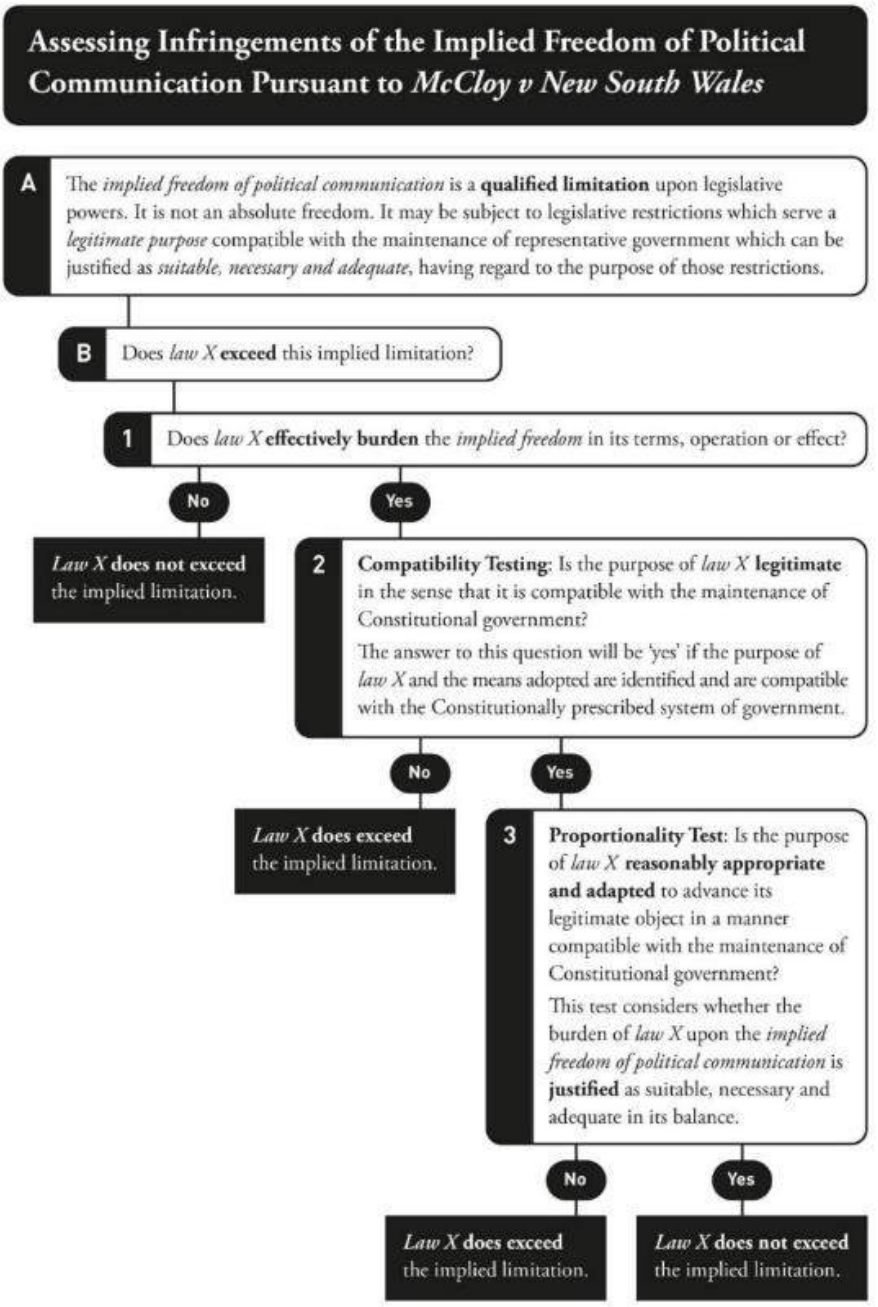
V. Conclusion

The constitutional protection of fundamental human rights in Australia is weak, with only a few narrowly construed express protections. Of those, only s 116 provides express protection for freedom of religion, although not against state infringements. The Constitution does, though, contain the potential for the protection of free exercise through the use of the implied freedom of political communication.

In this essay, we argue that the implied freedom may operate to encompass expressive conduct in the form of religious worship, and that such protection may extend to protect against incursions by both the Commonwealth (federal) and state governments. That protection, however, is not absolute. Rather, it is subject to infringement where the government can demonstrate a legitimate purpose for the infringement, which is compatible with the system of representative government, and that such a burden is justifiable as suitable, necessary and adequate,

having regard to the purpose of the restriction. The implied freedom makes possible, then, a slightly greater degree of protection for free exercise against both the Commonwealth and state governments, while allowing for that protection to be balanced against the community interest in safeguarding the community against individual excesses.

Appendix 1[36]



[36] © Nigel Williams, 2021, with permission.

RELIGIOUS POLICE AS STATE ACTORS AND IMPEDIMENTS TO THE PROTECTION OF INTEGRITY OF THE PERSON IN NIGERIA: BORROWING A LEAF FROM SAUDI ARABIA

Simon-Peter Ayoolwa St. Emmanuel[*]

Abstract

Human rights are inalienable, inherent and indivisible. They are the basic rights and freedoms common to every person on earth, and one of these fundamental rights is the right to the integrity of the person. Protection of the integrity of the person is significant to the enjoyment of other human rights especially the right to human dignity and freedom from ill treatment. However, this protection eludes millions of people in northern Nigeria due to the acts of the religious police; Hisbah corps. Consequently, this paper with focus on Kano and Kebbi states of Nigeria, examines the abuse of the protection of the integrity of the person by Hisbah as state actors, by investigating the right to human dignity and freedom from ill treatment as core rights in the context of safeguarding the integrity of the person vis-à-vis acts of the corps. It adopts a comparative approach and draws lessons from Saudi Arabia for Nigeria and concludes with viable recommendations.

Keywords: *Sharia, Hisbah, State Actors, Integrity of the Person, Human Rights.*

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I. Introduction

Following the transition to democratic rule in 1999, sharia was incorporated into state criminal law by the government of the twelve major Muslim majority states of northern Nigeria,[1] despite the provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) that the Government of the Federation or of a State shall not adopt any religion as State Religion.[2] Consequent upon introduction of sharia, extensive social and economic reform was launched.[3] Sequel to the introduction of the new sharia legislation, the state governments established structures to ensure its enforcement. These structures include State Sharia Commissions, Councils of *Ulama* with important advisory and executive functions, and boards for the collection and distribution zakat (alms) taxes, all with the aim of deepening and enforcing the application of Sharia law in the lives of the Muslims of the Sharia States.[4] Another important structure in this regard is the sharia implementation committees and groups known as *Hisbah* corps, whose main role is to ensure observance of sharia among the population and to report any breaches.[5] In addition, they are also to engage in mediation and conciliation within the society.[6]

[1] Zamfara State was the first state to adopt sharia under the then Governor, Ahmed Sani on 27 October, 1999, and thereafter followed by Sokoto, Kebbi, Niger, Katsina, Kaduna, Kano, Jigawa, Bauchi, Yobe, Gombe and Borno states.

[2] s. 10.

[3] Brandon Kendhammer, "The Sharia Controversy in Northern Nigeria and the Politics of Islamic Law in New and Uncertain Democracies" 45, No. 3 *Comparative Politics*, 292 (2013).

[4] Philip Ostien (ed.), Preface to Volumes I-V of Sharia Implementation in Northern Nigeria 1996-2006: A Sourcebook-VIII *available at*: http://www.sharia-in-africa.net/media/publications/sharia-implementation-in-northern-nigeria/vol_1_2_preface_to_volumes_I-V.pdf (last visited on Nov 13, 2020).

[5] Human Rights Watch, "Political Shari'a"? Human Rights and Islamic Law in Northern Nigeria, Vol. 16, No. 9 A (September 2004)-16 and 73 *available at*: https://www.hrw.org/reports/2004/nigeria0904/nigeria0904.pdf (last visited on Nov 10, 2020).

[6] *Supra* note 4.

Most *Hisbah* organizations in Nigeria started out as voluntary organizations formed by likeminded Muslims before the state stepped in to formalize their activities.[7] For example, the *Hisbah* in Kano and Zamfara states, with a legally sanctioned board with state-wide powers, employs thousands of people, who are on the pay-roll of the state governments.[8] The Kano State *Hisbah* Board was established by the Kano State Hisbah Board Law No. 4 of 2003, as a statutory agency of Kano State, which can sue and be sued in that capacity.[9] Kebbi State established a Hisbah Committee in 2001, which is centrally organized and coordinated by the state government's Department for Religious Affairs under the supervision of the Special Adviser for Religious Affairs or Sharia to the Governor. In Bauchi State, *Hisbah* activities are executed by virtue of the Bauchi State Sharia Commission Law 2001.[10] However, *Hisbah* in Kaduna State is more organized by the Islamic civil society organizations or religious sects without much government coordination.[11] According to Human Rights Watch, *Hisbah* operate openly and are provided with uniforms, vehicles and an office, usually by the local or state government.[12] In some states, the state government pays them a small salary, while some are directly supported by their local government (materially and financially) because they have structures at both local

[7] Abdul Raufu Mustapha and Mustapha Ismail, Sharia Implementation in Northern Nigeria Over 15 Years: The Case of Hisbah, Nigeria Stability and Reconciliation Programme Policy Brief No. 2 (2016)-4. *available at*: https://www.qeh.ox.ac.uk/sites/www.odid.ox.ac.uk/files/Sharia%20-%20POLICY%20BRIEF%20TWO%20Final%20Version.pdf (last visited on Nov 12, 2020).
[8] See *supra* note 4 at 5.
[9] s. 7.
[10] s. 8(g) empowers the Commission to recruit and control members of the *Hisbah*.
[11] Eyene Okpanachi, "Between Conflict and Compromise: Lessons on Sharia and Pluralism from Nigeria's Kaduna and Kebbi States" 25, No. 2 *Emory International Law Review* 911 (2011).
[12] *Supra* note 5 at 75.

government and state levels.[13] However, others such as the *Hisbah* in Kaduna, claim that membership and participation are voluntary and unpaid.[14] Consequently, *Hisbah* activities differ from state to state due to the peculiar nature of each. Although non-Muslims are not subject to sharia, they are subject to some of the statutory agencies such as the Kano State Censorship Board and *Hisbah*, especially in terms of enforcing the state-wide ban on the sale of alcohol.[15]

There have been reports of gross violations of human rights by the *Hisbah* while executing their functions. These violations include arbitrary arrests, physical violence on persons and destruction of means of livelihood especially in Kano and Kebbi states. Given the focus of this paper, it examines the violations of the right to human dignity and also the right to be free from cruel, inhumane or degrading treatment or punishment, which are the core rights understood within the notion of integrity of person, by the *Hisbah* corps in two northern states of Nigeria, which are Kano and Kebbi states. The choice of these two states is premised on the fact that there are widespread systematic violations of the rights which are at the crux of the protection of integrity of persons in these states. In addition, both states have similar guidelines banning stylish haircuts, sagging of trousers and playing of music at social events by disk jockeys.[16] In addition, it discusses the use of force by the *Hisbah* that

[13] *Ibid*.
[14] *Ibid*.
[15] Heather Bourbeau, Muhammad Sani Umar, *et al*., Shari'ah Criminal Law in Northern Nigeria: Implementation of Expanded Shari'ah Penal and Criminal Procedure Codes in Kano, Sokoto, and Zamfara States, 2017–2019, United States Commission on International Religious Freedom Report, (December, 2019)-3 *available at*: https://www.uscirf.gov/sites/default/files/USCIRF_ShariahLawinNigeria_report_120919%20v3R.pdf (last visited on 12 November 2020).
[16] Sahara Reporters, "Like in Kano, Hisbah Bans 'UnIslamic' Hairstyles, Dressing in Kebbi State" *Sahara Reporters*, Oct. 6, 2020 *available at*:

constitutes violations of these right in enforcing the sharia. Having introduced the work, the right to human dignity and protection of the integrity of the person will now be discussed.

II. Right to Human Dignity and Freedom from Ill-Treatment as Core Rights Within the Context of the Integrity of the Person

The right to personal integrity can be termed as the right to be treated in a humane manner and way that preserves a person's mental and physical wholeness.[17] Consequently, all human beings have the fundamental right not to be physically or mentally harmed by the state or its agents.[18] This section of the work discusses the right to human dignity and freedom from ill-treatment as core rights in the protection of the integrity of the person. It starts with the right to dignity and thereafter discusses freedom of ill-treatment in the context of the right against cruel, inhuman and degrading treatment.

1. The Right to Human Dignity

Every human being is inviolable and entitled to respect for his life and the integrity of his person, thus no one may be arbitrarily deprived of this right.[19] In addition, every person has the right to have his physical, mental

http://saharareporters.com/2020/10/06/kano-hisbah-bans-unislamic-hairstyles-dressing-kebbi-state (last visited on Feb 15, 2021).

[17] University of Minnesota Human Rights Center, Part 2: The Convention on the Rights of Persons with Disabilities (2012) *available at*: http://hrlibrary.umn.edu/edumat/hreduseries/HR-YES/chap-7.html#:~:text=Essentially%2C%20the%20right%20to%20personal,the%20State%20or%20private%20actors.> (last visited on Dec 22, 2020).

[18] Inter-American Commission on Human Rights, Citizen Security and Human Rights, paras 122-123 *available at*: http://www.cidh.org/countryrep/seguridad.eng/CitizenSecurity.V.htm (last visited on Feb 15, 2021).

[19] African Charter on Human and Peoples' Rights, 1981, art. 4.

and moral integrity respected.[20] In protecting the integrity of the person, an inalienable right that all human beings are endowed with is the right to be treated with dignity. This is premised on the fact that human beings only possess human rights because they have human dignity.[21] According to Olomojobi, the right to be treated with dignity, perhaps has a religious and metaphysical connotation because of the biblical quote that states let us make man in our own image, after our likeness.[22] The right to dignity is an important part of international human rights law and this is apparent in the first paragraph of the Preamble to the Universal Declaration of Human Rights (UDHR) and the second paragraphs of the preambles to the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR). This right is also guaranteed under the 1999 Nigerian Constitution (as amended).[23] Human dignity is at the core of human existence and by virtue of this right, everyone is to be treated as human beings and not animals. Olomojobi states that the right to dignity is foundational and a precursor to other constitutional rights which cannot be realized except human beings are treated with the utmost respect they deserve as human being.[24]

The courts have also through case law propounded on the respect for human dignity. In *Abodunrin* v. *Arabe*,[25] the court held that individuals

[20] American Convention on Human Rights, 1969, art. 5(1).
[21] Roberto Andorno, Human Dignity and Human Rights in ten Have H. and Gordijn B. (eds.), *Handbook of Global Bioethics* 45 - 47 at 49, (Springer, Dordrecht, 2014).
[22] Yinka Olomojobi, *Human Rights and Civil Liberties in Nigeria; Discussion, Analyses and Explanations* 47, (Princeton & Associates Publishing Co. Ltd., Lagos, 2016).
[23] Constitution of the Federal Republic of Nigeria, 1999 (Cap. C23, Laws of the Federation of Nigeria, 2004) s. 34.
s. 17(2)(b) of the same Constitution also provides that "…human dignity shall be maintained and enhanced."
[24] *Supra* note 21 at 61.
[25] (1995) 5 NWLR [Pt 393] 100 at 112.

have the right to respect of the dignity inherent in a human being and to the recognition of his legal status. In *Nemi* v. *The State*,[26] the court was confronted with a situation, whereby, a convicted felon awaiting punishment claimed that the delay in carrying out his execution was an infringement of his rights to the dignity of his person under section 34 of the 1999 Nigerian Constitution. In deciding this issue, the court held that, although the prisoner was condemned to die, he still has a right not to be subjected to inhuman treatment and the fact that he does not have a right to life, does not mean that he cannot enforce any other right. Similarly in *Adekunle* v. *Attorney-General of Ogun State*,[27] Tsammani, JCA, further simplified this issue by affirming that:

"If after the death sentence has been passed and the convict is in prison custody, if anything arises outside the normal custody that amounts to 'torture or inhuman or degrading treatment', that will be cause of action under the fundamental rights, but not militating against the death sentence. That in such a case, the death sentence stands but a new cause of action has arisen which can be separately enforced and remedied. In other words, that the 'inhuman and degrading treatment' outside the inevitable confinement in death row will not make illegal the death row sentence, rather it only gives ground for enforceable right under the Constitution."[28]

[26] (1996) 6 NWLR [Pt 452] 42.

[27] (2014) LPELR-22569 [CA]. This position was also adopted by the Zimbabwean Supreme Court in the case of *Catholic Commission for Justice and Peace* v. *A.G. Zimbabwe* (No. SC73/93), where the court pointed out that the "prison walls do not keep out fundamental rights and protections...and prisoners no matter the magnitude of the crime are not reduced to non-persons but retain all basic rights, save those inevitably removed from them by the law, expressly or by implication."

[28] *Id.* at 46-47, paras D-B.

Similarly, in *Rajasthan Kishan Sangthan* v. *State of Rajastah*,[29] the Indian Supreme Court held that a person even during lawful detention is entitled to be treated with dignity befitting any human being and the mere fact that he has been detained lawfully does not mean that he can be subjected to ill-treatment, much less any tortuous beating.

Consequent upon the foregoing, it is submitted that the right to human dignity is a component of the protection of the integrity of the person. Having discussed the right to human dignity, discussion will now move to the right to be free from ill-treatment.

2. The Right to be Free from Ill-Treatment

The right to be free from ill-treatment is guaranteed by both international and regional human rights instruments. The UDHR which is the bedrock of major human rights instruments provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[30] Nigeria is also a signatory to some human rights treaties that prohibits ill-treatment and they include the ICCPR,[31] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT),[32] African Charter on Human and Peoples' Rights (ACHPR).[33] Other key soft laws in this regard are the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[34] and the Principles on the Effective Investigation and Documentation of Torture

[29] AIR 1989 Rajasthan 10.
[30] Article 5.
[31] Articles 7 and 10.
[32] 1966. Nigeria signed this treaty on 28 July, 1988 and subsequently ratified same on 28 June 2001.
[33] Article 5.
[34] Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975.

and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Principles).[35] It is submitted that apart from been guaranteed by treaty law, freedom from ill-treatment is a norm of customary international law and is non-derogable even in time of war or public emergency.

Inhuman treatment was defined in *Uzoukwu* v. *Ezeonu II*, as an act that is "barbarous, uncouth and cruel treatment, a treatment, which has no human feeling on the part of the person inflicting the barbarity or cruelty."[36] Degrading treatment was also defined in the same case as the element of lowering the societal status, character value or position of a person and makes the victim have some form of complex, which is not dignifying.[37] While in *Isenalumhe* v. *Joyce Amadi*, as "reviling, holding one up to public obloquy, lowering a person in the estimation of the public, exposing to disgrace, dishonour, or contempt."[38] It is submitted that these definitions are relevant in the context of violations by the *Hisbah*, which will be discussed in the next section of this work.

III. Acts of *Hisbah* as impediments to the Protection of Integrity of person

In Nigeria, there is malevolent violation of the integrity of the person in various forms by state actors such as the personnel of the police, army and navy. The *Hisbah* is not an exception in this regard too. According to Bourbeau *et al*, the *Hisbah* in Kano at times go beyond their stated mandates by arresting non-Muslims, using excessive force (including assaulting police officers and lawyers) and detaining people in cells for

[35] Recommended by General Assembly resolution 55/89 of 4 December 2000.
[36] (1991) 6 NWLR [Pt 200] 708 at 724.
[37] *Id.* at 778.
[38] (2001) 1 CHR [Pt 458] 568.

days before releasing them or taking them to a court.[39] Human Rights Watch also reported that a group of about twenty members of the Kano State *Hisbah* armed with knives, sticks, cutlasses, and long curved weapons, disrupted a wedding party on the basis that it was an immoral gathering and that music was being played.[40] They beat and injured several people, including some of the musicians and other guests, and smashed musical instruments as well as the windscreen of a vehicle parked at the house.[41]

In addition, many people have been flogged on suspicion of drinking alcohol.[42] A young man in his twenties, was reported to have been flogged in Kebbi State, after he was arrested by *Hisbah* in the street, based on the allegation that he was drunk at the time.[43] He was not taken to the police station but straight to the sharia court, where he was flogged and released with a warning not to drink beer again.[44] Although the provisions of the Nigerian Constitution, as contained in sections 34(1) and 17(2)(b) does not explicitly prohibit beating by the *Hisbah* corps, it is submitted that they clearly extend to offences of this nature. This submission is premised on the fact that these are flagrant violations of the right to human dignity, which is applicable to all irrespective of religion, status and gender and also extends to the acts of the state, government agencies and private persons.[45] In addition, this right is associated with the freedom from torture, cruel, inhuman or other degrading treatment or punishment. It follows, therefore, that the right to dignity cannot be separated from an

[39] *Supra* note 15 at 6.
[40] *Supra* note 5 at 80.
[41] *Ibid*.
[42] *Id.* at 61.
[43] *Ibid*.
[44] *Ibid*.
[45] *Supra* note 36 at 778.

individual even if he or she is under a criminal trial because the right is inalienable.[46]

In *Alhaja Abibatu Mogaji* v. *Board of Customs and Excise*,[47] the Defendant's employees had, in an illegal raid, chased, beaten and arrested some market women and seized their goods. Adefarasin C.J, stated that "to descend on market women with guns and horsewhips and to seize goods arbitrarily, in an atmosphere of gunshots and horsewhipping is certainly out of step with the provisions of our laws."[48] His Lordship also held that "to organise a raid with the use of guns, horsewhip, tear gas, to make arbitrary seizure of goods without the inquiry and proof as to their origin, and also to strike or otherwise injure custodians of such goods amounts to inhuman and degrading treatment."[49]

In October 2020, photos and videos emerged online showing Kano *Hisbah* officials forcibly shaving the hair of young men they had arrested for sporting "un-Islamic" hairstyles.[50] In addition, they also routinely arrest, detain and punish youths for alleged improper dressing and for posting photographs and posters on their tricycles that they imperiously declare to be obscene.[51]

Following the Kano template, Kebbi State *Hisbah* released fresh guidelines for residents of the state in October 2020. These guidelines banned stylish haircuts, sagging of trousers and playing of music at social

[46] Immanuel Kant, The Metaphysics of Morals (1797) in M.J. Gregor, (ed.), *Practical Philosophy* 436 (Cambridge University Press, 1996).
[47] (1982) 3 NCLR 552.
[48] *Id.* at 560.
[49] *Id.*at 561-562.
[50] Editorial, "Stopping Hisbah's Human Rights Violations" *The Punch Newspaper*, Oct. 18, 2020.
[51] *Ibid*. See also Sahara Reporters, "Photo News: Hisbah in Kano Forcefully Shave Youths for Un-Islamic Hair Cuts and Mode of Dressing, Frequently Arrest Tricycle Riders for Adorning Their Keke with Photos Considered Obscene and Punish Youths Wearing Three Quarter Jeans

events by disk jockeys.[52] It also banned commercial motorcycle and tricycle riders from carrying two women at a time.[53]

It is submitted that shaving their hair of citizens by *Hishab* because their haircuts are "un-Islamic" is a violation of the right to dignity. This position was confirmed by the court in *Kekere-Omo* v. *Lagos State Government*,[55] when it held that compelling a woman to shave her hair under customary law as a symbol of bereaving her husband is a breach of the right to human dignity.[56] Accordingly, the *Hisbah* as a government agency has a duty to respect the right to human dignity because the Constitution of the Federal Republic of Nigeria prohibits its aforementioned acts[57] and this prohibition extends to it.[58] It is submitted that the protection of the integrity of the person is closely related to the right to life and it is infringed when members of the *Hisbah* corps shave the hair of citizens and subject them to punishment because the clippers used may not be sterilized and victims could contact virus such as HIV/AIDS or COVID-19.

[52] *Supra* note 16.
[53] *Ibid*.
for Improper Dressing" *Sahara Reporters*, Oct. 4, 2020 *available at*: http://saharareporters.com/2020/10/04/photonews-hisbah-kano-forcefully-shave-youths-%E2%80%98un-islamic-hair-cuts-and-mode-dressing%E2%80%99 (last visited on Dec 26, 2020).
[55] (1995) 6 NWLR [Pt 404] 760.
[56] This decision is relevant to this work because by virtue of colonial rule and received English law, Islamic law (sharia) is classified as a form of customary law applicable to northern Nigeria under the Nigerian Legal System. The High Court Law of Northern Nigeria, 1963, s. 2 provides that the term "Native Law and Custom" includes Islamic law. This definition was also adopted in the Native Courts Law (Cap 78, Laws of Northern Nigeria, 1963), s. 2. In addition, it is replicated in the High Court Laws of some northern states, for example, the High Court Law (Cap H2, Laws of Kwara State, 2007) s. 2.
[57] s. 34(1).
[58] *Supra* note 36 at 763.

It could be argued that the *Hisbah* is carrying out its legitimate government functions,[59] however, where their conduct results in inhuman or degrading treatment or punishment, there is an absolute obligation to refrain from such conduct.[60] In addition, state actors such as the *Hisbah* must not misuse their powers by molesting, harassing and intimidating innocent citizens entrusted to their care.[61]

IV. Lessons from Saudi Arabia

The morality police in Saudi Arabia is known as the Committee for the Promotion of Virtue and Prevention of Vice (CPVPV) and was formerly established in 1940.[62] It is also known as the religious police, *Hai'a* or *Mutawaa*, with a membership of about 8,000 personnel[63] and its members are called *Hai'a* men.[64] It is a governmental organization under the purview of the prime minister, which is a position held by the King of Saudi Arabia.[65] The major role of the CPVPV has always been to advise

[59] For example, Kano State *Hisbah* Law 2003, s. 7(vi) provides that the *Hisbah* are to advise on moral counseling in the society which is in conformity with Islamic injunctions.
[60] See the case of *R (Limbuela)* v. *Secretary of State for the Home Department* (2006) 1 AC 396 at 55.
[61] *Supra* note 38.
[62] Mohammed Francis, What Happened to The Mutawa or Saudi Religious Police? *available at*: https://insidesaudi.com/what-happened-to-the-mutawa-or-saudi-religious-police/ (last visited on Feb 15, 2021).
[63] *Ibid.*
[64] Louise Lief, "With Youth Pounding at Kingdom's Gates, Saudi Arabia Begins Religious Police Reform" *The Christian Science Monitor*, May 23, 2013 *available at*: https://www.csmonitor.com/World/Middle-East/2013/0523/With-youth-pounding-at-kingdom-s-gates-Saudi-Arabia-begins-religious-police-reform (last visited on Nov 24, 2020).
[65] Human Rights Watch, Saudi Arabia: A Move to Curb Religious Police Abuses *available at*: https://www.hrw.org/news/2016/04/18/saudi-arabia-move-curb-religious-police-abuses-0 (last visited on Feb 15, 2021).

and guide society to become better Muslims.[66] Accordingly, the CPVPV is responsible for enforcing sharia and policing morality issues such as segregation of the genders and dressing, by ensuring that women cover themselves from head-to-toe when in public.[67] In addition, it is also responsible for policing issues such as drugs, allegations of sorcery and witchcraft and insults to religion.[68]

Just like the Nigerian *Hisbah*, incidents of abuse and violations of human rights were associated with the CPVPV and this resulted in the government regulating their powers.[69] According to Bashraheel "after the Kingdom adopted a hard line religiously and socially during the post-1979 Sahwa (Islamic Awakening) era, the religious police strayed from their original intent. Fueled by an extreme ideology and with powers unchecked, this organized group of pious men turned from friend to foe of society."[70]

Saudi citizens and residents suffered ill-treatment, harassment and abuse from the CPVPV, especially violations of the integrity of their persons. It was reported that the CPVPV beat up a girl opposite the Nakheel shopping mall because she and her friend did not cover their faces.[71] A video of the beating sparked an uproar on social media.[72] In the video, the

[66] Aseel Bashraheel, "Rise and fall of the Saudi religious police" *Arab News*, Sept. 23, 2019 *available at*: https://www.arabnews.com/node/1558176/saudi-arabia (last visited on Nov 17, 2020).

[67] Agence France-Presse, "Saudi religious police can no longer detain people" *N World*, April 13, 2016 *available at*: https://www.thenationalnews.com/world/saudi-religious-police-can-no-longer-detain-people-1.145079#:~:text=%E2%80%9CI%20believe%20it's%20a%20very,cards%2C%20the%20new%20rules%20say. (last visited on Nov 17, 2020).

[68] *Supra* note 64.

[69] *Ibid.*

[70] *Supra* note 65.

[71] Arab News, "Haia men exceeded limits, girl too was at fault: Probe" *Arab News*, Feb. 11, 2016 *available at*: https://www.arabnews.com/saudi-arabia/news/878706 (last visited on Nov 17, 2020).

[72] *Ibid.*

religious police chased the lady for about half hour before she was shoved and fell on to the main road, and thereafter dragged on the ground.[73] The video of another incident shows three young members of the CPVPV attacking a British man and his Saudi wife in the parking lot of a Riyadh mall. A member of the religious police jumped on the British man's back and also later kicked his wife in the stomach.[74] *Hai'a* men have also been involved in fatal motor chases despite their head banning them from conducting high-speed car chases in pursuit of violators.[75] However, several months later in 2012, *Hai'a* men were found responsible for the death of a Saudi young father, Abdul Rahman Al-Ghamdi, who was killed in a high-speed car chase in Baha province, by an investigative committee.[76] The accident occurred on the flyover along the Janoub - Baljurashi road, when the victim's Nissan Altima car overturned and went over the flyover, killing the deceased and seriously injuring his wife and two children, who were also in the car,[77] thereby violating the integrity of the persons of the survivors. Just like the *Hisbah* in Nigeria, the CPVPV destroyed musical instruments, raided beauty salons, shaved heads, whipped people, burnt books and continued being unchecked.[78]

In addition, the CPVPV was overzealous with its powers, accordingly, abusive practices involving violations of the integrity of the person were rampant. It was reported that on 11 March 2002, the CPVPV interfered

[73] *Supra* note 64.
[74] Arab news, "Video: Couple attacked by Haia men in Riyadh mall parking lot" *Arab News*, Oct. 16, 2015 *available at*: https://www.arabnews.com/node/623531 (last visited on Nov 23, 2020).
[75] *Supra* note 63.
[76] Arab News, "Haia, patrol police blamed for car chase death in Baha" *Arab News*, July 11, 2012 *available at*: https://www.arabnews.com/haia-patrol-police-blamed-car-chase-death-baha (last visited on Nov 23, 2020).
[77] *Ibid*.
[78] *Supra* note 65.

with the rescue efforts during a fire outbreak at a girls' public intermediate school in Mecca, that claimed the lives of fifteen students because the fleeing students were not wearing *abayas* (an obligatory public attire of long black cloaks and head coverings for Saudi girls and women).[79] According to Akeel:

"the firefighters reached the school, only to find that members of the religious police - who usually roamed outside girls' schools to make sure that the girls and female staff were properly dressed and covered when arriving and leaving - were preventing anyone from fleeing or entering because the girls were uncovered. Precious time went by as girls suffocated, screamed for help and trampled over each other before the regular police were able to intervene and allow the firefighters to enter."[80]

Also, according to Human Rights Watch, whenever the girls got out through the main gate, the CPVPV forced them to return via another and instead of extending a helping hand for the rescue work, they beat the girls who had evacuated the school for improper dressing.[81] In addition, three young men from the United Arab Emirates were deported from Saudi Arabia by CPVPV for being too handsome.[82]

The CPVPV was feared in public places because of their harassment, physical abuse and arbitrary arrests, especially of women for such trivial matters as not covering the face or not wearing the proper *abaya*.[83] They

[79] Human Rights Watch, Saudi Arabia: Religious Police Role in School Fire Criticized *available at*: https://www.hrw.org/news/2002/03/14/saudi-arabia-religious-police-role-school-fire-criticized (last visited on Nov 22, 2020). However, a large number of *abayas*, shoes and bags left by the girls in the rush to get out of the building following the fire were thereafter found in the school after the incident. The dead students included nine Saudis, an Egyptian, a Guinean, a Chadian, a Nigerian and a Nigerien.

[80] Maha Akeel, "When a deadly fire killed 15 school girls in Makkah" *Arab News*, May 20, 2020 *available at*: https://www.arabnews.com/node/1660041 (last visited on Nov 22, 2020).

[81] *Supra* note 78.

[82] *Supra* note 63.

[83] *Supra* note 78.

constituted a law unto themselves and imposed restrictions on every aspect of people's lives that had nothing to do with religion, but rather their own narrow-minded interpretations and shows of power.[84] Lief submits that the major problem is that the CPVPV does not have a procedural manual and *Hai'a* men often invoke the Islamic legal concept of *sadd al-dhara'i*, which means blocking the means to evil.[85] He stated further that, according to this concept, not only can *Hai'a* men end un-Islamic behavior, they can also end acceptable behavior that might lead to un-Islamic behavior, no wonder, men can be too handsome.[86]

The abovementioned violations of the integrity of the person and other violent excesses by the *Hai'a* men, alongside increasing disgruntlement over their vicious conducts by the public, resulted in a restriction of their powers in 2016. The Saudi royal cabinet in order to curb them, issued a new regulation on 11 April 2016, stripping the religious police of its privileges.[87] By virtue of this new regulation, heads of centers and members of the religious police are not to arrest people, restrain them, chase them, request their documents, confirm their identities or follow them.[88] In addition, the new regulation also obliges *Hai'a* men to clearly display official ID cards containing their name, position, branch and official work hours.[89] In the same vein, they were required to act 'kindly and gently' and only report suspicious activity to law enforcement officers for them to take the necessary action.[90] According to Bashraheel, the decision to strip the religious police of its unchecked power is one of

[84] *Ibid.*
[85] *Supra* note 63.
[86] *Ibid.*
[87] *Supra* note 65.
[88] Article 7(2).
[89] *Supra* note 64.
[90] *Supra* note 79.

the most significant reforms in the country.[91] It was an unprecedented, risky yet necessary move that the Saudi government had avoided for decades.[92]

V. Recommendations and Conclusion

The integrity of the person is inviolable and every state has a duty to respect and protect it. This is the cornerstone of every civilized society based on democratic accountability and the rule of law. This is premised on the fact that human dignity which is a core right in the protection of the integrity of the person is inviolable. Human beings do not create dignity because it is inherent in their nature. Every person should be worthy of been respected no matter their age, status or gender by the *Hisbah*.

This work reveals that widespread arbitrary arrests by the *Hisbah* as well as the violations of the right to human dignity and freedom from ill-treatment by the corps is a foremost challenge to the protection of the integrity of the person in Nigeria, which is a pluralist society and secular state. Proliferating violations of the integrity of the person in northern Nigeria by the *Hisbah* amounts to impunity, which must be curbed by bringing violators to justice. Freedom, equality, justice and dignity are indispensable objectives for the attainment of the legitimate aspirations of all individuals and in order to achieve this, it is recommended that victims of violations of human dignity and ill-treatment by *Hisbah* should approach the courts for redress and enforcement of their fundamental rights. Human rights judgments condemning the acts of the *Hisbah* and ordering payments of adequate compensation by courts would guarantee

[91] *Supra* note 65.
[92] *Ibid.*

a safe and habitable society and build hope and faith in the country's legal system. In addition, it will safeguard the protection of the integrity of the person in the country.

Furthermore, it is recommended that procedures or mechanisms should be initiated by government institutions such as the National Human Rights Commission and the Citizens Rights Department or Office of the Public Defender in the relevant State Ministry of Justice, to address reports of violations of the integrity of the person. This recommendation is premised on the fact the courts may not be able to adjudicate on cases bordering on violations of the integrity of the person within record time because of its workload or heavy dockets, and such cases need to be administered and discharged with alacrity.

In conclusion, it is imperative to check the powers of the *Hisbah* because an uninhibited authority will continue to create an environment of fear in northern Nigeria. This can be achieved by borrowing a leaf from Saudi Arabia as shown in this work through issuance of orders or amendment of the respective enabling laws limiting the powers of *Hisbah* from using excessive force to punish citizens, arresting and detaining people in cells for days before releasing them or taking them to a court, beating and injuring people and forcibly shaving the hair of young men. The realization of the foregoing recommendations will aid in the protection of the integrity of the person *vis-à-vis* the right to human dignity and freedom from ill-treatment.

PROTEST NEEDS TO BE ADDRESSED BY SETTING UP A NEW MACHINERY

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Arvind P. Bhanu[**]

Abstract

Democracy makes people's participation essential. Participation in any form which makes democracy vibrant demands protection. Protest is one of the forms recognized by modern constitutional democracies. The Constitutional democracy of India guarantees such mode of participation too. Article 19 of Indian Constitution commits to protect not only people's participatory character of democracy, but it promotes by extending its support to various means and modes of participation in public life also. The Participation of people by mode of protest, though not expressly, has been given in the Constitution but it is placed along with inseparable rights of life and liberty. Thus, handling with such mode of participation becomes so vital that a protest, it may be small in beginning, if not handled with constitutional wisdom strikes at the very roots of constitutional democracy to which India is committed. In the following part of this discourse, a constitutional mechanism has been contemplated to make protest effective in order to provide a systematic meaningful strength to right to protest.

Keywords: *constitutional democracy, right to protest, fundamental guarantee, government power.*

Appraising protest:

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India has been witnessing weeks of weeks farmers' protest. However, no solutions to the concerns of the farmers even after several consultations and meeting with the Government have come out. The concerns in this protest are also being supported by non-farmers. The protest from farmers is constitutionally protected. The same protection is also applicable to the supporters and appreciators to the protest. The Constitution by its provision of Article 19 (1) (a)[2], Freedom of Speech and Expression, Article 19 (1) (b)[3], Right to peaceably assemble without arms and Article 19 (1) (c)[4] and Right to form associations and Unions, provides implied space to the protest as one of the modes to participate in democracy. By not making separate provision for protest, the complete strength to this mode has been assured. If this right would have been placed separately, it would have lost the identity of one of the main sustainable components of democracy as provided in these three sub articles of Article 19.

As above indicates that a protest always desires more and more voices- voices of supporters and appreciators as well as those who are protesters against protest. The protesters against protest are also participants in democratic process. They do have the same honor in the eyes of those provisions of Constitution which are ensuring the sustainability of government by the people. It is true that supporters and appreciators to the protest give a momentum to the protest even though it may be directionless. In the light of recent protest (Farmers' protest), it is observed that several protesters have gathered in so-called support of

[2] All citizens shall have the right to freedom of speech and expression.
[3] All citizens shall have the right to assemble peaceably and without arms.
[4] All citizens shall have the right to form associations or unions.

interest of farmers and they were observed to trying to tune this protest in different directions diluting its true version likely to lose its aims and objectives. However, a protest mixed with such different strategic aims does not become unconstitutional and lose its democratic recognition. It is having same applicability in the line as protesters against protest do. This also ensures the participation in democracy. But a right with inherent enforceability through protest forgets its right path and may come in uncertain state of realization.

It is noticeable fact that a right with inherent enforceability through protest is constitutionally recognized and does have all the strength equal to other rights with certain enforceability mechanism but due to lack of right direction and/or determined system, there is likelihood to meet unforeseeable outcome. However, it is also likelihood that the primary aims with which a protest began may be determined through democratic process in the long run. Because many voices were heard by democratic system. In that sense, any protest does not lose its ultimate meaningfulness of objective of democratic process. But after all, a misled protest diverts its right path primarily aimed at and the vision of founding father of Indian Constitution in giving such rights, loses in its sanctity.

Judicial version:

Since right to protest has not been recognized expressly in the Constitution, the Courts were requested to give their interpretation to the existence of this right. We live in participatory democracy. To make it more and more efficient, the Founding Father laid their vision in Article -19 (under freedom of speech and expression, peaceably to assemble to redress their grievances and form association and unions). The apex

Court in *Maneka Gandhi*[5], through Justice Bhagwati stated that, 'if democracy means the government of the people, on the part of the people, it is obvious that every citizen must have the right to participate in the democratic process and allow him to intelligently exercise his rights to make a choice, a free and general discussion of public issues is absolutely essential". The view brings forth the constitutional commitment to deliberative democratic theory which implicitly or explicitly assumes the need for widespread citizen participation in every conceivable manner[6]. Dr. Basu[7] in his book Shorter Constitution of India analyzed the underlying philosophy and various dimensions in scheme of Article 19, which is the source of right to protest, with reference to the restrictions provided under clauses (2) to (6). He found that the common thread[8] which runs throughout the restrictive clauses, is the operation of any existing law or enactment by the State of any law imposing reasonable restrictions to achieve certain objects is saved. Thus, the participation in democracy becomes subject to restriction once it encroaches in the domain of other rights.

In *Anita Thakur v. State of J & K*[9], the Court observed that …. it hardly needs elaboration that a distinguishing feature of any democracy is the space offered for legitimate dissent. One cherished and valuable aspect of political life in India is a tradition to express grievances through direct action or peaceful protest. Organized, non-violent protest marches were

[5] Maneka Gandhi vs Union of India 1978 AIR 597.
[6] Jamal Mohamed vs The Superintendent of Police on 13 March, 2020 (Madras High Court).
[7] DD Basu, Shorter constitution of India, 248 (14th Edition Reprint 2011, Vol. 01).
[8] Nothing in sub-clause ……. of clause (1) ……. shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clauses.
[9] Anita Thakur v. Govt. of J & K, 2016 SCC Online SC 814.

a key weapon in the struggle for independence, and the right to peaceful protest is now recognized as a fundamental right in the Constitution. However, they are subject to reasonable restrictions in the interest of the sovereignty and integrity of India, as well as public order. In *Ramlila Maidan Incident*[10], the Supreme Court held that, 'Citizens have a fundamental right to assemble and to make peaceful protest… but this right is not absolute, and restriction placed on this right too would have to be examined with reference to the concept of fundamental duties[11] and non-interference with liberty of others.

It is settled that the citizens have right to protest under Article 19 of Indian Constitution on the ground of promoting the participation in democracy politically in between the elections. This is also appreciated that concept of participation is broader than the right to vote. This strengthens the view that all citizens should be involved in decision-making processes that affect them. Moreover, participation is having support from human rights law. This is protected under Article 20[12] of Universal Declaration of Human Rights (UDHR) and Articles 21[13] and 22[14] of the International Covenant on Civil and Political Rights (ICCPR).

[10] Re-Ramlila Maidan Incident v. Home Secretary (2012) 5 SCC 1.

[11] Article 51-A (i) It shall be the duty of every citizen of India to safeguard public property and to abjure violence.

[12] Everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association.

[13] The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others.

[14] Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

However, the moot question is whether this right does include right to use public space for protest? The response to this question of existence of right to use public places in order to actuate the right to protest, both the rights should be seen as one dependent upon other. The Court in *Amit Sahni*[15] quoting Pulitzer Prize winner, Walter Lippmann, as "In a democracy, the opposition is not only tolerated as constitutional, but must be maintained because it is indispensable" made it unequivocally clear that public ways and public spaces cannot be occupied in such a manner and that too indefinitely. Justice K.K. Mathew in the *Himmat Lal*[16], observed that "Streets and public parks exist primarily for other purposes and the social interest promoted by untrammeled exercise of freedom of utterance and assembly in public street must yield to social interest which prohibition and regulation of speech are designed to protect. But there is a constitutional difference between reasonable regulation and arbitrary exclusion." The other relevant observation of Court is found in *Mazdoor Kisan Shakti Sangathan*[17], "each fundamental right, be it of an individual or of a class, does not exist in isolation and has to be balanced with every other contrasting right. It was in this respect, that in this case, an attempt was made by us to reach a solution where the rights of protestors were to be balanced with that of commuters" Thus, while assessing whether right to use public space is right connected to right to protest or not? Two points come out- one is that while exercising the right to protest, it is constitutionally desirable that this should be demonstrated on designated places, if not done on designated places, public spaces may be used to the

[15] Amit Sahni vs Commissioner of Police (Civil Appeal No. 3282 of 2020 decided on 7 October 2020)
[16] Himmat Lal K. Shah vs Commissioner of Police 1973 AIR 87
[17] Mazdoor Kisan Shakti Sangathan v. Union of India, AIR 2018 SC 3476

exclusion of the spaces meant for non-protestors. As above discussed, that reasonable restrictions can be imposed on this right too in order to make a balance between competing rights as seen in *Mazdoor Kisan Shakti Sangathan*[18], that the Court endeavored to emphasize on the principle of balancing the interests of the residents in the area vis-à-vis the interests of protestors to hold demonstrations at Jantar Mantar.

The above discussion shows that right to protest is settled right to all the citizens. However, to occupying public places to demonstrate their voices raises the questions. The public places are subject matter of shared rights to all. If one goes for using the public place to raise one's grievance and the other gets disturbed because of occupation of that place, the restrictive theory of rights does not allow him to do so at the cost of infringement of right of others. However, in a situation where the residents of vicinity allow them to demonstrate in the street, such allowance is perceived as support to the protesters.

Proposing mechanism:

As above discussed, right to protest is not questionable from any angle in democratic system which is being governed by the Constitution, but the concern here is that the steering of this high value fundamental right often falls in several hands engaged with different motives. Consequently, it may end without any logical conclusion and shall leave behind several casualty and damages to the property and may cause an insult to the Constitutional democratic expression. However, the more important concern is that even people exercise this protest peaceably, the common man suffers either by blockades of roads or diversion of roads, creating a

[18] Ibid

hue and cry in almost in all walks of common man's life. In majority of cases of protesters goes violent, causing vital injury to economy, social life including lives of protestors by their own acts (for instance, protest against Citizenship Amendment Act, 2019 (CAA) began in December 2019 and ended in March 2020 because of the intervention of the COVID-19). This also leads to victimization of several innocent misled persons. Thus, the damage of serious nature occurs.

Though, Constitutional democratic Countries in the world provide designated places for peaceably assemble and to raise their voices, yet travelling form a far flunked places to press their button of protest, large number of protesters create many hindrances, causing injuries to property and persons. The Constitution of those countries as Indian constitution does, take care of likelihood of such stoppages, blockades, damages, and injuries etc., In India, the responsibility has been assigned to the States to regulate the behavior of protesters within the framework of maintenance of "Law and Order"[19]. From starting point of protest to its end (it may be end in any direction) the State regulates through their law-and-order machinery system. However, this mechanism of regulating protest has its own limitations. It cannot provide direction to directionless movement. Thus, it needs further mechanism or machinery to deal with. Accordingly, an additional mechanism should be brought in existence. One is already in existence (regulation through law and order machinery) and the other one is proposed for dealing with transferred protest. In this part, the parted transferred protest should be handed over to transferred protesters (representatives) who are well-versed in handling the issues in

[19] Subject matter given in State list of Seventh Schedule (Article 246) of the Indian Constitution.

protest on right forum to be addressed politically, judicially, and through mediation, and other alternative mode of resolution. This is pertinent to know here that by breaking protest into two-protest and transferred protest, its fundamental right value is not diminished at all. It is as good as fundamental right.

To activate transferred protest mechanism, the State and Center are required to set up a machinery like Protesters Grievance Redressal Board etc. Like designated place for protest, there should be designated system to deal with transferred protest. The machinery/ Protesters Grievance Redressal Board should be formed consisting the experts possessing higher knowledge of law and experts to be drawn from other fields such as conflict resolution, sociology, Political Science etc. The original protesters shall approach to the board or machinery designated for receiving the protest. Such board/machinery (transferred protesters) with due diligence shall bring the matter related to the protest before the right forum like Court of Law or Parliament/State Assembly as it demands. When it is before legislature, it should be treated as political question and try to resolve on the forum of legislature and when it is in Court of Law, obviously it shall be treated with the provision of law.

By parting protest, the likelihood of probable prolongs adverse consequences due to protest may be diminished and the concerns of protesters can be addressed in right direction with right consequences. And the sanctity of protest as fundamental right shall be honored. Thus, the inclusion of transferred protest theory in Indian system to deal with protests may be a useful mechanism and a guarantee of rule of law as a

basic structure held by the supreme court in *Kesavananda Bharati*[20]. This will also be in line with '.... necessity of *auxiliary precautions'* thought by James Madison (Founding Father of the United States Constitution).

[20] Kesavananda Bharati Vs. State of Kerala, AIR 1973 SC 1461.

UNIVERSITY-INDUSTRY COLLABORATION: INSTITUTIONALIZING THE CULTURE OF INNOVATION IN DEVELOPING COUNTRIES

*Sumit Sonkar**

Abstract

Due to pressing socio-economic challenges, many developing countries are planning to adopt the University-Industry (U-I) collaboration policies, especially after witnessing the leap and bound success made by the US in technological innovation. By facilitating R&D, developing countries have realized that public-funded Universities can be a game-changer in achieving growth and development. However, developing countries should be vigilant in formulating the U-I collaboration policy or importing the Bayh-Dole model in a different economic and social context. Given its widespread impacts on academic institutions and society, an ill-conceived U-I collaboration policy can potentially do more harm than good. In the above context, this article discusses the various factors in envisaging the U-I collaboration policy to balance public interests and offer possible suggestions to minimize adverse effects.

Keywords: *Bayh Dole Act, Developing Countries, Innovation, Intellectual Property Rights, University-Industry Collaboration.*

I. Introduction

On the landscape of Science & Technology (S&T), developing countries have made tremendous strides to tackle a wide array of pressing

challenges, ranging from poverty elimination to disaster management. Therefore, there is no iota of doubt that collaborative initiatives carried by research institutions and industries can further unleash a vast reservoir of untapped creativity and innovation.

Although Research & Development (R&D) can transform developing countries' stagnant economies into a dynamic knowledge-based economy, however, their expenditure on it is almost negligible compared to the United States (the US), European Union, China, South Korea, and Japan, which are making dramatic progress. Realizing that technological innovation can boost economic growth, a few developing countries are attempting to bring the University-Industry collaboration (U-I collaboration) policy to facilitate R&D in public-funded Universities.

The US research institutions contribute around $1 trillion to the economy.[1] Therefore, the developing countries realize that Universities and research institutions can directly contribute to economic development too. In short, Universities cannot only be seen as imparting scientific education,[2] but have the potential to play a larger role in the development.[3] However, the needs and concerns of developing countries

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[1] Andy Sza, *Academic Research Added More than $1 Trillion to U.S. Economy*, Pharmpro, available at http://www.pharmpro.com/news/2015/03/academic-research-added-more-1-trillion-us-economy.

[2] P. Nguyen, *TECHNOLOGY TRANSFER: Challenges, Opportunities and Successful Cases*, Country Report of Vietnam, World Intellectual Property Organization (2011), available at http://www.wipo.int/edocs/mdocs/aspac/en/wipo_ip_han_11/wipo_ip_han_11_ref_30.pdf.

[3] B. Sampat, *Patenting and US academic research in the 20th century: The world before and after Bayh-Dole*, 35 Research Policy (2006), available at http://www.sciencedirect.com/science/article/pii/S0048733306000692.

are vastly different from developed countries[4] therefore, in the formulation of the U-I collaboration policy, developing countries should be cautious in importing the Bayh-Dole Act kind of model, adopted in a different economic and social context.

In the context of developing countries, it is essential to balance public interests with economic interests. Thus, this article endeavors to briefly analyze major issues in the U-I collaboration to deliberate before adopting a policy to regulate public-funded research.

II. The Purpose of University-Industry Collaboration

Generally, the rationale behind the U-I collaboration is to boost the commercialization of research to spur economic growth.[5] The idea was to exploit public-funded research that is gathering dust in laboratories or libraries.[6] Therefore, the U-I collaboration's objective was to grant propriety rights of research to Universities to license it to private entities for its commercial exploitation.[7]

[4] Latha Jishnu, *Does India need a Bayh Dole Act?*', Business Standard, July 9, 2008, available at http://www.business-standard.com/article/opinion/latha-jishnu-does-india-need-a-bayh-dole-act-108070901030_1.html/.

[5] A. So and others, *Is Bayh-Dole Good for Developing Countries? Lessons from the US Experience*, 6 PLoS Biology (2008), available at http://scholarship.law.duke.edu/faculty_scholarship/2286.

[6] *Research and Innovation Issues in University-Industry Relations*, WIPO Background Information Document, World Intellectual Property Organization (2002), available at http://www.wipo.int/export/sites/www/sme/en/documents/pdf/fp6.pdf.

[7] T. Stephen, *Asian Initiatives on Bayh-Dole, with Special Reference to India: How Do We Make It More "Asian?",* 10 Chicago Kent Journal of Intellectual Property (2010), available at http://scholarship.kentlaw.iit.edu/ckjip/vol10/iss1/3.

For instance, in the US, the *Patent and Trademark Law Amendments Act of 1980*, more commonly known as the Bayh-Dole Act, resulted in the development of innovative technologies such as Global Positioning System (GPS), Fetal monitoring, Deoxyribonucleic Acid (DNA) fingerprinting, Magnetic Resonance Imaging (MRI) body scanning, the vaccine for Hepatitis B, the atomic force microscope and Google searching algorithm, etc.,[8] which immensely contributed to its economic growth.[9]

Although the Bayh Dole Act was initially confined to the commercialization of life science research, its scope has spread to other frontiers of scientific challenges, thus shaping and affecting millions of lives. For example, the developments of clean, efficient, and environment-friendly technologies such as lithium-ion batteries, biomass gasifiers, agricultural waste removal systems producing clean water, etc., are some of the examples that highlight the importance of the U-I policies on environmental areas.[10] As noted above, U-I collaboration may profoundly influence human societies. However, it has certain downsides.

The commentators and critics have often questioned the appropriateness of the Universities or research institutions to engage in licensing and

[8] A. Rives, *Reorienting Bayh-Dole's March-In: Looking to Purpose and Objectives in the Public's Interest*, 5 Intellectual Property Brief (2014), available at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1094&context=ipbrief.
[9] *So*, supra note 5.
[10] J. Allen, *Being Green: Bayh-Dole Makes Every Day Earth Day*, IP Watch Dog, available at http://www.ipwatchdog.com/2013/04/22/being-green-bayh-dole-makes-every-day-earth-day/id=39269/.

patenting of inventions,[11] as it might adversely impact 'Open Science' and restrict modes of knowledge transfer, particularly when its economic contribution is inconclusive.[12] While these apprehensions are fair, the governments are finding it challenging to address the complex issues, at the same time, industries are unable to fulfill the demands of consumers sustainably.[13]Therefore, it is important to adopt an inclusive U-I collaboration policy to facilitate the creation of cutting-edge technologies and their equal distribution in society.[14]

Moreover, it is widely believed that U-I collaboration may offer opportunities to develop a medium for the constant interaction between multiple actors of the economy, therefore, helps in knowledge production.[15] Furthermore, if commercialize, royalties generated through the U-I collaborations provide enough resources at the disposal of Universities to meet future resource-centric activities and ensure the Universities' financial autonomy.[16]

In terms of employability, this policy may provide a platform for the University's students to get exposure to the industries' requirements and enable the Universities to identify future innovators/creators from the

[11] *Sampat*, supra note 3.
[12] *Sampat*, supra note 3.
[13] M. Salleh and M. Omar, *University-industry Collaboration Models in Malaysia*, 102 Procedia - Social and Behavioral Sciences (2013), available at http://www.sciencedirect.com/science/article/pii/S1877042813043395.
[14] *Id*. at 655.
[15]A. Constantino, *The Importance of Technology Transfer*, Unemed, available at http://www.unemed.com/blog/the-importance-of-technology-transfer.
[16] P. Miesing and others, *University Technology Transfer in China: How Effective are National Centers?* in J. KATZ, D. SIEGEL AND A. CORBETT, ADVANCES IN ENTREPRENEURSHIP, FIRM EMERGENCE AND GROWTH (2014).

pool of potential students engaged in the research.[17] Other than that, through the U-I policy, the Universities' may be able to decently incentivize people engaged in the research while developing products and processes at reasonable costs.[18] In this way, the role of U-I policy in economic progress becomes important and relevant.[19]

In sum and substance, the objective of the U-I collaboration is to create an environment to develop technologies for the welfare of the public[20] while making them a driving force in economic advancement.[21] However, U-I collaboration in developing countries has been weak, mainly due to excessive regulation, Universities' limited autonomy, and other structural constraints.[22] Thus, there is a need to address the issues inhibiting U-I collaboration in developing countries.

III. Major Issues in University Industry Collaboration

U-I collaboration simultaneously presents both opportunities and conflicts. This partnership to utilize the Universities' research can be mutually beneficial to all the stakeholders. However, it is desirable that the competing conflicts, for example, intellectual property regime, ownership, exclusivity, confidentiality and royalties, etc., should be

[17] J. McNeill, *A Model for University-Industry Collaboration: The Center for Analog and Mixed Sign Integrated Circuit Design at Worcester Polytechnic Institute*, (2004), available at http://ece.wpi.edu/~mcneill/papers/mcneill_industry_university.pdf.
[18] *Salleh*, supra note 13.
[19] *Salleh*, supra note 13, at 654.
[20] M. Liew and others, *Enablers in Enhancing the Relevancy of University-industry Collaboration*, 93 Procedia - Social and Behavioral Sciences (2013), available at http://www.sciencedirect.com/science/article/pii/S1877042813035805.
[21] J. Kloppers and others, *Improving technology transfer in developing countries*, 3rd African Regional Conference on Engineering Education (2006), available at http://web.uct.ac.za/staff/gaunt/ARCEE06jpk_jct_db_ctg.pdf.
[22] *Id.* at 1.

reconciled to develop productive, sustainable, and harmonious U-I partnerships.[23]

1. IP Framework in University Industry Collaboration

IP has been a critical factor in governing technological developments, specifically in biotechnology, medical devices, and software programs.[24] By creating knowledge, IP protection serves the public interests. Therefore, for the effective and efficient functioning of the U-I collaboration, adequate patent protection is critical for commercializing the innovation Moreover, IP protection is necessary for transferring Universities' research to industries, which is not possible by the open knowledge as they often produce basic inventions, which required further research before converting them into marketable products.[25] This whole process involves risks and investment. Therefore, in the absence of legal certainty to protect the inventions, industries may remain reluctant to collaborate with the Universities to exploit their research. Moreover, open inventions can be appropriated by third parties that severely reduce competitiveness in the market.[26] By allowing Universities to protect their

[23] J. Casey, *Developing Harmonious University-Industry Partnerships*, 30 University of Dayton Law Review (2004), available at https://litigationessentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid=3B15&doctype=cite&docid=30+Dayton+L.+Rev.+245&key=58df0c3d1a717d3ef7528965a7a62ead.

[24] R. Falvey and N. Foster, *The Role of Intellectual Property Rights in Technology Transfer and Economic Growth: Theory and Evidence*, UNIDO Working Papers, United Nation Industrial Development Organization (2006), available at https://www.unido.org/fileadmin/user_media/Publications/Pub_free/Role_of_intellectual_property_rights_in_technology_transfer_and_economic_growth.pdf.

[25] D. Winwood, *The Importance of Patents and Academic Technology Transfer*, IP Watch Dog, available athttp://www.ipwatchdog.com/2015/03/26/the-importance-of-patents-and-academic-technology-transfer/id=56081/.

[26] *Id*.

research through the instrumentality of IP, the transformation of inventions into industrial applications can be facilitated faster.[27] Therefore, in the U-I collaboration, Universities should be allowed to retain ownership of the public-funded research.

On the other hand, critics pointed out that IP is an incentive to drive innovation but not the only means.[28] Too much emphasis on stronger IP protection not only leads to overlapping claims and time-consuming disputes but also undermines the importance of the other forms of knowledge diffusion such as publication, conferences, training, capacity building.[29] Furthermore, the transaction costs of registering, licensing, and managing IP is far greater than the benefits accrued from it. Therefore, the objective of allowing Universities to reap the financial fruits of commercializing inventions is exaggerated.[30] Thus, add little value to the public interests.[31] For instance, the US experience suggests that a strong IP regime often delayed scientific developments and

[27] P. Zuniga, *The State of Patenting at Research Institutions in Developing Countries: Policy Approaches and Practices*, Working Paper No. 4 World Intellectual Property Organization (2011), available at http://www.wipo.int/export/sites/www/econ_stat/en/economics/pdf/wp4.pdf.

[28] S. Basheer, *Mysterious Indian "Bayh Dole" Bill*, Spicy IP Blog, available at http://spicyip.com/2008/07/mysterious-indian-bayh-dole-bill.html.

[29] A. Weilbaecher, *Lost In Translation? The Promises and Pitfalls of Enacting U.S. Bayh-Dole Style Legislation in India*, 14 Public Interest Law Reporter (2009), available at http://lawecommons.luc.edu/pilr/vol14/iss2/8/.

[30] *Id*.at 5.

[31] K. Nair and B. Nair, *Protection and Utilization of Public Funded Intellectual Property Bill 2008 – A Critical Analysis of the Indian Bayh-Dole Act*, 2 NUJS Law Review (2009), available athttp://nujslawreview.org/wp-content/uploads/2015/02/karthy.pdf.

proliferation because it monopolizes the inventions for a specific period, therefore exclude the public from employing the knowledge.[32]

Undoubtedly, technology is crucial for scientific development, but imposing strong IP protection on public-funded research without considering the requirements and needs of society is not an optimum way to transfer technology between Universities and industries.[33] The excessive protection to public-funded research under U-I collaboration can have chilling effects, which may stifle innovation than promoting it. Therefore, by withholding information, a strong IP policy framework can restrict access to technology, thus hampering the progress of ongoing and future research.

Although to commercialize research, Universities may have to enter into exclusive licenses with industries due to the post-production costs. However, they should reserve the right to use licensed research for future research.[34] Therefore, emphasis should be given to the careful design of U-I collaboration policies to minimize the negative impacts of IP protection.[35] To avoid such situations, the government should ask Universities to create a common open-source pool of critical innovations for achieving public interest goals.[36] For example, the CISR's Open Source Drug Discovery (OSSD) project is a lofty attempt to promote

[32] L. Larena, The Price of Progress: Are Universities Adding to the Cost, 44 Houston Law Review (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917367.
[33] *Arguments Against the PUPFIP Bill*, The Center for Internet and Society, available at http://cisindia.org/a2k/publications/pupfip/why-no-pupfip.
[34] *McNeill*, supra note 17.
[35] *Zuniga*, supra note 27, at 13.
[36] *Nair*, supra note 31, at 710.

openness and accessibility research related to pharmaceutical products and processes.[37]

The U-I collaboration can significantly augment social and sustainable development by converting public-funded research into industrial and economically significant innovation and utility.[38] Nevertheless, putting strict IP constraints on disseminating knowledge in the U-I collaboration scheme may eventually end up patent thicketing.[39] Therefore, public interests to access knowledge should be balanced with industries' endeavors to seek investment returns. Thus, a flexible IP enforcement regime will suffice to transform Universities' intellectual creations and knowledge into commercial products and processes.

2. Significance of Policy Framework on University-Industry Collaboration

A uniform and transparent policy on public-funded U-I collaboration is essential to encourage the Universities to collaborate with industries for commercial utilization of the research adequately and effectively.[40] For instance, the U-I collaboration policy on the lines of the Bayh-Dole Act brought bringing transparency and clarity in the affairs of knowledge creations. Thus, paving the way for its exploitation in the US. Therefore, the policy governing U-I collaboration minimizes regulatory uncertainty

[37] Pranesh. Prakash and Sunil. Abraham, *Does India need its own Bayh-Dole?* The Indian Express, April 24, 2009, available at http://archive.indianexpress.com/news/does-india-need-its-own-bayhdole-/450560/.
[38] M. Kazuyuki and M. Shingo, *Examining the University Industry Collaboration Policy in Japan: Patent analysis*, Trade and Industry Discussion Paper Series 11-E-008, The Research Institute of Economy (2011), available at http://www.rieti.go.jp/jp/publications/dp/11e008.pdf.
[39] An overlapping set of patents right
[40] *Research and Innovation Issues in University-Industry Relations*, supra note 6, at 2.

and risks associated with converting public-funded research into commercial products and processes.[41]

The absence of a U-I collaboration policy leaves room for discretion, leading to conflicts and disputes among stakeholders. Therefore, the U-I policy plays a significant role in preventing disputes by limiting the arbitrary discretion of the parties engaged in the exploitation of public-funded research. At the same time, it may provide the dispute settlement mechanism to resolve the disputes arising out of the U-I collaboration. Put differently, by eschewing arbitrary and ad hoc decision-making, U-I policy enables the protection and management of public-funded research in a more systematic and organized manner. For example, clarity on ownership, revenue sharing, and obligations & duties of recipient institutions and creators largely minimize the conflicts arising from it. Therefore, it is significant and desirable for developing countries to develop a robust policy to regulate U-I collaboration and its matters, keeping in mind the social setup within which it needs to operate.

Move over such a U-I policy framework will enable the Universities to formulate their norms to internally regulate the commercialization of public-funded research and address the areas left by the overarching national framework.[42] However, the Universities policies must be consistent with the U-I collaboration's national framework, i.e., should not be ultra-vires to the national U-I collaboration policy. Therefore, a duty is incumbent upon the stakeholder, i.e., Universities, industries, and

[41] *Research and Innovation Issues in University-Industry Relations*, supra note 6, at 3.
[42] *Research and Innovation Issues in University-Industry Relations*, supra note 6, at 5.

government, to formulate a coherent policy that is mutually beneficial and take into account the concerns of public interest arising out of U-I collaboration.

3. Role of Government

It is on the government to create a conducive environment for translating university research into industrial products and processes while promoting R&D.[43] In that sense, the primary function of governments is to formulate and execute U-I collaboration policies in a way that taxpayers on whose funding the researchers we conducted should also receive benefits. To do so, while designing a U-I collaboration policy, the government should ensure that various safeguards have been explicitly stipulated to insulate public interests.[44] Given the apprehensions of the U-I collaboration policy, the government should balance the competing claims of various stakeholders.[45] Nonetheless, for U-I collaboration to be effective and efficient, governments should refrain from interfering in the U-I collaboration policy on the pretext of public interests. Otherwise, instead of upholding public interests, such interventions would jeopardize it and produce undesirable results.

4. Autonomy to Universities

The main obstacle in making the U-I collaboration effective and efficient is the legal status of the Universities. Most of the Universities in developing Countries are government funded. Therefore, generally, they

[43] *Kloppers*, supra note 21, at 661.
[44] *The Bayh-Dole Act A Guide to the Law and Implementing Regulations*, Council of Government Relations (1999), available at www.cogr.edu/viewDoc.cfm?DocID=151744.
[45] *Kloppers*, supra note 21, at 661.

do not enjoy autonomy, which is a prerequisite for Universities to possess ownership rights over their research outcomes. In the absence of such legal status, Universities are heavily dependent upon the government and its agencies for permissions and clearances to engage with the industries, which enormously suffer from red-tapism and bureaucratic hurdles.[46] As a result, the dependency on the government for necessary approvals creates a significant barrier for the Universities to collaborate with the industries and exploit research commercially. Without functional autonomy, Universities will not be able to roll out or commercialize cutting-edge research.[47] Therefore, University's capabilities to develop innovation or knowledge creation cannot be fully realized. In such a situation, governments have to devise policies to bestow autonomy to Universities to commercialize research without government approvals and green signals.

5. Ownership over Inventions

The most revolutionary aspect of the U-I collaboration is granting ownership rights of the public-funded research to institutions and universities.[48] Possibly, it is one of the most important incentive mechanisms for Universities to commercialize their research.[49] Therefore, a broad and liberal IP framework for the U-I collaboration

[46] R. Nezu and others, *Technology Transfer, Intellectual Property and Effective University-Industry Partnerships: The experience of China, India, Japan, Philippines, the Republic of Korea, Singapore and Thailand*, World Intellectual Property Organization (2007), available at http://www.wipo.int/edocs/pubdocs/en/intproperty/928/wipo_pub_928.pdf.
[47] *Id*. at 39.
[48] *Stephen*, supra note 7, at 21.
[49] G. Edgar and O. Kharazmi, *A Conceptual Model of the role of University-Industry Collaboration in a National Systems of Innovation***,** available at www2.uwe.ac.uk/faculties/BBS/.../047_Edgar_ConceptualModule.pdf.

must be adopted to endow ownership rights to the Universities over their intellectual creations.[50] The ownership rights over research allow Universities to undertake joint or co-ownership with the industries, which want to contribute or commence research. However, the government should retain research related to security, defense, or atomic inventions in the national interests. Nonetheless, the U-I collaboration policy should clearly stipulate these exceptions to remove the ambiguity on this aspect of ownership, as mere practice will not suffice. Thus, governments should allow Universities to claim ownership rights over their research to maximize their benefits.[51]

6. Incentives for Inventors/Researchers

The inventors and researchers are catalysts in inventions, knowledge creation, and its production. The success of U-I collaboration is heavily dependent upon the active participation, involvement, and contribution of the inventors or researchers. However, how to incentivize them to keep them motivated? Revenue sharing could be one such means for providing incentives, not just to the researchers but also to people contributing to the production and facilitation of knowledge creation.[52] Therefore, to encourage and motivate inventors or researchers to produce cutting-edge research, the efforts of the inventors or researchers should be incentivized. Another way to incentivize researchers is to recognize their efforts either through pecuniary or non-pecuniary awards. A monetary award can be given in the form of a fixed rate of royalties or revenue

[50] *Zuniga*, supra note 27, at 22.
[51] *Zuniga*, supra note 27, at 27.
[52] *Nezu*, supra note 46, at 42.

derived from the research exploitation or lumpsum payments in the form of awards. Another commonly used practice is to acknowledge the efforts of the inventors or creators.[53] Another way to incentivize inventors and researchers is to allow them engaged in activities such as consultations with the industry. However, this approach may result in a conflict of interests and may influence the decision-making process at the Universities.[54]

Nevertheless, to recognize the efforts of the inventors, enabling U-I collaboration policy may not be sufficient as the capacity of one institution differs from another. Therefore, the incentive mechanism should be formulated according to the nature and value of the research. Thus, a more subtle approach is required to deal with this aspect of the U-I collaboration policy.

7. Exclusive Licenses

One of the most contentious parts of the U-I collaboration is granting exclusive licenses to the industries for the exploitation of public-funded research. The argument often given in support of the maintainability of the legal monopoly to exclude others for a certain duration is that a significant amount of investment is required to translate the research into marketable products or processes before acquiring the desired benefits.[55] The cost of turning the University's research into marketable products or processes is much higher than the research concluded at Universities.[56]

[53] *Zuniga*, supra note 27, at 28.
[54] *Zuniga*, supra note 27, at 71.
[55] *Research and Innovation Issues in University-Industry Relations*, supra note 6, at 4.
[56] *Research and Innovation Issues in University-Industry Relations*, supra note 6, at 4.

Without the exclusivity, companies may not be inclined to invest in the University's research because of the lack of legal monopoly as their competitors can develop the same products or processes, which may vitiate the economic prospects.[57]

Understandably, exclusivity allows the industries to invest in the development of marketable products. However, commentators contended that the grant of exclusive licensing might also lead to creating a patent thicket, which will restrict future research and its development.[58] In addition, the grant of exclusive licenses to the industries may end up in the taxpayers paying twice, once through a levy of indirect taxes in the name of supporting public-funded research and again buying the innovation from industries to which the exclusive license was granted.[59]

Critics also submitted that without any express qualification and neutralizing clauses, granting an exclusive license may tantamount to assault on academic freedom, which may deter, delay and inhibit the dissemination of scientific research.[60] Therefore, as a matter of policy, Universities should grant non-exclusive licenses invariably to those industries who accept the terms and conditions attached to it.[61] The grant of an exclusive license should only be considered in exceptional

[57] *The Bayh-Dole Act A Guide to the Law and Implementing Regulations*, supra note 44, at 2.
[58] *Stephen*, supra note 7, at 17.
[59] *Nair*, supra note 31, at 708.
[60] D. Czarnitzki, C. Grimpez, and A. Tooley, *Delay and secrecy: does industry sponsorship jeopardize disclosure of academic research?* Industrial and Corporate Change Advance Access (2014), available at http://icc.oxfordjournals.org/content/early/2014/05/22/icc.dtu011.full.pdf+html.
[61] *Bayhing for blood or Doling out cash?* The Economist, available at http://www.economist.com/node/5327661.

circumstances or commercialization outweighs the public interests.[62] However, it should not be granted in cases of extreme public importance or compelling emergencies.[63]

8. Royalty

By licensing of inventions, Universities may receive a steady flow[64] of income in the form of royalties.[65] These royalties either can also be utilized to support future research,[66] allow Universities to be self-reliant to meet requirements and exigencies,[67] and incentivize the researchers engaged in producing research to maintain their motivation and commitment.[68] However, incentivizing researchers may be contentious as when the research is conducted on public-funded resources, why should the U-I collaboration policy grant royalties to the researchers when they might be receiving remuneration for the same work Moreover, royalties can make research output hugely expensive. The way out is that to make any invention affordable and avoid unjustly enriching researchers, on a case-to-case basis, Universities may waive or reduce the royalties accrued from the licensing of the public-funded research outputs.[69]

[62] *Sampat*, supra note 3, at 786.
[63] *Stephen*, supra note 7, at 19.
[64] *Casey*, supra note 23.
[65] *Basheer*, supra note 28.
[66] W. Schacht, *The Bayh-Dole Act: Selected Issues in Patent Policy and the Commercialization of Technology*, Congressional Research Service 7-5700, US Congress, (2012), available at https://fas.org/sgp/crs/misc/RL32076.pdf.
[67] *Basheer*, supra note 28.
[68] *Edgar*, supra note 49.
[69] A. M. Rector and M. C. Thursby, *Licensing Inventions from Entrepreneurial Universities: The Context of Bayh–Dole*, in Marie C. Thursby (ed.) *Technological Innovation: Generating*

9. Accessibility and Affordability

A U-I collaboration policy should institutionalize public access and affordability clauses. The dearth of sufficient safeguards to avail the inventions on reasonable terms and pricing may stultify the objectives of U-I collaboration. The right to access public-funded research should be balanced with the industry's profit-making drive. Therefore, U-I policy should contain safeguards for accessibility and affordability. Otherwise, it may become a hotbed of profit maximization at the expense of public interests. For instance, anti-retroviral drugs like Didanosine and cancer drug Imatinib were developed by one of the public Universities in the US. However, after commercialization, the costs of those drugs were out of reach of the people from whose contributions research was developed.[70] Therefore, while formulating U-I policies, it is necessary to ensure that public-funded research should be the accessibility and affordable to the public.

10. Abuse of University-Industry Collaboration

The research conducted in a corruption-free environment provides a level playing to researchers and enhances the credibility of the Universities and their research outputs.[71] However, given the enormous resources involved in the U-I collaboration process, it provides a breeding ground for embezzlement of funds and falsification of data or results. Thus, there

Economic Results (Advances in the Study of Entrepreneurship, Innovation & Economic Growth, Volume 26) Emerald Group Publishing Limited, (2016) pp.361 – 413.

[70] D. Dasgupta, Whose Test Tube Babies? Outlook, available at http://www.outlookindia.com/article/whose-test-tube-babies/237865.

[71] *Larena*, supra note 32, at 35.

should be a provision in the U-I policy to penalize serious misconduct, improprieties, and fraudulent practices to maintain its integrity.

11. March-In Rights

The purpose of the U-I collaboration is to promote the utilization and commercialization of public-funded research, but not at the expense of affordability, accessibility, and availability to the public.[72] If a public-funded research license has not been put to use or exploit within a reasonable time,[73] or brought to the market under reasonable terms or are abused[74] or are unable to fulfill or satisfy other regulatory requirements.[75] In such cases, the U-I policy should contain provisions for the government to intervene to protect the interests of the public.

In other words, in case of non-fulfillment of obligations undertaken by the licensee or when the desired efforts are found to be defeating the goals of the U-I collaboration, the government should reserve the right to intervene to fulfill the public interests.[76] The US experience suggests that industries frequently take licenses of public-funded research not to commercialize them but to eliminate the competition and block other competitors from taking it.[77] In such situations, the government should reserve the right to withdraw or revoke the licenses of companies that are unable to use the licenses within a reasonable time.[78]

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[72] *Rives*, supra note 8, at 77.
[73] *Rives*, supra note 8, at 112.
[74] *Weilbaecher*, supra note 30.
[75] *The Bayh-Dole Act A Guide to the Law and Implementing Regulations*, supra note 44, at 6.
[76] *Rives*, supra note 8, at 104.
[77] *Innovation's golden goose*, The Economist, available athttp://www.economist.com/node/1476653
[78] *Id.*

For example, the Bayh-Dole Act authorizes the US government to exercise march-in rights in the cases of practical application,[79] to alleviate health or safety needs,[80] requirements for public use,[81] breach of the agreement.[82] Although the US government has never invoked the march-in rights, the developing countries should ensure that similar provisions should be present in the U-I collaboration policies to protect public interests.[83]

12. Technology Transfer Office

The Technology Transfer Office (TTO) is an integral part of the policy to promote U-I collaboration. The effective utilization of public-funded research mainly depends upon the efficiency of the TTOs.[84] The TTOs provide adequate support to researchers engaged in the development of inventions, identifying potential inventions, provide assistance in patenting, negotiate with industry, manage, administer the license of the inventions, and other aspects of collaboration, which creators may not be able to carry out due to lack of expertise in these areas.[85] Therefore, TTOs are an effective medium to bridge the gap between Universities and industries. Although the establishment of TTOs is essential to facilitate technology transfers between Universities and industries, an inefficient TTO can obstruct the collaboration too. Thus, it is necessary to make TTOs accountable through specific regulations[86] to avoid such

[79] Bayh Dole Act 1980 Section 203(a)(1) (United States)
[80] Bayh Dole Act 1980 Section 203(a)(2) (United States)
[81] Bayh Dole Act 1980 Section 203(a)(3) (United States)
[82] Bayh Dole Act 1980 Section 203(a)(4) (United States)
[83] *Stephen*, supra note 7, at 20.
[84] *Stephen*, supra note 7, at 58.
[85] *Research and Innovation Issues in University-Industry Relations*, supra note 6, at 5.
[86] *Stephen*, supra note 7, at 58.

occurrences and maintain their roles as the gateway to commercialize research, not gatekeepers obstructing it.[87]

13. Monitoring and Evaluation

For the efficiency of U-I collaboration, monitoring and evaluation are critical aspects of it. To effectively evaluate the commercialization of public-funded research, a U-I collaboration policy should contain procedures related to periodic reporting. In this way, the government can keep track of U-I collaboration activities and curb public-funded research mismanagement. To tackle opportunistic behavior, the annual audit should also be made part of the regulatory mechanism.[88] Independent agencies and civil societies can be roped to audit the expenditures of the public-funded research activities.

14. Regulatory Authority for the Management of Public Funded Research

An independent regulatory authority should be established to manage the public-funded research. It should act as a nodal agency for all the technology transfer activities between the Universities and industries. This authority should receive periodic reports from the Universities and research institutions on collaboration and technology transfer-related activities to ensure transparency and accountability.

[87] *So*, supra note 5, at 2080.
[88] *Sampat*, supra note 3, at 787.

Exclusive licensing had been a major concern in U-I collaboration policy as granting exclusive licenses on public-funded research may unnecessarily block the alternative forms of spurring innovation.[89] Therefore, Universities should be obliged to consult with this authority, consisting of experts on exclusive licensing issues. This authority may review the exclusive licensing proposals to assess that they do not unduly restrict access to public research.[90] Only after considering exclusive license impact, based on the nature of the invention, the possible public use, and other factors, does the authority recommend or deny it.[91]

However, the assessment should be done within a strict timeline. Otherwise, the whole system would be marred by delays, resulting in delaying of exploitation of research, which would virtually kill it.[92] This nodal agency may also play a role in resolving the dispute amicably.

IV. Conclusion

The challenges faced by the world cannot be solved by traditional knowledge alone. Therefore, Universities must undertake greater responsibility to advance, disseminate, and diffuse new knowledge to drive economy and society. However, scientific knowledge without industrial application may not suffice to address the problems. Thus, U-I collaboration could be an appropriate framework to bring Universities and industries to work together to find solutions to the teething problems.

[89] *Arguments Against the PUPFIP Bill*, supra note 33.
[90] *Larena*, supra note 32, at 78.
[91] *Stephen*, supra note 7, at 55.
[92] *Stephen*, supra note 7, at 56.

Nonetheless, the nature of the Intellectual Property regime, exclusive licenses, Technology Transfer Offices, royalty, ownership, accessibility & affordability, march-in rights, and regulatory authority issues need to be resolved before framing U-I collaboration policy. Just because U-I collaboration has worked in the developed societies, developing countries should not start adopting or imitating the U-I collaboration policy to transfer knowledge. They should assess and conduct a systematic analysis of different models of U-I while keeping in mind the social, political, and economic realities of their society. In other words, developing counties should not copy U-I collaboration *in toto* without suitable modification and amendment. Otherwise, it can be counterproductive and may undermine public interests.

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CONCEPTUALISING 'BLACK LIVES MATTER': TIME TO CONSIDER *SUBSTANTIVE EQUALITY* AS A FUNDAMENTAL CONSTITUTIONAL GUARANTEE

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Abstract

This article attempts to conceptualise the demands of the Black Lives Matter movement as a series of practical socio-political objectives. It argues that instead of introducing new legislation every time when there is a backlash against structural injustice, there is need to question the foundational principles of constitutional philosophy. For this purpose, the article compares the equality jurisprudence of three jurisdictions: India, the USA, and Australia. It demonstrates that equality laws across these jurisdictions have been enacted and operationalized in a limited philosophical framework. To prove that, it discusses caselaw from these jurisdictions and suggests constitutional readjustment for potentially transformative results.

Keywords: *equality, constitutional principle, structural biases, democracies.*

I. Introduction

In 2010 on a fine April morning, I read in a newspaper that in a village called Mirchpur, in the state of Haryana (India), a man named TaraChand

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and his daughter were burnt alive. Their crime was that two days before a dog owned by a member of a *dalit* (formerly known as "untouchables") community barked at some young men of the *Jaat* community, an upper caste with almost complete feudal authority in the hinterlands. The insult of being barked at by a dog of a *dalit* was apparently too much to bear. In an attempt to teach a lesson to these "untouchables", the *dalit* community was attacked by a mob resulting in serious injuries, burnt houses and the death of TaraChand and his daughter. Against this atrocity there was a wide-spread reaction and a movement for justice. I sprang into action like many, writing leaflets, helping to organise protests with the usual format of sloganeering, and singing poems of revolutionary poets.

The rise of Black Lives Matter movement last year in wake of the murders of George Floyd in Minneapolis and of Jacob Blake in Kenosha at the hands of a public officer is quite a similar popular reaction against yet another set of violent atrocities resulting out of extreme structural injustice. It led to justified public anger, expressing disgust at police brutality, and the removal of racist symbols from public places. These protests with similar demands of ending systemic racism sparked across the globe and they at least revealed that structural injustices exist in all democracies varying only in degree and form. But in-spite of these popular reactions there are deeper central questions that are needed to be addressed i.e. even when there exist numerous laws to prevent such socio-political injustices, why then these injustices so blatantly persist in all democracies? And what principles a democratic constitution should incorporate, then, in order to move towards fundamental structural changes in society?

In this essay, I will briefly highlight the constitutional understanding of the concept of Equality in three jurisdictions i.e. India, United States of America and Australia. I will argue that the current constitutional understanding of the concept of Equality hinders the fight against the structural inequality. And therefore, the anti-discrimination legislations enacted in various democracies have perpetually remained ineffective. In the end, I will suggest a constitutional re-adjustment for potentially transformative results.

II. Prioritisation of Liberty over Equality in political and constitutional theory

Despite the people's overwhelming emotional response in the favour of Black Lives Matter movement, neither the empty political phrases in the newspapers nor the academic arguments supported by impressive empirical data in numerous journals seem to be able to grapple with the depth and grandness of the problem. And given the ineffective history of so many anti-discrimination legislations, it seems that the solution may also not lie in merely introducing new legislations. So, in my view, first, there is a need to go deeper and question the foundational philosophical principles of the constitutional law itself. Because since the Eighteenth century Enlightenment movement, the philosophical and moral beliefs within western political thought have dedicated themselves in upholding Individual Liberty as supreme moral and political virtue before which all other political values can be sacrificed, even Equality. Evidently, while American and French revolutions predicated their political and moral legitimacy on preservation and propagation of Individual Liberty; Equality, on the other hand, remained a mere political rhetoric till the

second half of the last century. The politico-philosophical currents advocating the supremacy of Individual Liberty like classical Liberalism, Utilitiarianism and the political discourse of Libertarianism, have heavily influenced the political philosophies in every century. Consequently, there has always been a very strong underpinning tendency of prioritising Individual Liberty over other political values not only within the western political thought, but also in constitutional interpretations and theories. Various philosophers perceive this philosophical phenomenon as 'Contradiction of Values' inherent in our political thought. Ronald Dworkin accepted that this notion of 'Contradiction of Values' holds a dominant position today in our moral, political and constitutional philosophies.[1] Isaiah Berlin explains this clash and prioritisation of political values as, "we are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which inevitably, involve sacrifice of others."[2] This philosophy helps to maintain the stats-quo of existing power structures within our body-politic. It has built a grand narrative that to safeguard Individual Liberty, equality in substance may be denied to the people living outside the periphery of power and privilege in the society.

III. Inability of current Equality legislations in dismantling structural inequalities

[1] Ronald Dworkin, *Justice for Hedgehogs*, (Harvard University Press, 2011); Thomas Nagel, 'The Fragmentation of Value', *Mortal Questions*, (Cambridge University Press, 1979).
[2] Isaiah Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed), *Liberty: Incorporating Four Essays on Liberty* (Oxford University Press, 2002) 166-217; And also see *Crooked Timber of Humanity: Chapters in the History of Ideas*, [London: John Murray, 1991, Henry Hardy (ed.)].

The above discussed notion of 'Contradiction of Values' and prioritising Individual Liberty seeped in constitutional philosophy. It not only shaped the structure, aims and scope of anti-discrimination legislations across various democracies, it also influenced the theories of constitutional interpretations and judicial attitudes. The ossified attitude of legislators and judges discouraged the concepts like Affirmative Action and Substantive Equality. This made the structural change in our politics and society more challenging. Though the democracies did respond to the previous political movements for race, gender and caste justice, yet the states were never able to come up with any fundamental change. The equality clauses or doctrines do exist in our constitutions but they only cover the one aspect of equality i.e. equality of treatment and cannot guarantee equality, especially to its historically excluded communities, substantially.

For example, current democratic constitutional regimes guarantee only equality of treatment principle or formal equality, which consciously ignores socio-historical factors (cast, race, gender etc.) within which a person develops her individuality. Even if these socio-historical factors act as a handicap for the citizens in their lives, formal equality dictates strict blindness to these factors. On the other hand, principle of substantive equality, which takes account of socio-historical factors of the individuals in order to form policies (often known as Affirmative Action) empowering socially vulnerable sections, is not a mandated constitutional principle anywhere, rather it depends on legislative or executive discretion. Within this imbalanced constitutional doctrine of equality, many democracies have made legislative efforts to eradicate the structural biases.

Historically, racial protests and government actions have been locked in the same cyclic responses, with no or little gain. Whenever there is a

popular surge against systemic racism, at best, federal governments pass laws, claiming an end to racism or gender bias, like the *Civil Rights Act 1964* in the US. In response, the universities, elite professional schools, numerous federal and state departments have amended their local regulations in order to accommodate within their ranks women and people of colour. Similarly, the Australian federal government has ratified treaties like the *International Convention on Elimination of all Forms of Racial Discrimination* (ICERD) & *International Convention on Elimination of all Forms of Discrimination against Women* (ICEDW). The federal statutes like *Sex Discrimination Act* have been amended several times to fulfil these treaty obligations. But in-spite of these sweeping national laws, numerous executive regulations, official reports attesting to decades of discrimination, and legal challenges to these detrimental laws, last year we saw Black Lives Matter movement where thousands of people protested against police atrocities holding placards - 'I can't breathe'.

So why have laws across various democracies failed to bring any fundamental change? Because these laws are based on above discussed political philosophy i.e. 'Contradiction of Values', which have not yet allowed constitutional doctrines of equality to accommodate substantive equality as a fundamental guarantee to its citizens. And since states have been enacting equality statutes within above context, they have been ineffective to address the core of the problem. Therefore, unless this foundational framework of 'Contradiction of Values' in philosophy is not

challenged, the Equality laws are likely to remain ineffective. Below I have discussed the practical examples.

IV. Constitutional structures and Equality provisions

In order to substantiate the abstract claim made above, I will briefly discuss equality jurisprudence of three major democracies i.e. India, United States and Australia. I will highlight this clash of values and prioritisation of one value over the other through the structure and language of the constitutional provisions and judicial interpretations. This imbalance of values helped to maintain a structure of power which systematically keeps some sections of society excluded from social privilege, higher echelons of state power and economic prosperity. Black Lives Matter movement is the backlash against this structural injustice.

But before that I will lay down the framework within which I have considered substantive equality for the purposes of this argument. Principle of substantive equality is very broad. It has different dimensions and its aims can vary considerably[3]. Administrative strategies adopted to deliver those aims are called Affirmative Action programs. So, it can be said that affirmative action programs are reflection of substantive equality principle in action. Any public institution or even a private organisation either takes upon itself to achieve certain substantive equality aims or is compelled to do so because of statutory obligations. Achieving racial or gender diversity in education institutions, state departments; facilitating easier access of business opportunities to

[3] Sandra Fredman, *Discrimination Law*, (Oxford University Press, 2011).

oppressed sections, restoring cultural and linguistic rights etc. or sharing state power with historically excluded sections of society are few of many aims which can be attributed to substantive equality. Further, these

aims can be achieved through various affirmative action programs like special concessions, preferences, quotas etc.

1. India

In constitution of India, equality of treatment is essentially mandated. Article 14 states 'The State shall not deny….equal protection of the laws..'[4], Article 15(1) states 'The state shall not discriminate…on grounds only of religion, race, caste..'[5], and Article 16(1) states 'There shall be equality of opportunity for all citizens in matters relating to employment…'[6]. These provisions represent principle of formal equality or equality of treatment because it expresses that all citizens must be treated 'equally' irrespective of their social, historical or economic status. And the language makes it a mandatory obligation for state. These non-discrimination clauses are, no doubt, significant to pursue justice but certainly not enough to transform socio-political and especially cultural practices which have structurally excluded certain sections from all education, power and privilege throughout history. Yet when it comes to substantive equality, the constitutional provisions empowering state to identify the relevant social classes and make provisions to amend the historical wrongs, make it optional for the state to do so. Which means

[4] *The Constitution of India* (1949) Article 14, https://indiankanoon.org/doc/367586/
[5] *The Constitution of India* (1949) Article 15(1), https://indiankanoon.org/doc/609295/
[6] *The Constitution of India* (1949) Article 16(1), https://indiankanoon.org/doc/211089/

any government with appropriate majority in parliament can chose not to pursue the ends of social justice in India. This is exemplified through the language of Article 15(4) which states, 'Nothing in this article…. Shall prevent the state from making any special provision for the advancement of any socially or educationally backward classes of citizens…'[7] and

Article 16(4), which states, 'Nothing in this article shall prevent the state from making any provisions for the reservation of appointments… in favour of any backward class of citizens..'[8]. Unlike formal equality provisions above, state in this case is free whether or not to enact any affirmative action policy. Consequently, in interpreting the language of Article 15(4) & 16(4), role of judiciary has not been too positive either. In *Ajit Jhanjhua* (I&II)[9], petitioners challenged a state policy granting extra benefits (reservation in promotions) to the members of Scheduled Castes/Tribes[10] in government services. State argued that there is a very less percentage of Scheduled Castes/Tribes in the administrative positions, therefore such a policy is necessary. Court while deciding this matter, opined that substantive equality provisions are not the part of fundamental rights of the constitution and termed them as mere 'enabling provisions'. This subsequently allowed the Supreme Court in *M. Nagraj*[11] (2006) to refuse state policy of granting reservations in promotion to dalits in government services effectively securing the status quo in state's power structures. In this case petitioners challenged a bunch of constitutional amendments (71st, 77th & 85th Constitution Amendment

[7] *The Constitution of India* (1949) Article 15(4), https://indiankanoon.org/doc/609295/
[8] *The Constitution of India* (1949) Article 16(4), https://indiankanoon.org/doc/211089/
[9] *Ajit Singh Janjua & Others Vs. State of Punjab & Others* (1996) 2 Supreme Court Cases 715.
[10] Formerly known as untouchables or dalits.
[11] *M. Nagraj & Others Vs. Union of India & Others* (2006) 8 SCC 212. This decision was eventually overruled in 2018 but constitutional structure of equality remains the same.

Acts), all pertaining substantive equality provisions, arguing that these provisions violate the true purpose of equality embedded in Indian constitution i.e. equality of treatment. The Suprem Court of India while deciding that impugned amendments are constitutional, crafted another judicial test which made it impossible for states to give more benefits to the Scheduled Castes/Tribes in government services. Evidently it has become a common

experience in democracies that as far as substantive equality and affirmative action programs are concerned, courts seemed to have played the role of a hurdle.

2. United States of America

Similar experience is repeated in United States[12]. US Supreme Court have been consistently interpreting Equal Protection clause in 14th Amendment of the constitution, as it only intends equality of treatment. Attempts by legislature or executive to inculcate provisions predicated on substantive equality through affirmative action have been systematically discouraged. Starting from a landmark Supreme Court affirmative action case- *Bakke* (1978)[13], where A non-minority candidate challenged 'set-aside' or quota of seats in favour of racial minority candidates in a medical School of the University of California. It was argued that quotas violate equality of treatment. Court declared quotas to be unconstitutional. It agreed that state can have affirmative action programs

[12] Adam Cohen, Supreme Inequality: *The Supreme Court's Fifty-Year Battle for a More Unjust America*, (Penguin Publishing Group, 2020).
[13] *Regents* of the *University of California Vs. Bakke*, 438 U.S. 265 *(1978)*.

for benign purposes but cannot fundamentally take into account race or gender of the candidate, hence diluting the very purpose of the affirmative action. Justice Powell in this case presented the concept of 'Diversity' in a way that did not require an account to be taken of the socio-historical factors of one's community in determining university admissions. By passively ignoring these factors in *Bakke*, subsequent cases strangulated affirmative action programs. Eventually, Supreme Court developed its categorical stand that equality provisions in US constitution simply command to treat people as individuals. This was exemplified in *Parents Involved*[14] where

in the Court's view, state's race based affirmative action programs only demean the individuality of a person. Here the issue was that a Seattle School District in order to maintain racial diversity among its schools, used a system called 'racial tiebreaker' i.e. if percentage of students belonging to any one race is more in a given school than previously decided, then administration can favour candidates with a particular racial background. Court quashed this policy reminding once again that equality of treatment is the only allowed version of equality in US. In *Rice Vs Cayetano*[15], State of Hawaii enacted a constitutional provision defining who can be considered racially a native Hawaiian. The object being that trustees in Office of Hawaiian Affairs be elected by native Hawaiian people only. This measure, termed as affirmative action by State of Hawaii, was quashed by the Supreme Court declaring that any racial-classification, no matter how benign or intending empowerment of historically excluded sections, must be considered unconstitutional.

[14] *Parents Involved in Cmty. Sch. Vs. Seattle Sch. Dist. No 1*, 551 U.S. 701 (2007).
[15] *Rice Vs Cayetano*, 528 U.S. 495 (2000).

Similarly in *Richmond*[16], the City Council of Richmond, Virginia stipulated that companies which are awarded construction contracts must divert 30% of their business to minority business enterprises. On being challenged, Supreme Court held it to be unconstitutional on the grounds that equality of treatment and not substantive equality is permissible under constitution and the Court specifically opined that such policies violate the right of people to be treated with equal dignity and respect. Moreover, to scrutinise affirmative action programs, the Supreme Court applied a judicial test called 'Strict Scrutiny', whereby any legislative provision aiming to include racial minority by granting any sort of preference or concession, will have to be scrutinised strictly, if challenged. Such political and

judicial attitudes have seriously undermined attempts in US to restore the balance of education and power in society. Hence, American judiciary's wrongful interpretation of substantive equality and its' reliance on 18th century political philosophy in construing the concept of Individualism have encouraged political atmosphere questioning the very moral legitimacy of substantive equality.

3. Australia

In Australia the absence of any bill of rights or explicit substantive rights in the constitution adds extra layer of complication. Even equality of treatment is granted through statutes like *Sex Discrimination Act* (1975) and *Race Discrimination Act* (1984) rather than through a constitutional guarantee. This political arrangement can potentially always led to a situation whereby an elected parliament is compelled to dilute the rights

[16] *City of Richmond Vs. J.A. Corson Co*, 488 U.S. 469 (1989).

of any racial minority or a socially vulnerable group. A good example of this is Native Title Rights, which are interpreted from the lens of property law rather than treating them as essential fundamental rights securing cultural identity of a historically oppressed population. In *Mabo* (II)[17] (1992) High Court of Australia overturned the colonial claim that Australia was a *terra nullis* i.e. an empty land. In response the federal parliament passed *Native Title Act* in 1993, whose objective was recognition and protection of Native Title within national land management system. But in the event of native title rights clashing with statutory land leases, usually held by non-aboriginal population, the question inevitably arose, whose title was stronger? This lead to gradual weakening of native title claims vis-à-vis statutory land leases. In *Wik*[18] (1996) High Court tried to balance native title and leaseholder's rights, yet it gave primacy to leaseholder's rights. In this case an Aboriginal group of people claimed Native title in Queensland where two pastoral leases already existed. They argued, on technical grounds, that Queensland government exceeded its powers in granting pastoral leases to the non-aborigial parties. And in this process of granting theses leases, the state failed to provide adequate measures for the preservation of Aboriginal land rights, therefore, on this ground pastoral leases should become invalid. The High Court of Australia refuted this argument, rather it ended up in considerably reducing the strength of native title vis-à-vis pastoral leases. Similarly in the case of *Ward*[19] (2002), the Native Title rights again clashed with mining and pastoral rights. The High Court of Australia reconfirmed that in certain circumstances the Native title rights

[17] *Mabo Vs. Queensland (No. 2)* [1992] HCA 23.
[18] *The Wik People Vs. State of Queensland & Others* [1996] HCA 40.
[19] *Western Australia Vs Ward* [2002] HCA 28.

can be extinguished and it explained how and when these basic rights of the aboriginal people can be extinguished. The High Court made it clear that *Native Title Act* does provide for the partial and even permanent extinguishment of the Native Title rights. We can see a visible decline in the strength of native title i.e. rights of an extremely excluded and oppressed section diminishing. The land rights of aboriginal people are not just property rights but it is a fundamental necessity to maintain their identity. But because there is a complete absence of entrenched substantive equality rights in Australian constitution, restorative justice for Australian aboriginal population remains a dream.

With this discussion it can be seen that problem does not lie in functioning of any one branch of the state. Rather the problem lies in the fact that state's obligation to impart social justice is merely a matter of political discretion. And this discretion is predicated on constitutional principles which consider substantive equality as a secondary value. Therefore, when within this philosophical and constitutional context any state enacts a law aiming to squarely tackle the problem of

social injustice, it inevitably fails to push socio-political consciousness towards more effective transformative results.

V. Conclusion

Given the current political decadence in tolerance towards multiculturalism, racial fraternity etc. across all democracies, the most significant role of substantive equality right now should be to act as a catalyst, expediting the transformation of socio-political consciousness

among our societies. Affirmative Action policies aiming to restore the historically excluded classes in echelons of state power and higher education may have far greater transformative potential. It can not only lead to diluting superficial stereotypes and biases, but being in relatively commanding positions in administration, historically excluded classes can impact and shape policies affecting them more efficiently. This has been prevented systematically leading to the current situation of near complete alienation of these sections from power structures. It has caused them to have extreme distrust on democracy's empty narrative of justice while being embroiled in unending cycles of violence. Therefore, so that the political movements like Black Lives Matter do not fizzle away, it is important that demands are rationally conceptualised and transformed into practically achievable socio-political objectives. Questioning and demanding the change in foundational principles of our constitutions can be one such method.

REASONABLE ACCOMMODATION OF PERSONS WITH DISABILITIES IN EMPLOYMENT AND WORKPLACES

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Abstract

Reasonable accommodation is an important instrument for defending the principle of equality and justice, including equalization of opportunities for persons with disabilities. Reasonable accommodation in employment and workplaces empowers individuals with disabilities, makes such individuals financially independent, enhances their labour market participation and makes them productive labour force and all these have significant impact in enriching society and strengthening the national growth and development. India is a party to major international human rights and disability-related legal instruments, including the UN Convention on Rights of Persons with Disabilities (CRPD). As part of its obligation under CRPD India has enacted the Rights of Persons with Disabilities Act 2016 incorporating therein explicit legal provisions of many aspects of 'reasonable accommodation' of persons with disabilities. It is the duty of all stakeholders to ensure compliance of the legal provisions of 'reasonable accommodation' as outlined under the Rights of Persons with Disabilities Act 2016 and Rights of Persons with Disabilities Rules 2017 and accordingly every establishments, including private organizations and enterprises, must come out with their specific

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equal opportunity policies for persons with disabilities in employment and workplaces. A written reasonable accommodation policy gives confidence to an individual to disclose her/his disability identity and seek reasonable accommodation from employers.

Keywords: *accommodation, persons with disabilities, employment, workplace, accessibility, India.*

I. Introduction

As per *World Report on Disability* about 15% of the world's population (based on 2010 global population estimates), i.e., over a billion population of the world, are estimated to be living with some kind of disabilities, including between 785 and 975 million persons of working age (aged 15 years or above)[1]. The number of persons with disabilities is increasing rapidly due to poverty, hunger, illness, violence, war and conflicts, natural calamities, earthquakes, accidents (particularly road accidents), improvements in medical treatments prolonging lives of elderly and ill persons, etc. Every person experiences at least some kind of temporal disabilities at some stage in her/his life. In a way, we as human beings are only temporarily abled bodies and we all are destined to live with dignity with equal rights and opportunities for all of us, including those who we have socially created and defined as 'persons with disabilities.' A just society must necessarily ensure that persons with disabilities are duly empowered, uplifted and provided livelihood opportunities on equal terms with others so that they can live lives independently and in a dignified manner. As early as in 1923, the International Labour Organization (ILO) emphasised the need for

[1] World Health Organisation, *World Report on Disability* (2011).

countries to recognise that society owes an obligation to "disabled" workers and that such workers have economic value[2]. In the words of Juan Somavia, former Director General of ILO, "when we promote the rights and dignity of people with disabilities, we are empowering individuals, strengthening economies and enriching societies at large."[3] According to a World Bank study published in 2000, the range of global GDP lost annually due to disability is estimated to be between $1.37 trillion and $1.94 trillion.[4] Excluding disabled persons from the world of work has costs for societies, in terms of their productive potential and the ILO estimates that such exclusion may cost countries between 1 to 7 per cent of GDP.[5] Employment and works are important means for meeting basic needs and sustaining life and most importantly in case of persons with disabilities employment and works in addition provide a sense of individual identity, choice and independence. United Nations Division for Social Policy Development states, "Employment is central to the ability of persons with disabilities to maintain a decent standard of living for themselves and for their families, and is an important factor influencing their opportunities to participate fully in society…. Work is a defining feature of human existence and in many societies the ability to

[2] C. Ngwena, "Equality for people with disabilities in the workplace: An overview of the emergence of disability as a human rights issue", 29(2) *Journal for Juridical Science* 177 (2004).

[3] International Labour Office, "Facts on disability in the world of work" (2007), available at: https://www.ilo. org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_0877 07.pdf (last visited on June 14, 2020)

[4] Robert L. Metts, *Disability issues, trends and recommendations for the world bank. Social protection discussion paper no. 0007* (The World Bank: Washington, 2000), available at: http://documents 1.worldbank.org/curated/en/503581468779980124/pdf/multi0page.pdf (last visited on November 19, 2020).

[5] Barbara Murray, Employment for social justice and a fair globalization: Overview of ILO programmes, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_140958.pdf (last visited on June 25, 2020).

work is viewed as one of the most important ways in which people can make their individual contributions to their communities."[6]

However, in the world of work, persons with disabilities experience common patterns of discrimination – such as high unemployment rates, prejudice about their productivity and lack of access to the workplace environment.[7] Given the opportunities and right workplace environment in consonance with the principle of reasonable accommodation, most of the persons with disabilities can become productive assets for the society. There is a need to increase the rate of labour market participation of persons with disabilities through formal legal and institutional mechanisms of reasonable accommodation. Accessibility of the workplaces and built-environment (including accessibility to information, facility services, transportation, housing, etc.) is also important in enhancing employment and productivity of persons with disabilities. Reasonable accommodation, coupled with accessibility, can enhance the prospects of securing, returning to, retaining and advancing in suitable employment of an individual with disabilities. Workplace accommodations have the potential to play a major role in the ability of many people with disabilities to participate in the workforce.[8]

Reasonable accommodation is an important instrument for defending the principle of equality and justice and equalization of opportunities for persons with disabilities. It is one of the pillars upon which the

[6] United Nations Division for Social Policy Development, Toolkit on disability for Africa: The right of persons with disabilities to work.
[7] *Supra* note 3
[8] Priyanka Anand and Purvi Sevak, "The role of workplace accommodations in the employment of people with disabilities", 6(12) *IZA Journal of Labor Policy* 1 (2017).

recognition of the rights of people with disabilities rests.[9] A reasonable accommodation is any modification or adjustment that is 'necessary or appropriate' to allow a particular individual with a disability the equal enjoyment of all human rights and fundamental freedoms.[10] As such, reasonable accommodation has become a central theme for most of the international, regional and national disability legislations and policy making concerning persons with disabilities. Reasonable accommodation in employment/workplaces and right to work of persons with disabilities (including non-discrimination in workplace) have been prominently highlighted in the United Nations Convention on Rights of Persons with Disabilities (CRPD), which was adopted unanimously by the UN General Assembly through its resolution 61/106 of 13 December 2006 and which entered into force on 3rd May 2008. India was among the first countries to sign and ratify the CRPD (ratified on 1st October 2007). As part of its obligation under CRPD (which is a legally binding instrument) India enacted the Rights of Persons with Disabilities Act (in brief RPWD Act) in 2016. The RPWD Act 2016 has clearly spelt out the provisions of accessibility and reasonable accommodation of persons with disabilities in employment and workplaces. Indian judiciary has also played a crucial role in promoting reasonable accommodation of persons with disabilities through positive interpretation of the disability legislations.

In light of the above, this paper has made an effort to understand the concept of reasonable accommodation of persons with disabilities in the

[9] Rafael De Asís Roig, "Reasonableness in the concept of reasonable accommodation", 6 *The Age of Human Rights Journal* 42 (2016), available at: https://core.ac.uk/download/pdf/236365122.pdf (last visited on Dec 20, 2020).

[10] Frédéric Mégret and Dianah Msipa, "Global reasonable accommodation: How the Convention on the Rights of Persons with Disabilities changes the way we think about equality", 30(2) *South African Journal on Human Rights* 263 (2014).

contexts of employment and workplaces. It has critically assessed the provisions of reasonable accommodation under important international and national disability legislations. It has highlighted the important legislative and policy measures in India for ensuring reasonable accommodation of persons with disabilities in employment and workplaces. Finally, by way of citing important court cases, the paper has highlighted the role of Indian judiciary in promoting reasonable employment and workplace accommodation of persons with disabilities.

II. Reasonable accommodation – An international perspective

At the international level, the concept of reasonable accommodation has long been recognized implicitly in various human rights instruments within the provisions of equalization of opportunities, right to work and non-discrimination. However, as a concept reasonable accommodation was originally conceived in a formal manner during the American civil rights movement in 1960s and was in fact applied in the context of accommodation of religious practices of employees by the employers. The United States Civil Rights Act of 1968 requires employers to "reasonably accommodate" an employee or potential employee's religious observance or practice unless an accommodation would cause undue hardship on the employer's business.[11] It was again reinforced in

[11] UN, The concept of reasonable accommodation in selected national disability legislation: Background conference document prepared by the UN Department of Economic and Social Affairs for the s**eventh session of** adhoc committee on a comprehensive and integral international convention on the protection and promotion of the rights and dignity of persons with disabilities, UN General Assembly, New York, 16 January – 3 February 2006, **A/AC.265/2006/CRP.1,** (7 December 2005), available at: https://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm#:~:text=The%20term%20reasonable%20accommodation%20was,the%20grounds%20of%20religious%20practice.&text=The%20concept%20of%20reasonable%20accommodation%20was%20first%20applied%20to%20the,States%20Rehabilitation%20Act%20of%201973 (last visited on June 14, 2020).

the United States Equal Employment Opportunity Act of 1972. In the context of disability, reasonable accommodation was first conceptualized and legally recognized in the United States Rehabilitation Act of 1973, which requires federal employers to develop affirmative action plans for the "hiring, placement, and advancement of individuals with handicaps" and in addition it prohibits federal agencies and employers that receive federal funds from discriminating against applicants or employees with disabilities.[12] *Section 503 (a)* of the Rehabilitation Act (as amended) states that "any contract entered into by any federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with disabilities". The Rehabilitation Act laid the strong foundation of reasonable accommodation under the Americans with Disabilities Act of 1990 (in brief ADA). ADA is considered a highly influential piece of US legislation intended to profoundly modify the situation of persons with disabilities and it has applied the concept of reasonable accommodation to several contexts such as employment, housing, education, transport and health services.[13] The concept of reasonable accommodation under ADA was integrated with the Rehabilitation Act through amendment.

Before proceeding further on the important and specific legal provisions on reasonable accommodation let us have a brief understanding as to what

[12] Barbara A. Lee, "Reasonable accommodation under the Americans with Disabilities Act: The limitations of Rehabilitation Act precedent", 14(2) *Berkeley Journal of Employment and Labor Law* 205 (1993).
[13] *Supra* note 10 at 255.

the reasonable accommodation means in the context of employment and workplaces. An "accommodation mandate" in case of employment is a requirement that employers take special steps in response to the distinctive needs of particular, identifiable demographic groups of workers.[14] For Roessler & Rumrill[15], "an accommodation is a modification to the work environment or to the way an essential job function is performed and the purpose of the accommodation is to allow an otherwise qualified person to enter or to continue in employment by removing or reducing significant disability-related work limitations." ILO's *code of practice on managing disability in the workplace* defines an adjustment or accommodation as "adaptation of the job, including adjustment and modification of machinery and equipment and/or modification of the job content, work organization and the adaptation of the work environment to provide access to the place of work and working time to facilitate the employment of individuals with disabilities."[16] Further, under the ILO's *code of practice*, workplace means "all the places where people in employment need to be or to go to carry out their work and which are under the direct or indirect control of the employer."[17]

While most of the accommodations may be met with very little or no extra/direct costs to the employers some accommodations may be costly

[14] Christine Jolls, "Accommodation mandates", 53(2) *Stanford Law Review* 231 (2000).
[15] Richard T. Roessler and Phillip Rumrill, *The win-win approach to reasonable accommodations* 6 (National Multiple Sclerosis Society, 2018).
[16] International Labour Organization, *Code of practice on managing disability in the workplace* (2001), available at: https://www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/tmemdw-2.pdf (last visited on Dec 20, 2020).
[17] *Ibid.*

for employers if these require significant alterations or modifications in the way jobs are structured or restructured. These is why the qualifier 'reasonable' has been added before the word 'accommodation' in order to ensure that employers who employs persons with disabilities are not faced with unnecessary burden, undue hardship or disproportionate costs to their businesses. Nevertheless, it is important to acknowledge that reasonable accommodations help enable employees with disabilities to perform their jobs to the best of their abilities.[18] Reasonable accommodation addresses or removes specific barriers or limitations that interfere with the abilities of individual employees with disabilities. In fact, the provision of accommodations is designed to remove or mitigate the effect of physical, social or environmental barriers on the ability of people with disabilities to perform essential job functions.[19] By removing the barriers that prevent employees from performing the essential functions of a position, reasonable accommodations allow employees to fulfil their potential as employees.[20]

Schwab & Willborn[21] have given two conceptual interpretations to reasonable accommodation - procedural reasonable accommodation and substantive reasonable accommodation. Procedural reasonable accommodation requires employers to engage in an "interactive process"

[18] Alex B. Long, "Reasonable accommodation as professional responsibility, reasonable accommodation as professionalism", 47 *University of California, Davis* 1763 (2014), available at: https://lawreview.law.ucdavis.edu/ issues/47/5/Articles/47-5_Long.pdf (last visited on November 22, 2020).

[19] Kim L. MacDonald-Wilson, Ellen S. Fabian, *et al.*, "Best practices in developing reasonable accommodations in the workplace: Findings based on the research literature", 16(4) *The Rehabilitation Professional* 221 (2008).

[20] *Supra* note 18 at 1763-4.

[21] Stewart J. Schwab and Steven L. Willborn, "Reasonable accommodation of workplace disabilities", 44(3) *William & Marry Law Review* 1197-1284 (2003).

to explore accommodation possibilities, to analyze the job and its essential functions, consult with individual with a disability about the precise job related limitations imposed by the disability and about potential accommodations which would permit performance of the job's essential functions, and consider the individual's preferences in selecting and implementing an appropriate accommodation.[22] It is akin to a kind of customization of accommodation based on job skills of the persons with disabilities and negotiated agreement on accommodation between prospective employees and the employer without any extraneous legal compulsion. Procedural component of reasonable accommodation requires individual employers to investigate the productivity of individuals with disabilities and, hence, permit the society to reap benefits that would otherwise be lost.[23] Against the procedural aspect, the substantive reasonable accommodation is a hard choice imposed on employers through legally enforced reasonable accommodation. Under the substantive reasonable accommodation norms employers are legally bound to hire individuals with disabilities even though they may be more costly to employ or less productive than others.[24]

Any adjustment, modification or change in employment and workplace policies, including changes in the physical structure of the workplace for reasonable accommodation of persons with disabilities also benefit other employees resulting in higher overall productivity for the organization. As such, reasonable accommodations can be viewed from the perspective of "productivity enhancers" and should not be viewed as "special

[22] *Id.* at 1258.
[23] *Id.* at 1259.
[24] *Id.* at 1260.

treatment" as they often benefit all employees.[25] The American with Disabilities Act, 1990 (ADA), which is credited to have created the legally enforceable standard benchmark of reasonable accommodation before the enactment of the UN Convention on Rights of Persons with Disabilities, defines reasonable accommodation as "any adjustments that allow people with disabilities to enjoy equal employment opportunities as long as the required modifications do not result in undue hardship for the employer." The undue hardship proviso recognizes that it is sometimes unfair to place the entire burden of accommodating an individual's disability on a particular employer.[26] Under ADA, anyone who is a "qualified individual with a disability" is entitled to reasonable accommodation, provided the individual, "with or without reasonable accommodation, can perform the essential functions of the employment position individual holds or desires," and provided the accommodation does not create an "undue hardship" for the employer.[27] The Equal Employment Opportunity Commission (EEOC), the federal agency that enforces the ADA, has issued regulations creating the following three aspects of reasonable accommodation[28]: (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; (3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by

[25] Office of Disability Employment Policy, U. S. Department of Labor, *Accommodations*, available at: https://www.dol.gov/odep/topics/Accommodations.htm (last visited on June 17, 2020).
[26] Pamela S. Karlan and George Rutherglen, "Disabilities, discrimination, and reasonable accommodation", 46(1) *Duke Law Journal* 29 (1996).
[27] *Supra* note 12 at 209.
[28] *Supra* note 12 at 210.

employees without disabilities. Failure to provide reasonable accommodation is considered as discrimination and violation of the ADA.

One of the earliest international examples of accommodation or adjustment of the right of people with disabilities to work opportunities was the ILO's *Employment (Transition from War to Peace) Recommendation*, 1944 (No. 71), which stated "disabled workers, whatever the origin of their disability, should be provided with full opportunities for rehabilitation, specialised vocational guidance, training and retraining, and employment on useful work."[29] Prepared in the backdrop of the Second World War, the *Employment (Transition from War to Peace) Recommendation* (which has been replaced/superseded by the *Employment and Decent Work for Peace and Resilience Recommendation*, 2017 (No. 205) recognized that **"**the character and magnitude of the *employment adjustments* required during the transition from war to peace *will necessitate special action*, more particularly for the purpose of facilitating the re-employment of demobilised members of the armed forces, discharged war workers, and all persons whose usual employment has been interrupted as a result of the war, enemy action, or resistance to the enemy or enemy-dominated authorities, by assisting the persons concerned to find without delay the most suitable employment (italics mine)."[30] *Sections 39 to 44* of *Employment (Transition from War to Peace) Recommendation* addressed various employment issues of

[29] International Labour Organization, *R071 - Employment (Transition from War to Peace) Recommendation* (1944), available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:19037200471851::NO::P12100_SHOW_ TEXT: Y: (last visited on Dec 20, 2020).
[30] *Ibid.*

disabled workers including inducement to employers for reasonable employment quota for disabled persons. The ILO (in the said *Recommendation*) said that persons with disabilities should, wherever possible, be trained with other workers, under the same conditions and the same pay, and called for equality of employment opportunity for disabled workers and for affirmative action to promote the employment of workers with serious disabilities.[31] In fact, through several other recommendations from time to time, ILO is making continuous efforts to protect the interests of persons with disabilities in employment and workplaces.

Various international human rights instruments when interpreted liberally and positively can be found to support reasonable accommodation for persons with disabilities. For example, *Article 23* of the Universal Declaration of Human Rights (UDHR) ((adopted by the UN General Assembly on 10 December 1948) states, "(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (4) Everyone has the right to form and to join trade unions for the protection of his interests."

International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted by UN General Assembly on 16 December 1966 and

[31] Arthur O'Reilly, *The right to decent work of persons with disabilities* 4 (International Labour Organization: Geneva, 2007).

came into effect with effect from 3 January 1976) has made following provisions with regard to right to work and just and favourable conditions of work – "*Article 6 (1)*: The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right"; and "*Article 7***:** The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work." In its General Comment No. 5 on Persons with Disabilities (adopted at its 11th Session on 9 December 1994) the Committee on Economic, Social and Cultural Rights stated that for the purposes of the Covenant, 'disability-based discrimination' may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights. Again, in its General Comment No. 23 of 27 April 2016 on the right to just and favourable conditions of work the Committee on Economic, Social and Cultural Rights stated the following: "At times, workers with disabilities require specific measures to enjoy the right to just and favourable conditions of work on an equal basis with others. Workers with disabilities should not be segregated in sheltered workshops. They should benefit from an accessible work environment and must not be denied reasonable accommodation, like workplace adjustments or flexible working arrangements. They should also enjoy equal remuneration for work of equal value and must not suffer wage discrimination due to a perceived reduced capacity for work."

Article 15 of the African (Banjul) Charter on Human and Peoples' Rights (adopted on 27 June 1981 and entered into force 21 October 1986) states that "every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work." Further, *Article 19(2)(f)* of the Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa (adopted on 29 January 2018) specifically directs "State parties to take effective and appropriate measures ensuring that reasonable accommodation is provided to persons with disabilities in the workplace."

The World Programme of Action (WPA) concerning Disabled Persons (adopted by the UN General Assembly on 3 December 1982), which is a global strategy to enhance disability prevention, rehabilitation and equalization of opportunities and to further full participation of persons with disabilities in social life and national development states that "the wider application of ergonomic principles leads to adaptation of the workplace, tools, machinery and equipment at relatively little cost and helps widen employment opportunities for the disabled." The UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities (adopted by General Assembly on 20 December 1993) under *Rule 7* on 'Employment' states that "States should encourage employers to make reasonable adjustments to accommodate persons with disabilities and programmes of action by States should include: (a) measures to design and adapt workplaces and work premises in such a way that they become accessible to persons with different disabilities; and (b) support for the use of new technologies and the development and production of

assistive devices, tools and equipment and measures to facilitate access to such devices and equipment for persons with disabilities to enable them to gain and maintain employment." *Rule 7* further states that "States, workers' organizations and employers should cooperate with organizations of persons with disabilities concerning all measures to create training and employment opportunities, including flexible hours, part-time work, job-sharing, self-employment and attendant care for persons with disabilities." The Vienna Declaration of the World Conference on Human Rights 1993 reaffirms that all human rights and fundamental freedoms are universal and thus unreservedly include persons with disabilities. The Declaration further states that persons with disabilities should be guaranteed equal opportunity through the elimination of all socially determined barriers, be they physical, financial, social or psychological, which exclude or restrict full participation in society.

The European Union adopted the concept of reasonable accommodation through its Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. *Article 5* of the Directive on 'Reasonable accommodation for disabled persons' states as follows: "In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied

by measures existing within the framework of the disability policy of the Member State concerned."

In the meantime, many countries also came out with their specific reasonable accommodation provisions through their country-specific disability legislation. However, most of the country-specific disability legislations failed to address reasonable accommodation in comprehensive manner and could not match up to the legally enforceable standard benchmark of reasonable accommodation available under disability legislations of USA. Most of the country-specific disability legislations failed to comprehensively address reasonable accommodation of persons with disabilities as enshrined in several international and regional legal instruments.

The first legally binding international instrument to comprehensively address the reasonable accommodation concerns for persons with disabilities is the UN Convention on Rights of Persons with Disabilities (CRPD), which has been signed and ratified by most of the countries of the world. According to *Article 2* of the CRPD, 'reasonable accommodation' means "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms." This Article further considers denial of reasonable accommodation as 'discrimination on the basis of disability'. *Article 5(*3) of CRPD states that in order to promote equality and eliminate discrimination, "States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided." Under *Article*

8(2)(iii) "States Parties are required to take measures to promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market." *Article 27(1)* of CRPD states that "States Parties recognize the right of persons with disabilities to work, on an equal basis with others; and this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities." It further says that "States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia: (a) prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions; (b) protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions….; (e) promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;…. (h) promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures; (i) ensure that reasonable accommodation is provided to persons with disabilities in the workplace; … (k) promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities."

Types of reasonable accommodations

Reasonable accommodations in the context of employment and workplaces are different in terms of differential needs and requirement of persons with disabilities in discharging their job responsibilities and carrying out essential job functions. As a formal procedure the reasonable accommodation starts with the initial stages of recruitment and selection processes. It may include modification and restructuring of essential job profiles, changes in recruitment policies and rules, modified work schedules including flexibility of work time and option to work from home or convenient locations, alternate schedules, periodic breaks, shifting in work, duty leave, transportations, etc. Reasonable accommodation includes changing or modifying the workplaces and the existing facilities in the workplaces as per specific requirements of an employee with disabilities including the facilities/provision of reader/interpreter and personal attendant or assistant. Without any undue or disproportionate burden or excessive costs on the employer, reasonable accommodation may also include acquisition of appropriate assistive or supportive equipment, devices/tools or (new) technologies that allows employees with disabilities to equally perform the essential functions of a job along with others. Adjustment or modification of workplaces for the individual needs of the employee with disabilities include making physical accessibility of the workplaces with appropriate provisions of ramps and lifts, modification of toilets/washrooms, etc. ILO's *code of practice on managing disability in the workplace* has come out with several measures for adaptation to accommodate the specific concerns of employees with disabilities, such as – adaptations of the workstation to enable the worker with a disability to perform the job effectively;

adaptations to tools and equipment to facilitate optimal job performance in consultation with the disabled worker and worker representatives; review of the job description and making changes accordingly; flexibility of work schedules enabling some individuals with disabilities to perform a job satisfactorily; etc. The *code* also prescribes that the competent authorities should make available to employers the incentives for workplace adjustments, as well as a technical advisory service which provides up-to-date advice and information on adjustments to the workplace or the organization of job tasks, as required.[32] Appropriate job training, promotion in jobs and awareness raising about possible accommodation measures are also important components of any responsible reasonable accommodation mandate.

1. Reasonable accommodation vis-à-vis accessibility

There is no doubt that reasonable accommodation is intrinsically linked to accessibility in many respects. However, at the conceptual level reasonable accommodation and accessibility are different from each other. Reasonable accommodation is an individualized or customized provision of adjustment or adaptation measures to ensure equal entitlement of rights and benefits for individuals with disabilities. In this regard, it is pertinent to quote Ontario Human Rights Commission[33], which states as follows: "The essence of accommodating people with disabilities is individualization…. each person with a disability must be considered, assessed and accommodated individually…. There is no set

[32] *Supra* note 16.

[33] Ontario Human Rights Commission. (2000). *Policy and guidelines on disability and the duty to accommodate* (2000), available at: http://www.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_disability_and_the_duty_to_accommodate.pdf (last visited on Dec 20, 2020).

formula for accommodating people with disabilities. Each person's needs are unique and must be considered afresh when an accommodation request is made."

In essence, reasonable accommodation is approved on a case-by-case basis to ensure equality and is an integral part of individual rights.[34]

Accessibility on the other is an important instrument for promoting accommodation of all persons with disabilities in general without specific concern for an individual with disabilities. Accessibility provisions are anticipatory in nature in the sense that such provisions are already taken care of without any prior accommodation request by an individual with disabilities. According to ILO's *code of practice on managing disability in the workplace* to facilitate the recruitment of persons with disabilities and job retention by workers who acquire a disability, employers should take steps to improve the accessibility of the work premises to people with different types of disability, including consideration of entrance to and movement around the premises and of toilet and washroom facilities. Accessibility to the workplaces and its associated built-environment is fundamentally important legal instrument in ensuring employment opportunities and just and favourable workplaces for persons with disabilities and the same is legally enforceable without any consideration on 'undue' or 'disproportionate' burden clause (which is applied in the case of reasonable accommodation). In other words, the obligation to implement accessibility is unconditional, i.e. the entity obliged to provide

[34] Marianne Hirschberg and Christian Papadopoulos, "Reasonable accommodation" and "accessibility": Human rights instruments relating to inclusion and exclusion in the labor market", 6(3) *Societies* 10 (2016).

accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities whereas the right to be provided with a reasonable accommodation is not absolute and is subject to the 'disproportionate or undue burden' limit.[35] The duty to provide reasonable accommodation arises only at the moment at which a person with a disability has need for a particular solution in a given situation.[36]

III. Employment and workplace accommodation for persons with disabilities in India

As per 2011 *Census* of the Government of India, there is an estimated 2.68 crore persons with disabilities in India, constituting 2.21% of the India's population. This low estimate in term of percentage is based on a very narrow definition of disability under Persons with Disabilities Act 1995 and has accordingly being questioned by international funding agencies and disability rights activists. Disability activists and international funding agencies invariably state that the number of disabled persons is quite higher than the officially estimated Census figure. A recent study by NCPEDP and FICCI states: In India, "approximately 7-10% people live with disabilities and an equal number rapidly acquiring disability on account of medical conditions, accidents and old age."[37] In absolute term, the number of persons with disabilities

[35] Delia Ferri, "Reasonable accommodation as a gateway to the equal enjoyment of human rights: From New York to Strasbourg", 6(1) *Social Inclusion* 44 (2018).
[36] *Id.* at 43).
[37] National Centre for Promotion of Employment for Disabled People (NCPEDP) & Federation of Indian Chambers of Commerce & Industry (FICCI), *Structural framework for accessible urban infrastructure in smart cities*, available at: http://ficci.in/spdocument/22933/Smart_Cities%20new.pdf (last visited on November 16, 2020).

in India is quite substantial and this calls for appropriate accommodation measures for realization of their rights and entitlement including their education, healthcare and most importantly it calls for measures in increasing their participation in labour markets by way of reasonable accommodation in employment and workplaces. India is a party to all the major international human rights and disability-related legal instruments/treaties, including the UN Convention on Rights of Persons with Disabilities (CRPD). As part of its obligation under CRPD India has enacted the Rights of Persons with Disabilities Act (in brief RPWD Act) 2016 incorporating therein explicit legal provisions of many aspects of 'reasonable accommodation' of persons with disabilities. Earlier, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (in brief PWD Act 1995) contained certain important accommodation provisions and there is a need to have a bird's eye-view on the employment related accommodation provisions/sections of PWD Act 1995 before embarking on the reasonable accommodation provisions under RPWD Act and other legal and policy measures.

Important employment and workplace related accommodation provisions/sections of PWD Act 1995 are as follows – "*Section 32(a)*: Appropriate Governments shall identify posts, in the establishments, which can be reserved for the persons with disability"; "*Section 33*: Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent. for persons or class of persons with disability"; "*Section 38*: The appropriate Governments and local authorities shall by notification formulate schemes for ensuring employment of persons with disabilities, and such schemes may provide for— (a) the training and welfare of persons with disabilities, (b) the

relaxation of upper age limit, (c) regulating the employment, (d) health and safety measures and creation of a non-handicapping environment in places where persons with disabilities are employed; *Section 41*: The appropriate Governments and the local authorities shall, within the limits of their economic capacity and development, provide incentives to employers both in public and private sectors to ensure that at least five per cent. of their work force is composed of persons with disabilities"; "*Section 42*: The appropriate Governments shall by notification make schemes to provide aids and appliances to persons with disabilities"; "*Section 47*: (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service: Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits: Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier, and (2) No promotion shall he denied to a person merely on the ground of his disability"; "*Section 66(1)*: The appropriate Governments and the local authorities shall within the limits of their economic capacity and development undertake or cause to be undertaken rehabilitation of all persons with disabilities"; "*Section 67(1)*: The appropriate Government shall by notification frame an insurance scheme for the benefit of its employees with disabilities"; "*Section 68*: The appropriate Governments shall within the limits of their economic capacity and development shall by notification frame a scheme for payment of an unemployment allowance to persons with disabilities registered with the Special Employment Exchange for more than two years and who could not be placed in any gainful occupation."

The accommodation provisions under the PWD Act 1995 were largely confined to Government establishments. Against this, the RPWD Act 2016 has incorporated several reasonable accommodation provisions that are applicable and legally enforceable for both public and private entities. In line with CRPD, the RPWD Act 2016 has defined 'reasonable accommodation' as necessary and appropriate modification and adjustments, without imposing a disproportionate or undue burden in a particular case, to ensure to persons with disabilities the enjoyment or exercise of rights equally with others (*Section 2(y)*). Under *Section 2(h)* of the RPWD Act denial of reasonable accommodation is treated as 'discrimination' in relation to disability. Some of the important provisions/sections of the RPWD Act 2016 that are crucial for reasonable accommodation of persons with disabilities in employment and workplaces are as follows – "*Section 3:* (1) Appropriate Government shall ensure that the persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others, (2) Appropriate Government shall take steps to utilise the capacity of persons with disabilities by providing appropriate environment, (3) No person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim, … (5): Appropriate Government shall take necessary steps to ensure reasonable accommodation for persons with disabilities"; "*Section 19(1)*: Appropriate Government shall formulate schemes and programmes including provision of loans at concessional rates to facilitate and support employment of persons with disabilities especially for their vocational training and self-employment"; "*Section 20*: (1) No Government establishment shall discriminate against

any person with disability in any matter relating to employment, (2) Every Government establishment shall provide reasonable accommodation and appropriate barrier free and conducive environment to employees with disability, (3) No promotion shall be denied to a person merely on the ground of disability, (4) No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service: Provided that, if an employee after acquiring disability is not suitable for the post he was holding, shall be shifted to some other post with the same pay scale and service benefits: Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier, and (5) The appropriate Government may frame policies for posting and transfer of employees with disabilities"; "*Section 21*: (1) Every establishment shall notify equal opportunity policy detailing measures proposed to be taken by it in pursuance of the provisions of this Chapter in the manner as may be prescribed by the Central Government, and (2) Every establishment shall register a copy of the said policy with the Chief Commissioner or the State Commissioner, as the case may be."

In exercise of powers conferred by sub-*Sections (1*) and (2) of *Section 100* of the Rights of Persons with Disabilities Act, 2016 (49 of 2016), the Government of India framed additional rules concerning reasonable accommodation vide the notification of Department of Empowerment of Persons with Disabilities (Divyangjan), Ministry of Social Justice and Empowerment dated 15th June 2017. Important rules concerning reasonable accommodation include the followings – "*Rule 3*: (1) The head of the establishment shall ensure that the provision of sub-*Section*

(3) of *Section 3* of the Act are not misused to deny any right or benefit to persons with disabilities covered under the Act, … (4) No establishment shall compel a person with disability to partly or fully pay the costs incurred for reasonable accommodation"; "*Rule 8*: (1) Every establishment shall publish equal opportunity policy for persons with disabilities, (2) The establishment shall display the equal opportunity policy preferably on their website, failing which, at conspicuous places in their premises, (3) The equal opportunity policy of a private establishment having twenty or more employees and the Government establishments shall inter alia, contain the following, namely: (a) facility and amenity to be provided to the persons with disabilities to enable them to effectively discharge their duties in the establishment, (b) list of posts identified suitable for persons with disabilities in the establishment, (c) the manner of selection of persons with disabilities for various posts, post-recruitment and pre-promotion training, preference in transfer and posting, special leave, preference in allotment of residential accommodation if any, and other facilities, (d) provisions for assistive devices, barrier-free accessibility and other provisions for persons with disabilities, (e) appointment of liaison officer by the establishment to look after the recruitment of persons with disabilities and provisions of facilities and amenities for such employees; (4) The equal opportunity policy of the private establishment having less than twenty employees shall contain facilities and amenities to be provided to the persons with disabilities to enable them to effectively discharge their duties in the establishment"; "*Rule 9*: (1) Every establishment covered under sub-rule (3) of rule 8 shall maintain records containing the following particulars, namely:- (a) the number of persons with disabilities who are employed and the date from when they are employed, (b) the name, gender and

address of persons with disabilities, (c) the nature of disability of such persons, (d) the nature of work being rendered by such employed person with disability, and (e) the kind of facilities being provided to such persons with disabilities"; "*Rule 11*: (1) For the purposes of computation of vacancies, four percent of the total number of vacancies including vacancies arising in the identified and non-identified posts in the cadre strength in each group of posts shall be taken into account by the appropriate Government for the persons with benchmark disabilities"; *Rule 15(1)(a)* (on Accessibility) states that "every establishment shall comply with standard for public buildings as specified in the Harmonised Guidelines and Space Standards for Barrier Free Built Environment for Persons with Disabilities and Elderly Persons as issued by the Government of India, Ministry of Urban Development in March, 2016."

It is important to understand that the provisions on reasonable accommodation under the RPWD Act 2016 and Rights of Persons with Disabilities Rules 2017 are legally binding on establishments and employers and they may be penalized for denial of accommodation. Based on the RPWD Act 2016 and its Rules 2017 many establishments, including private ones, have framed their specific equal opportunity policies for persons with disabilities. Those who failed to frame their equal opportunity policies need to frame the same immediately in compliance with RPWD Act 2016 and Rights of Persons with Disabilities Rules 2017.

Before the enactment of the RPWD Act 2016 and framing of Rights of Persons with Disabilities Rules 2017, the Department of Personnel and Training of the Ministry of Personnel, Public Grievances and Pensions,

Government of India had already issued guidelines (on 31st March 2014) to provide certain additional facilities/amenities to the persons with disabilities to enable them to effectively discharge their duties – such as identification of jobs, post-recruitment and pre-promotion training, assistive devices, free accessibility, preference in transfer/posting, special casual leave, etc. The guidelines called for job specific post-recruitment as well as pre-promotion training programmes for the persons with disabilities. The guidelines also called for ensuring that training programmes are conducted at the time of change in job, introduction of new technology, after promotion of the employee, etc and suggested that the venue of the training may be fixed as considered suitable for conducting such training. The guidelines directed that an employee with disability shall be placed with an experienced employee for at least one month on resuming responsibility of a post in order to help him/her to pick up skills required to perform the job and also the adaptations that may be required in individual cases. Most importantly, the guidelines directed that persons with disabilities should be assisted by providing them high tech/latest technology led assistive devices (including low vision aids, hearing aids with battery), special furniture, wheel chairs (motorised if required by the employee), software scanners, computer and other hardware, etc. in accordance with their requirement, which would improve their efficiency. Further, the guidelines called for reimbursement of the cost of such devices with a specific time period for such devices to persons with disabilities in accordance with the price/durability of the special devices, special furniture, software, scanners, computer and other hardware, etc. as fixed in consultation with various National Institutes working in the sphere of disability, including a review in every three years to check the availability or need for introduction of enhanced/upgraded

versions of such devices/software, etc. The guidelines called for modification in all public buildings including Government offices to provide easy accessibility and barrier free environment for persons with disabilities, including preference of persons with disabilities in government accommodations and accessible accommodation near their place of posting. The guidelines also called for Grievance Redressal Mechanism involving persons with disabilities and Liaison Officer to address issues and amenities for persons with disabilities. In addition, the guidelines made provision of 10 days Special Casual Leave in a calendar year for participating in Conference/Seminars/Trainings/Workshop related to disability and development. With regard to posting and transfer policy, the guidelines says that as far as possible the persons with disabilities may be exempted from the rotational transfer policy/transfer and be allowed to continue in the same job, where they would have achieved the desired performance. Further, it says preference in place of posting at the time of transfer/promotion may be given to the persons with disability subject to the administrative constraints. The practice of considering choice of place of posting in case of persons with disabilities may be continued. To the extent feasible, they may be retained in the same job, where their services could be optimally utilised.

IV. Indian judiciary and case laws on reasonable accommodation

Judiciary in India has long been playing significant role in ensuring rights and entitlement of persons with disabilities. It has upheld several works and employment related rights for persons with disabilities through positive and progressive interpretation of the various provisions of the PWD Act 1995 in combination with the constitutional provisions. In fact,

before India could enact a new disability legislation in compliance with its obligation under the United Nations Convention on Rights of Persons with Disabilities (CRPD), courts had already started incorporating various principles under the CRPD into domestic enforcement of rights of persons with disabilities, including the interpretation of the principle of 'reasonable accommodation' enshrined in the CRPD.[38] Several petitions were filed in courts concerning the issues of reservation in jobs and identification of suitable posts for persons with disabilities, reluctance of establishments to employ or retain persons with disabilities or persons acquiring disabilities while in services, issues concerning promotion in employment, premature retirement or termination of jobs on ground of disability and the judiciary passed on several strictures and orders involving all these issues. With few exceptions, most of the judgements of the judiciary in the disability cases have gone in favour of the persons with disabilities.[39]

In its significant judgement in the case of *Ranjit Kumar Rajak vs. State Bank of India* (Writ Petition No. 576 of 2008 (Bom HC), judgement order dated 8 May 2009) the Bombay High Court recognised for the first time the concept of 'reasonable accommodation' at the workplace in India relying on the concepts of 'reasonable accommodation' and 'right to work and employment' enshrined under *Articles 2* and *27* respectively of the CRPD. The petitioner, who underwent a renal transplant, was rejected

[38] Jayna Kothari, *Post-CRPD development of the principle of "reasonable accommodation"* (6 January 2012), available at: https://clpr.org.in/blog/post-crpd-development-of-the-principle-of-reasonable-accommodation/#:~: text=According%20to%20Article%202%20of, with%20others%20of%20all%20human. (last visited on June 15, 2020).
[39] Rumi Ahmed, *Rights of persons with disability in India: A critical legal analysis* 267 (White Falcon Publishing: Chandigarh, 2015).

for the post of probationary officer in the State Bank of India on the ground that the rules required the bank to reimburse medical expenses incurred by officers and given his medical condition the petitioner would require regular medical check-ups, the costs of which would be very high on the bank and could not be borne by the bank. The mute question before the Court, was "whether a person who is fully qualified for a post because of his past or present medical condition which otherwise did not interfere with his fitness to dispense the duties of his post, be denied employment because of the financial *burden* that would be cast on the employer."[40] The Court brought the fact that India is a signatory to the Convention on the Rights of Persons with Disabilities and its Optional Protocol and cited *Article 27* of the Convention which recognises the right to work of persons with disability including right to be "accepted in the labour market and work environment that is open, inclusive and accessible to persons with disabilities." The Court also underlined the importance of India's international obligations with respect to rights of disabled persons and accordingly observed as follows: "The law is now well settled that though United Nation Convention may not have been enacted into the Municipal Law, as long as the convention is not in conflict with the Municipal Law and can be read into *Article 21* [of the Constitution] it is enforceable. Therefore, in the absence of any conflict it is possible to read the test of reasonable accommodation in employment contracts." The Court further observed, "…it is clear that reasonable accommodation forms a part of our Municipal law though there is no enacted legislation. The State including instrumentalities of the State, therefore, must confirm

[40] *Summary of judgements on disability rights*, available at: https://cis-india.org/accessibility/blog/summary-of-judgments-on-disability-rights (last visited on June 15, 2020).

to this principle either at the stage of employment or in the course of employment. Most, in the case of course of employment if an employee suffers a medical problem, including kidney failure and consequent renal transplant bear the cost. This is a case of accommodation in service as long as the employee is fit to work and not totally incapacitated."

Most importantly, the Court observed that the respondents have not placed any material on the facts of the case that burden cast on them for the medical expenses would cause undue hardship in the context of the size of the organisation, the financial implications on the organisation and/or on the morale of other employees and the like and in view of the absence of placing such material the defence of undue hardship which is bearing the medical costs in a case of reasonable accommodation on the facts of the case will have to be rejected. Accordingly, the Court ordered that the petitioner be offered employment and allowed to join within sixty days.

As far as the application of the CRPD in Indian municipal law is concerned (particularly in the absence of a municipal law being enacted at that time), the Supreme Court of India in the case of *Suchita Srivastava & Anr vs. Chandigarh Administration* **(**Civil Appeal No.5845 of 2009, judgement order dated 28 August 2009) clearly stated as follows – "We must also bear in mind that India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) on October 1, 2007 and the contents of the same are binding on our legal system." Again, in its judgement in the case of *Syed Bashir-ud-din Qadri vs. Nazir Ahmed Shah and Others* (Civil Appeal Nos. 2281-2282 of 2010, judgement order dated 10 March 2010) the Supreme Court further upheld the doctrine of reasonable

accommodation and in addition it made it clear that 'reasonable accommodation' would require the provision of aids and appliances to enable a disabled person in employment to carry out his duties effectively. Indian judiciary also pronounced judgements on many occasions paving the ways for reasonable accommodation in the field of education and barrier-free accessibility of the built-environment. In its pathbreaking judgement the Supreme Court of India in the case of *Rajive Raturi vs. Union of India* (Writ Petition (Civil) No. 243 of 2005 with Writ Petition (Civil) No. 228 of 2006, judgement order dated on 15 December 2017) passed several orders in connections with barrier-free accessibility for persons with disabilities after taking into considerations important accessibility provisions under the Rights of Persons with Disabilities Act 2016.

V. Conclusion

Reasonable accommodation is an important instrument for defending the principle of equality and justice and equalization of opportunities for persons with disabilities. Reasonable accommodation in employment and workplaces empowers individuals with disabilities, makes such individuals financially independent, enhances their labour market participation and makes them productive labour force and all these have significant impact in enriching society and strengthening the national growth and development. There is a general mis-perception that employers tend to lose or incur more cost if they employ individuals with disabilities and concede to the reasonable accommodation demands of such employees. Contrarily, most of the accommodation costs incurred by employer are always less when compared with the benefits gained from accommodation. Employer tends to gain from accommodation cost

as it enhances productivity of the employees with disabilities. According to ILO[41], employers benefit from the employment of people with disabilities, who can make a significant contribution at their place of employment, in jobs matched to their skills and abilities and it is also based on evidence that enterprises may gain from the retention of experienced workers who become disabled.[42] This is the essence of the reasonable accommodation requirement, which requires employers to make reasonable accommodations to those defined as disabled if those accommodations will enable the persons to perform the job. A successful or mature employer may in fact understand the benefits of employing persons with disabilities and will readily solicit reasonable accommodation requirements from such employees. Some specific cases of reasonable accommodation may of course be costly imposing 'undue' or 'disproportionate' burdens on employers. In such cases, government and its agencies may come out with incentives to be offered to employers, especially the small employers who employs persons with disabilities.

Since reasonable accommodation is provided based on individual requests for adjustments, modifications or adaptions in employment and workplaces it is important to ensure that individuals are given confidence to declare their disability identities and seek for accommodations required. Some persons with disabilities may be reluctant to disclose their disability identity particularly when they are not sure whether their employers would entertain their reasonable accommodation requests or not. As such, it should be mandatory for organizations or enterprises to come out with clear written reasonable accommodation policies or equal

[41] *Supra* note 16.
[42] *Ibid.*

opportunity policies as envisaged under Rights of Persons with Disabilities Act 2016. This will give confidence to an individual with disabilities to disclose her/his disability and request needful accommodation. Explicit organizational values and policies regarding diversity and disability in the workplace and organizational flexibility are positively related to accommodating employees with disabilities.[43] For sustainable reasonable accommodation of persons with disabilities, "we need organizations and workplaces that embrace diversity especially in terms of employees' capacities."[44] However, confining reasonable accommodation to employment and workplaces alone is not sufficient. It is significantly important to address the broader issue of accessibility particularly in the context of barriers external to the workplace and the workplace environment.

[43] *Supra* note 19 at 225.

[44] Katharina Vornholt, Patrizia Villotti, *et al.,* "Disability and employment – Overview and highlights", 27(1) *European Journal of Work and Organizational Psychology* 51 (2018).

CONTEMPORARY SOCIAL DETERMINANTS & LAW OF UNDER-AGE MARRIAGE IN INDIA

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Abstract

In the Indian context, Under-age marriage is regarded as a deplorable practice and it is often addressed as paradigmatic case of the obstinacy of traditional law, particularly in modern societies of Hindu law. It was believed that marriage of both sexes permitted by all the religion based personal laws governing Hindu, Muslims, Sikhs, Jains and Buddhists. At the same time, various reports recognise that child marriage denies children right to care, protection education, skill development, and good health. Social reformers in India sought abolish this practice as early as in the 19th century by recognising child marriage as a social evil. Nevertheless, it is disheartening to note that, under –age marriage continues to be practiced in various parts of the country, despite the presence of Prohibition of Child Marriage Act, 2006 which renders the child marriage voidable and punishable under the law. In the first part author will examine the prevalence, implications and evolution of child marriage law in India. Following that, second part of the paper would review the law critically and make recommendations to discourage the practice of early marriage.

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Key Words- *Under-Age, Child marriage, Age, Punishment, Customs, Consent*

I. Introduction

Under-age marriage is complex phenomenon, and profoundly linked with various socio-cultural and historical context. In almost all societies across the globe, from Middle East to Latin America, South Asia to Europe, early marriage has been a common phenomenon. The practice of under-age marriage is widespread across India, but it is most prevalent in northern, eastern and western regions. Jharkhand, Bihar, Rajasthan, Andhra Pradesh, West Bengal, Uttar Pradesh, Haryana, Maharashtra, Assam, Orissa & Gujarat have witnessed the greater incidence of under-age marriage. Despite child marriage has been illegal in India since 1929, the practice of under-age marriage is a reality. As per the recent report of United Nations International Children's Emergency Fund (UNICEF), India has the largest number of child brides in the world (15,509,000), although the prevalence of child marriage in India has decreased from 47 per cent in 2005-2006 to 27 per cent in 2015-2016[1]. Data from National Family Health Survey (2015-2016) has also shown a significant decline in child marriage amongst 15-19 years old and 20-24 years old is 11.9% and 26.8% respectively for girls in India[2]. Further, the National Family Health Survey (2015-2016) shows that the percentage of incidence is higher in rural areas (14.1percent) than in urban areas (6.9 percent).[3] Child marriage has also been brought to the attention to the

[1]Child marriage widespread in Bihar, Rajasthan and Bengal: UNICEF Report available at: https://www.indiatoday.in/india/story/child-marriages-widespread-in-bihar-rajasthan-and-bengal-unicef-report-1454035-2019-02-12 (last visited on Nov 25, 2020)

[2]available at : https://ncpcr.gov.in/showfile.php?lang=1&level=1&sublinkid=1671&lid=1677 (Last visited Dec 2, 2020)

[3] available at: https://timesofindia.indiatimes.com/india/1-out-of-10-girls-still-ends-up-as-a-child-bride-in-india/articleshow/67899544.cms (Last visited September 3,2020)

general public by high-profile movements such as '*Girls not Brides*'. Child marriage not only deprives them of their right education, health and safety, but put them in a position where girls are unable to make informed decision about their rights to sexual and reproductive health. Furthermore, marrying underage directly impacts both the health of the girl and their children. Girls who marry early are more vulnerable to intimate partner violence and sexual abuse than those who marry later in life. Hence, it violates the rights guaranteed United Nations Convention on the Rights of Child. It is therefore, high time to put an end to the tradition of early marriage in order to protect children's rights in society.

II. Institution of Marriage in India

Marriage has long been recognized as a sacred institution in all civilized societies. Its significance in maintaining stable existence in a structured society cannot be exaggerated. Some people regarded marriage as just civil contract, while others treated it a religious institution.[4] Marriage as a union between a man and woman recognized by law. Most often, marriages in India are arranged by elders, although views of the parties to the marriage are seriously considered, compared with North American and European society, where the individual is at the center of the marriage. In India's traditional family system, where elders and parents continue to make major decisions about education and marriage even in educated castes and communities. Despite modern influences, the basic values towards marriage remained unchanged among young people.[5]

III. Genesis of Under-Age Marriage in India

[4] *Deivanai Achi* v *R.M. Al. Ct. Chidambaram Chettiar* AIR 1954 Mad 657

[5] Jaya Sagade, *Child Marriage in India' Socio-Legal and Human Rights Dimensions*, 3-4. (Oxford University Press, 2012)

Notably, the fact of early marriage is illegal and punishable under the law is known to almost all the communities, in which this practice is widespread. Various factors are associated with the phenomenon of child marriage, the most important amongst are patriarchal norms based on ignorance, poverty, culture, tradition and value. In addition, girls are considered to be financial burden on the family, therefore, illiteracy and unemployment strongly reinforces the practice. Yet, the countries where there are strongly religious and traditional justifications for child marriage will not see an end to child marriage without shifts in social norms.

1. Custom and Social Norms

It is hard to find the roots of the custom of child marriage, since the tradition to marry off children early especially girls has been followed for centuries. In 1992, *Bhanwari Devi*, working as a 'Saathin' worker with the 'Mahila Samakhya Programme', in western Rajasthan tried to stop the marriage of nine- month- old child. In retaliation, she was gang raped by upper caste men in front of her husband. In 2005, Shakuntala Verma, supervisor under the Integrated Child Development Services Scheme (ICDS) intervened to stop a child marriage and was subsequently threatened and attacked by some people, caused serious injury to her hands. These incidence represent the resistance to any steps taken to end the practice of child marriage, which is profoundly rooted in the Indian culture.[6]

[6] 'A Study on Child Marriage in India: Situational Analysis in Three States' By Pt. G.B Pant Institute of Studies in Rural Development available at: http://planningcommission.gov.in/reports/genrep/Report_Child_Marriage_in_India.pdf (Last visited Nov 20, 2020)

A study conducted by Institute of Health Management reiterates the fact that social tradition continues to be one of the factors contributing to child marriages, such as the age old tradition known as "*jangh pavitr karna*" in which people marry their daughter's before the beginning of menstruation on the assumption that they will go to heaven, and if parents fail to marry of their daughters before the commencement of mensuration, they commit a sin, as per Brahminical tradition, marriage is a *kanyadana,* a 'gift of a virgin'. Therefore, Pre-pubertal marriage was a norm and most girls were actually married as teenagers.[7] Even in recent times, parents from educated families prefer to marry their daughters early due to protection and the difficulty in finding groom after the age of 18.[8]

2. Sexuality

Controlling girls and women's sexuality is another aspect that influences the practice of under-age marriage. Indian society is by and large patriarchal, leading to blind subjugation. Until marriage, daughter's 'chastity' is closely linked to the honor and status of the family. Since marriage is an alliance between families and patrilineage, the honor and reputation therefore, marrying a girl simply transfer control of her sexuality to her husband. In addition, parents indicate the fear of pre-marriage pregnancy outside the wedlock, harassment, sexual abuse at

[7] C. J. Fuller and Haripriya Narasimhan, Companionate Marriage in India: The Changing Marriage System in a Middle-Class Brahman Subcaste The Journal of the Royal Anthropological Institute
Vol. 14, No. 4 (Dec., 2008), pp. 736-754 available at: https://www.jstor.org/stable/20203738?seq=1#metadata_info_tab_contents (Last visited Nov 20,2020)

[8] HAQ: Centre for Child Rights, 'Come Together' National Consultation on Prevention of Child Marriage available at: http://haqcrc.org/wp-content/uploads/2016/07/come-together-national-consultation-on-prevention-of-child-marriage-12-13-august-2014-new-delhi.pdf (Last visited Nov 23, 2020)

school. Some of their fears are realistic but weaken the social engagements and work opportunities of the girls. Therefore, the only solution in the name of culture is to marry off their girls at younger ages, rather than encountering child sexuality.[9]

3. Lack of Awareness of Law

Child marriage was widely accepted as a social problem and there was no mechanism in place to prevent society from practicing evil. It is because of this reason Child Marriage Restraint Act, 1929 was enacted in order to raise the age limit of the male and female persons for the purpose of marriage. Despite laws, the practice continues, because of lack of awareness and deep-rooted cultural traditions. As per National Family Health Survey (1992-1993) large majority of women were not aware of CMRA and the legal minimum age of marriage India. In 2006, The Prohibition of Child Marriage Act enacted in 2006 by replacing the Child Marriage Restraint Act, 1929. The Special Marriage Act, 1954 also contain provisions to prohibit the practice of Child Marriage. The menace of child marriage has not been completely eradicated due to Illiteracy and legal illiteracy among rural people and more so among women despite several laws. It is only possible If people are familiar with the laws.

IV. Consequences of Under-Age Marriage

Under-age marriage has social, intellectual, psychological, emotional and health consequences particularly in terms of reproductive and social status. It is a barrier to the social development of the individual. Child marriage has numerous and varying negative effects for both sexes, but

[9] *Supra* note 5 at 9.

the impact of underage marriage on girls in particular is much greater than that of boys.[10]

1. Adolescent Fertility and Poor Child Health

When married so early, the girl child is required to enter into sexual relationship, which can have sexually, social and psychological aversive effects on her. These victims are more likely to become pregnant early. Girls below the age of 18 are five times more likely to die during pregnancy or child birth than women between the ages of 20 and 24. Women married as minors tend to become early mothers because they are unaware the benefits of using contraception. These adolescent mothers are more likely to experience fistula, sexually transmitted infections, postpartum hemorrhage, mental disorders, pregnancy complications and health risk.[11] According to data from the National Family Health Survey 4 (2015-16) estimated 4.5 million girls between the age of 15 and 16 years were pregnant or had already become mothers. Moreover, children of adolescent mothers have poor birth outcomes, including low birth weight as compared to children of older mothers.[12] In some cases rapid repeat pregnancy (RPP)[13] is an issue for young and adolescent mothers. It further poses a great health risk for mother and children.

2. Curtailment of Education Opportunities

[10] *Supra* note 1.
[11] Dr. Gerd Ferdinand, Dr Manjushree Palit *et.al*. (eds.), Global Victimology: New Voices 91 (Universal Law Publishing, New Delhi, 2017).
[12] Srinivas Goli *'Eliminating Child Marriage in India: Progress and Prospects*' available at: https://www.researchgate.net/publication/31408/705_Eliminating_Child_Marriage_in_India_Progress_and_Prospects (Last visited Dec 2, 2020).
[13] *Rapid Repeat Pregnancy (RRP)* is "it happens in a period of in between pregnancies up to 24 months it is considered a risky situation due to a short period for the female organism to recover for a new safe obstetric development, especially at adolescence".

Gender and Social norms play a significant role in early marriage, curtailing educational opportunities especially for adolescent girls, which later affects autonomy of girls, reproductive health, gender equality and employment opportunities. According to the latest report of National Commission for Protection of Child Rights, across India estimated 39.4% of girls between the age of 15-18 years drop out of school and college. Despite the increase in overall literacy rate in the country, the dropout rate among adolescent girls remains high at 64.8%[14]. This demonstrates a strong correlation between age of marriage and lack of education. NFHS (2015-16) finds that one- year increase in a girl's education will delay her marriage by 0.4 years.

3. Victims of Sexual and Gender- Based Violence

Child marriage places young girl at high risk of physical/sexual abuse and intimate partner violence.[15]Girls married before 18 often experience physical, psychological, or sexual violence at the hands of their husbands than those who enter into marriage later as consenting adults. Survey conducted by International Center for Research on Women (ICRW) revealed chances of being beaten, slapped, or threatened gets increased two-fold if girl gets married before the age of eighteen and chances of marital rape increased by three-fold than those who marry later. In some cases, one-third of child brides believing that, a husband has the right to beat his wife.[16]

[14] https://ncpcr.gov.in/showfile.php?lang=1&level=1&&sublinkid=1357&lid=1558 (Last visited Dec 13, 2020).

[15] "Sexual Abuse recurrent in child marriages: Study", *The New Indian Express*, Dec 15, 2017 available at: http://www.newindianexpress.com/states/telangana/2017/dec/15/sexual-abuse-recurrent-in-child-marriages-study-1727740.html.

[16] Helena Minchew, Child marriage is violence against women and girls available at: https://iwhc.org/2014/12/child-marriage-violence-women-girls/ (Last visited Nov 29, 2020).

Sex, or any form of sexual behavior, with a child under the minimum legal age with or without consent violates his or her human rights. In 2017, UNICEF produced the Report on *"A familiar face violence in the lives of children and adolescent"* which indicates that worldwide 15 million adolescent girls (aged 15 to 19) have witnessed forced sex at some point in life and are also at higher risk of forced sex by a current/former husband, partner or boyfriend. Furthermore, findings based on data from 30 countries confirm that only one per cent of girls who had experienced forced sex sought any professional assistance.[17] Lately, Supreme of India in *Independent Thought* v. *Union of India*[18], criminalized sex with minor wife below the age of 18 years. Section 375 of the Indian Penal Code (IPC), defines the offence of rape, has an exception which acquiesce girl husband between the ages of 15 and 18 to have non-consensual sexual intercourse with her. Her willingness or consent was immaterial. In such cases, husband was exempted from punishment for rape. An unmarried girl child can prosecute her rapist, but a married girl child between the age of 15 and 18 could not even do that. The Supreme Court pointing out injustice further observed that:

> "A child remains a child whether she is described as a street child or a surrendered child or an abandoned child or an adopted child. Similarly, a child remains a child whether she is a married child or an unmarried child or a divorced child or a separated or widowed child. At this point we are reminded of Shakespeare's enduring

[17] A Familiar Face violence the life of children and adolescents, 2017 https://data.unicef.org/resources/a-familiar-face/ (Last visited Nov 29, 2020).

[18] (2017)10 Supreme Court Cases 800 "the Supreme Court observed that marital rape exemption was inconsistent with other laws such as the Protection of children from Sexual Offences Act, 2012 (POSCO Act) and the Protection of Women from Domestic Violence Act, 2005 (PWDVA) which criminalize non-consensual sexual intercourse with a minor, and sexual abuse".

belief that a rose by any other name would smell as sweet - so also with the status of a child, despite any prefix"

Accordingly, the exemption clause now reads "sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape".

V. Human Rights Obligations of the Government

Today, issue of under-age marriage has gained the attention worldwide, and considered to be human right violation. Across the globe, the human rights organizations, policy makers started a campaign to 'end forced/early marriage'. Since, for generations, child marriage was a practice in societies and linked with custom's, traditions & historical context. A child marriage is a formal or customary union in which, one or both parties are under the age of eighteen.[19] According to research conducted by United Nations Population Fund (UNFPA), the number of girl child marriages will reach 140 million between 2011 and 2020, averaging 39 thousand per day or 14.4 million per year.[20] Numerous international covenants and agreements on women and children mandate that girls should be protected from forced and early age marriage, by putting an obligation upon the governments to introduce these laws into national legislation and also provides a mechanisms for their enforcement. However, women's' rights within marriage are sometimes excluded at the time of ratification of international human rights treaties

[19] Gayle Tzemach Lemmon Lynn SEl Harake *'Child Brides, Global Consequences How to End Child Marriage'*, July2014 by Council of Foreign Relations available at: www.cfr.org/content/…/child%20Brides%20%Global%20consequences.pdf (Last visited Nov 15, 2020) .

[20] available at: https://www.un.org/youthenvoy/2013/09/child-marriages-39000-every-day-more-than-140-million-girls-will-marry-between-2011-and-2020/#:~:text=NEW%20YORK%2C%207%20March%202013,daily%20will%20marry%20too%20young. (Last visited Dec 20,2020).

by many countries, which is fostering gender inequality and discrimination by default.[21]

List of international human rights treaties addressing the conundrum of Under-Age marriage

- Article 16 of Universal Declaration of Human Rights, 1948.
- Article 1(c) of Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery,1956.
- Article 1, 2, 3 of Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, 1964.
- Article 2 & 16 of Convention on the Elimination of All forms of Discrimination against Women, CEDAW 1979.
- The Convention on the Rights of the Child, 1989.
- The African Charter on the Rights of Welfare of the Child, 2000
- Article 6(a & b) of Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Known as Maputo Protocol) (2003)
- In 2013, The United Nation General Assembly (UNGA) adopted the 1st Child, Early, And Forced Marriage Resolution in 2013 and second resolution in 2016 and a third resolution in 2018 to enforce their commitment to eradicate child marriage by 2030 in the Sustainable Development Goals(SDGs).

  In recent years, international law has increased the State's accountability for overt abuses of human rights. Ratification of international conventions, entails a duty to the State, with the responsibility to take

[21] *Ending Child Marriage: A Guide for Global Policy Action 2006*. available at: https://www.unfpa.org/publications/ending-child-marriage-guide-global-policy-action (Last visited Dec 20, 2020).

necessary steps, and provide remedies to victims through investigations. Child marriage, however, does not inherently involve the State, as it is typically performed by private individuals in accordance with customs and traditions of the parties. However, if the State fails to prosecute those who are responsible for contracting child marriages, indicates that State is not genuinely concerned with the prohibition of child marriage. Therefore, States are responsible for upholding international commitments to discourage and condemn such actions by private individuals.[22] Furthermore, in order to protect, respect and fulfill human rights, three types of duties/ obligations are imposed upon the State parties. [23]:

a) The States shall not interfere with the enjoyment of human rights.
b) The States are required to protect the individual against harm from all including non-state parties.
c) The States are required to take positive steps to ensure the fulfillment of human rights.

VI. History of Pre- Child Marriage Legislation in India

The drive against child marriage was introduced for the first time by social reformist Raja Ram Mohan Roy in the early 19th century. He strongly advocated for the eradication of child marriage to save child brides against forcible sexual intercourse and to control the large population of young widows. In those days, life expectancy being quite low and within first few years of married life, young brides used to

[22] *Supra* note 5 p.113-114.
[23] Ibid.

become widows on large scale. They were compelled to remain in seclusion from the world and remarriage of widows was not permitted[24].

1. Under-Age Marriage and the Age of Consent in India

The first legislation to control the practice of child marriage, i.e., the Special Marriage Act or Civil Marriage Act, 1872 was introduced by the British Government, but this Act was not applicable to Hindus. Until 20 Century, the problem of child marriage was closely associated with the age of consent. In 1860 the Indian Penal Code was enacted and laid down minimum 10 years of age for girls and consummation below the age was punishable as an offense of rape. The minimum age of marriage was legally fixed only after the Child Marriage Restraint Act, 1929 was passed.

A. Phulmonee & Rukhmabai Cases Shifting the Discourse of Child Marriage In India

The problem of child marriage and its devastating effect on girl's well-being were highlighted in *Rukhmabai*[25] and *Phulmonee*[26] cases before the courts. In addition, both the cases played significant role in shifting the discourse on child marriage and credited them with bolstering advocacy against child marriage which also led to the abolition of child marriage and rise in the age of marriage through national legal reform.

Rukhmabai was married in 1874, at the time of marriage she was just eleven years old and did not live with her husband till 1884, because she

[24] Tahir Mahmood, *"*Marriage Age in India and Abroad-Comparative Conspectus*"* 22 *JILI, 38* (1980).
[25] *Dadaji Bhikaji* v. *Rukhmabai* IX Indian Law Reporter (Bombay Series) 529 (1885).
[26] *Queen Empress* v. *Huree Mohan Mythee* XVIII. Indian Law Reporters (Calcutta) 49 (1891).

was permitted to stay at home until she was twenty. In 1884, When her husband asked her to stay with him, she however, declined to stay with him. Then, a case for restitution of conjugal rights was filed by her husband. *Rukhmabai* argued before the court that, since she was unable to give legal consent to marriage at 11 years of age, therefore, her marriage was invalid. So, the argument raised by her was novel and gained attention, because at that time child marriages were widespread and endorsed by law, religion, culture and society. This was the first case of this kind. While dismissing the case Bombay High Court made a note by stating that:

> "It would be a barbarous, a cruel, a revolting thing to do to compel a young lady under those circumstances to go to a man whom she dislikes, in order that he may cohabit with her against her will".

B. Phulmonee's Case

The second incident arouse public opinion against child marriage, and for raising the age of consent. *Phulmonee*, an 11 years old girl, died on her wedding night due to vaginal rapture because her 35-year-old husband had sex with her forcibly. In India, 1860 law only criminalized marital rape where the girl was under the age of 10 years. So, her husband was not convicted for rape because, *Phulmonee* was older, but was sentenced to one year of imprisonment for "causing grievous hurt by an act so rashly and negligently done as to endanger life". In order to recognize marital rape above 10 years of age, court did not encourage expansive interpretation of the statute. Thus, the *Phulmonee* case highlighted the existing inadequacies of law and ultimately led to the reform in rape laws. And, in 1891 the age of consent in Section 375 of Indian Penal Code, raised to twelve years of age.

VII. Child Marriage Restraint Act, 1929

With the objective of regulating early childhood marriages between Hindus, Rai Saheb Harbilas Sarda introduced Sarda Bill on 1st of February 1927. The Sarda Bill was circulated among the public for their opinion and later, referred to the select committee for further modification. During the debate over Sarda Bill and Hari Singh Gour's bill to amend the Indian Penal Code, the Government of India formed Age of Consent Committee 25 June 1928 led by Sir Moropant Joshi, to address the issue of consent. To effectively combat the evil of child marriage, Joshi Committee submitted its report in 1929 and recommended changes under Indian Penal Code, such as raising the age of cohabitation to 15 years of age and raising the age of marriage to 14 years for girls and 18 for boys. Finally, after extensive deliberation, Sarda Bill was passed and received the assent of Governor-General's assent on 1st October, 1929, and it was officially recognized as the Child Marriage Restraint Act. [27] On 1 April 1930 the Act was applied in British India. Section 2(a) provided the minimum age for the solemnization of marriage and also specified the definition of a 'Child', means a person, if a male, below 18 years of age and if a female, below 14 years of age. The word 'minor' in the Act refers to any person of either sex who is under the age of 18. Furthermore, the Act declared child marriage as an offence and prescribed the punishment for the adults solemnizing the child marriage[28]. In addition, it provides imprisonment for up to one month and fine of 1000 Rs. Later in 1949, the law was changed to raised the age of

[27]. Sumita Mukherjee, 'Using The Legislative Assembly For Social Reform: The Sarda Act Of 1929' South Asia Research Doi: 10.1177/0262728006071514 Vol. 26(3): 219–233 available at: www.sagepublications.com (Last visited Dec 15, 2020).

[28] See ss. 3-6 of Child Marriage restraint Act ,1929.

marriage for girls from 14 to 15 years. Again in 1978, the Act was amended to raise the marriage age of girls from 15 to 18 and for boys from 18 to 21.[29] In addition, a new provision was introduced which made offences under the Act partly cognizable. The Act, however, does not make the marriage void. It focuses upon the appropriate age for a husband to have sex with his wife, the subject of validity of early age marriage was left out of its scope. As a result, despite the strict penalty, the outlawed Act does not end the practice of child marriage.

VIII. Prohibition of Child Marriage Act, 2006.

There were growing demands from various quarters to make the provisions of 1929 Act more effective, hence the Child Marriage Restraint Act, 1929 replaced by Prohibition of Child Marriage Act, 2006 and made a marriage voidable at the option of the child. The detailed proposal for making changes to the 1929 Act, were also provided by The National Commission for Women[30] & The National Human Rights Commission[31]. The Central Government in order to give effect the recommendations of the Commissions, decided to repeal the Child Marriage Restraint Act, 1929 and re-enact new Act entitled 'Prohibition of Child Marriage Act, 2006 (PCMA) which came into effect on January 10, 2007

1. Salient Features of the Act

[29] The reason for the amendment expressed in clear terms the concern for the need to control the growth of population as well as the health of young mothers.

[30] National Commission for Women, *Annual Report*, (1995-96) recommended the Government should appoint child marriage prevention officers; the punishment provided under the Act should be made more stringent; marriages performed in contravention of the Act should be made void and the offences under the Act should be made cognizable.

[31] National Human Rights Commission, *Annual Report*, (2000-01) recommended in order to curb the practice of child marriage action should be taken against organizers of child marriage; compulsory registration of marriage; marriage needs to be voidable

- Under the Prohibition of Child Marriage Act, 2006, a child is defined as a male who has not reached the age of 21 and a female who has not reached the age of 18. Child Marriage' is defined as a marriage in which either contracting party is a child.
- Section 3 of the Act declares a child marriage voidable only if the children or their guardian file a petition for the annulment of the marriage within two years of reaching the age of majority.
- The scheme of the Act, is not intended to make all the child marriages void ab initio, it is only in the three circumstances specified in Section 12 of the Act first, where the minor is taken or enticed out of the keeping of the lawful guardian; second, by force or by deception; third, for the purposes of trafficking[32].
- The Act confer the power under Section 13 on the magistrate to issue injunction on the basis of complaint or may even take *suomotu* cognizance in order to stop the solemnization of marriage. Furthermore, Section 14 of the Act, declares child marriage *void ab initio* in the event of any child marriage solemnized in violation of the injunction order given pursuant to Section 13.
- Another significant aspect of the Act is Section 16, which requires the State Government to notify the appointment of Child Marriage Prohibition Officers in the State to prevent and prosecute the solemnization of child marriage and to raise awareness about the evil of

[32] section. 12 In certain circumstances, marriage between minor is void:
When a minor is taken or enticed out of the custody of the lawful guardian; or is forced, compelled, or by any deceitful means induced to go from any place; or is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold for trafficked or used for immoral purposes' such marriage shall be null and void

problem. For this purpose, the District magistrate has been given additional powers to prevent mass marriages from taking place on *Akhayatrutiya* by taking appropriate measures and using the required minimum force.

- The Act provides rigorous punishment of two years and fine of up to one lakh rupees for male above eighteen for contracting a child marriage[33] and also for arranging, actively participating and celebrating child marriage.[34]. It is worth mention that women are exempted from punishment under the PCMA.
- Following the decree of nullity, Section 4 of the Act, provides for maintenance to the minor girl; if husband was minor at the time of marriage, the husband's parents or guardian would maintain her until she remarries.
- Section 6 confers the legitimacy of children born of child marriage

2. Gaps in Prohibition of Child Marriage Act

- It is pertinent to note that, under other laws, both the sexes becomes major at the age of 18 years of age[35], the Act, however, does not provide uniform age of boys and girls for the purpose of marriage.[36] Certain different legal standards have been introduced on the basis of the existing social notions that the age of eighteen years is insufficient for a boy to reach the desired level of education and economic freedom. Such logic leads to the logical

[33] PCMA 2006, s.9
[34] PCMA 2006, ss. 10 & 11
[35] Special Marriage Act, 1954, section 4(c), requires a male to have completed 21 years of age and a female the age of 18 years for the solemnization of a marriage. section 2(a), Prohibition of Child Marriage Act, 2006 and section 5(iii), Hindu Marriage Act, 1955 also provide a similar provision
[36] Juvenile Justice Act (Care and Protection Act) 2000 (JJA) and the Indian Majority Act, which define "child" as any person below 18, regardless of sex.

inference that girl's education and economic freedom are less important than a boy's. This promotes gender inequality in the country by perpetuating the gender stereotype that women are inferior to men.

- Another significant concern is that under the Act, child bride can only invalidate the marriage until she is 20 years old while child's groom can avoid a marriage until he is 23 old. By the time child's brides or their families chooses to initiate the legal process, their marriage would have been consummated. Furthermore, there are other challenges in proving their age since there is no mandatory requirement for birth and marriage registration.
- Section 4 of the Act, only gives the girl, who was party to the annulled voidable marriage right of maintenance and residence. However, the beneficial provision has not been made applicable to girls who's marriage has been declared void in pursuant to Section 12 and 14 of the Act.
- Notably, the Act is prohibiting and criminalizing the solemnization of child marriage, but it does not invalidate the marriage below the age automatically.
- "Option of puberty" by Muslim girl under Section 2(vii) of the Dissolution of Muslim Marriages Act, 1939 is travesty of the PCMA. Under Muslim law, girl may marry after attaining the age of puberty, while PCMA, lays down minimum age of marriage for girls is 18 years of age. In order to avoid marriage, Muslim law requires that girl must obtain the decree of dissolution of marriage before she attains the age of majority as well as her marriage has not been consummated, if marriage is consummated girl is deprived to get the marriage annulled.

IX. Paradox of Personal Laws in Child Marriage

Another issue that highlight the paradoxes that exist in our various legal systems is the minimum age of marriage, consent, right to dissolve child marriage, and the penalty for child marriage.

1. Hindu Marriage Act, 1955

Section 18 of Hindu Marriage Act, 1955 lays down punishment for girl & boy for marrying below 18 & 21years of age. [37] However, the provision would go to show that punishment has been provided only to parties to the marriage however, parents are exempted from punishment for performing or arranging any child marriage. Section 5(ii) of the Act does not require the valid consent of the parties. Admittedly, the consent refers unsoundness of mind, mental disorder and insanity. Section 12(c) further provides that, where consent of the parties to the marriage obtained by 'force' or 'fraud' marriage is voidable however, said provision is not applicable to child marriage. With regard to dissolution of marriage, Section 13(2)(iv) of the Hindu Marriage Act, 1955, states that child bride has a right to repudiate her marriage if it was solemnized before the age of 15, provided , she repudiated her marriage after 15 but before the age of 18. Therefore, for the dissolution of child marriage she must file petition for divorce.

2. Muslim Law

Marriage is a contractual union in Islam, and valid marriage requires consent. Islamic texts do not explicitly provide a minimum legal age for

[37] section 18: Every person who procures a marriage for himself or herself to be solemnized under this Act. shall be punishable (a) in the case of a contravention of the condition specified in clause (iii) of section 5, with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both

marriage, but both males and females must have reached level of puberty. Notably, marriage of Muslim girl above this age without her consent is void. Dissolution of Muslim Marriage Act, permitted the Muslim girl to dissolve her marriage who was married before reaching the age of 15, she could repudiate it by exercising her 'option of puberty' upon attaining the puberty, if the marriage had not been consummated.

3. Indian Christian Marriage Act

Under Indian Christian Marriage Act, 1872, for the purpose of marriage, defines the age of boy and girl to be at least 21 & 18 and also requires the mandatory publication of notice of minimum 14 days. The Act, defined minor means a person who is less than 21 year of age, and marriage cannot be celebrated before the expiry of notice period unless permission is obtained from parents or guardian. However, consent is not required where parties are above the age of 21. The Act imposes the penalties for minor marriages performed without the parent's or guardian's consent before the period has expired.

4. Parsi Marriage and Divorce Act

According to Parsi Marriage and Divorce Act, 1936, minimum age for a girl to marry is 18 and boy to marry is 21. Under -age will be considered invalid. The Act is silent with regard to consent, and has not laid down penalties for under- age marriage.

5. Jewish Personal Laws

Jewish law is absolutely uncodified and are governed by religious law. Jewish text provides that, girl marriage could be performed after reaching the age of puberty. Marriage before puberty is not valid.

X. Judicial Response

Historically, there was lack of clarity in the law itself and the courts have taken inconsistent approach with regard to PCMA and the personal laws.

In various decisions the courts have expressed little concern about the impact of child marriage on minor. With regard to the validity of marriages performed in violation of the age requirement prescribed by the Child Marriage (Restraint) Act, 1929, in *Venkatacharyulu* v *Rangacharyulu*[38], the High Court of Madras, in 1891, observed:

> "There can be no question that a Hindu marriage may be a religious ceremony. According to all the writings, it may be a *samskaram* or holy observance, the as it were one endorsed for a lady and one of the foremost devout ties endorsed for the refinement of the soul. It is official for life since the marriage ceremony completed by saptapadi …. Makes a devout tie when once made, cannot be unfastened. It isn't a unimportant contract in which a consenting intellect is indispensable. The individual hitched may be minor or indeed of unsound intellect and however in case the marriage custom is appropriately solemnized, there's a substantial marriage".

The Division Bench of Punjab & Haryana High Court in *Mohinder kaur* v *Major Singh*,[39] emphasized that, contravention of age rule does not affect the validity of marriage and hence such contravention cannot be pleaded as a defense to a petition for restitution of conjugal rights. It was further observed by the court that the infringement Section 5 (iii) did not affect the marriage's bond and make the marriage either void or voidable.

[38] (1891) IRLMad.316

[39] AIR 1972 P&H 184 See also *Smt. Naumi* v. *Narotam* AIR 1963 HP 15 *Budhi* Sahu v. Lohurani Sahuni [ILR(1970) Cut 1215].

The Andhra Pradesh Court in *P.A Saramma* v *Ganapatlu*[40] , took a revolutionary step after realizing the hidden impact of child marriage by holding the marriage invalid in violation of the age rule. The full bench

of the same high court expressed disagreement from its previous decisions in *P. Venkatataraman* v *State of Andhra Pardesh*[41] and upheld the validity of child marriage with a fear that it will make the innocent children bastards if such unions are pronounced invalid and void. Children, otherwise innocent, would be regarded as illegitimate children of the couple. It is worth noting that while upholding the legality of child marriage, courts are more likely to consider its adverse effects and impose harsher punishments for those who commit this crime in order to create a deterrent effect.

The court observed in *Jitender Kumar Sharma* v *State* [42] & *Association for Justice and Research* v *Union of India*[43], that, Prohibition of Child Marriage Act, 2006 has a secular character and Hindu Marriage Act, 1955 has an overriding effect. In the 2006 Act, the court also acknowledged several loopholes that makes the legislation weak and do not help in preventing the child marriage. No doubt, practice has been discouraged but it has not been absolutely banned by the legislation.

In the light of child marriage, important decisions were taken by Madras and Delhi High Courts in *T Sivakumar* v *Inspector of Police*, Thiruvallui, Town Police Station, Thiruvallur[44] & in *Court on its Own Motion* (*Lajja*

[40] 1970 PLR102
[41] AIR 1977AP43
[42] (2010)171 DLT 543 (DB)
[43] (2010)SCC Online Del1964
[44] (2012) Mad 62 (FB)

Devi) v. *State*[45]where both the courts considered that law had been enacted with the aim to discourage the evil practice of solemnizing child marriages as well as to improve the health of children. Accordingly, 2006 Act, is a special legislation in contrast to Hindu Marriage Act, 1955 which is the general law governing Hindu marriages. As a result, if there is any inconsistencies between the two acts, Hindu Marriage Act, 1955, takes precedence. For this reason, marriage involving bride below 18 and bridegroom below 21 renders the marriage voidable under Section 3 of 2006 Act and will subsist until annulled by the court.

In *Miss Seema Begaum* v. *State of Karnataka*[46], petitioner sought the relief from the declaration that the provisions of the Prevention of Child Marriage Act, 2006 did not apply to her because she belongs to Muslim community and has reached the level of puberty and is now 16 years old. Islam allows 15 years old Mohammedan girl who has attained puberty to marry without the consent of her parents and her Personal law recognized the child marriages, the same cannot be taken away or diluted by the 2006 Act. Karnataka High Court reiterated that while dealing with cases of child marriage, judges must remember that the Prohibition of Child Marriage Act, 2006 (PCMA), which is a secular law, takes precedence over any religious personal law.

Supreme Court recently in *Hardev Singh* v *Harpreet Kaur* [47] without commenting on the validity of marriages held that marriage between boy of 17 year-old with 21 year -old adult woman cannot be punished under

[45] (2012) 193 DLT 619 (FB)
[46] 2013 SCC OnLine Kar 692: ILR 2013 Kar 1659: (2015) 1 KCCR 281
[47] 2019 SCC OnLine SC 1514

Section 9 of the Prohibition of Child Marriage Act, 2006.Taking note of this fact, Bench further observed that :

> "The 2006 Act does not make any provision for punishing a female adult who marries a male child. Hence, a literal interpretation of the above provisions of the 2006 Act would mean that if a male aged
>
> between the years of eighteen and twenty-one contracts marriage with a female above eighteen years of age, the female adult would not be punished, but it is the male who would be punished for contracting a child marriage, though he himself is a child… We are of the view that such an interpretation goes against the object of the Act as borne out in its legislative history".

The Apex Court for the effective implementation of the Act, suggested a review and stated that:

> "The time has come when this Act needs serious reconsideration, especially in view of the harsh reality that a lot of child trafficking is taking place under the garb of marriage including child marriage"[48]

XI. Conclusion & Suggestions

Under-age marriage is a direct violation of human right. Despite consistent efforts to eradicate the practice, it continues in various parts of the country. The passage of Prohibition of Child Marriage Act, 2006 is a significant step toward preventing the solemnization of the child marriage. Despite the existence of strong legal framework, the

[48] *Independent Thought* v *Union of India* (2017)10 Supreme Court Cases 800

persistence of social norms and traditions, as well as the presence of the various Personal Laws applicable to the communities prescribing their minimum age for marriage, are among the few factors that have a limited effect on the prevention of under-age marriage. Consequently, the subject of early -age marriage necessities a through examination. It is also important to note that enacting or reforming the law won't make

people obey it unless the other frameworks are meaningfully improved. To make parents and students aware of the negative consequences of child marriages, the Government should incorporate the key features as well as the penal provisions of PCMA into the calendars and prospectus provided by the educational institutions. Birth and marriage registration should be made compulsory. Furthermore, religious leaders and priests were made aware of the negative consequences of early age marriage. Individuals, family members and the community at large must be mobilized to obey the law in order to establish a legal culture that the laws are enacted for their benefit. A sensitive judiciary could contribute towards realizing the goals of the law therefore, judges must be made aware of their role and of social problems. To conclude, all the stakeholders including academicians, researchers, national, international, intergovernmental and non- governmental representatives, as well as activists from different fields, must cooperate as a matter of priority in order to eradicate the evils of under-age marriage.

CHILD RIGHTS IN JEOPARDY: CHALLENGES IN RECRUITING FAMILIES FOR FOSTER CARE IN INDIA

*Vasundhra, Dr. Subhradipta Sarkar**

Abstract

Foster care is a method to provide alternate family to a child who are unable to live with their biological parents. Identification of familiesto protect the children requiring alternative care is a fundamental element in foster care services. This is popularly called "recruitment" in the Western world, finding appropriate families for the kind of children needing placement needs planning. Various mediums and techniques are essential and needed to make recruitment successful. Providing alternative care for a child is his basic right as stipulated in the United Nations Convention on the Rights of the Child. This article is an attempt to broadly view the issues and challenges of foster family recruitment specifically targeted in the Indian context. The lack of financial resources, technical know-how, human resource is hampering the efforts in selecting the families from community. In the absence of awareness in the community, it is difficult to attract families and make the scheme successful. A policy supported with evidence-based research with strong political will and sufficient resources will ensure that every child grows in a family environment and his rights are upheld.

Keywords: *Recruitment, Foster care, Foster family, Awareness, Motivation, Assessment.*

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I. Introduction

India is committed to protect children and their rights by ratifying the United Nations Convention on the Rights of the Child (UNCRC) in 1992,[1] which happens to be the most ratified human rights document in the world. UNCRC contains provisions covering all attributes of children, including the right of the child to stay in family environment. Institutional Care should be the last option, if child is unable to live with biological parents, however, it was found that thousands of children in many countries were residing in institutional care and it was the first and only option available to the child. Such research findings by Kevin Browne on impact of institutionalization upon children was shocking for the world and deinstitutionalization caught the attention of social workers.[2] Deinstitutionalization is described by Eurochild as a process to remove children from institutional care settings and placing them in community or family-based care.[3] The countries having substantial number of children in institutional settings suddenly became the focus of international agencies. There was tremendous pressure to shift focus from institutional care to non-institutional family-based care. After 20 years of adoption of UNCRC, it was felt necessary to help and guide the countries for better implementation of alternative care placements and on November 20, 2009, Guidelines for the Alternative Care of Children was

[1] Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (Nov. 20, 1989)

[2] Kevin Browne *et al.*, "Overuse of institutional Care for Children in Europe", 332 *Brit. Med. J.* 485 (2006), *available at*: https://www.bmj.com/content/332/7539/485 (last visited on Dec. 25, 2020)

[3] Eurochild, Deinstitutionalisation and Quality Alternative Care for Children in Europe: Lessons Learned and The Way Forward 6 (2014), *available at*: https://bettercarenetwork.org/sites/default/files/2020-06/DI_Lessons_Learned_web_use.pdf (last visited on Dec. 25, 2020)

adopted.[4] European countries came together and formed Eurochild to protect children across the region. The Opening Doors campaign for European Children from 2013 to 2019 was launched to end institutional care and to support and develop community-based care.[5]

According to the UN, "foster care" refers to such situations where "children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children's own family that has been selected, qualified, approved and supervised for providing such care."[6] The foster family is unrelated to the child and taking care of an unrelated child is not only challenging, but also stressful resulting in unsuccessful placements. Finding capable families from community has always been a challenge for Foster Care Agencies across the world. Various methods are used to identify foster families to come forward and take children in their care, and identification of foster families is popularly known as "recruitment" in western countries.[7] This article discusses the legal framework relating to foster care and recruitment in specific in India. Without the support of caregivers, this system is destined to fail. Therefore, as the first step, it very essential to identify them. Being action-oriented, multitudinous approaches for different people would appeal the interested families. Recruitment is not a one-off event but an ongoing process. There are quite a few challenges in recruitment which this article analyses, and prescribes

[4] UN, Guidelines for the Alternative Care of Children, U.N. Doc. A/RES/64/142 (Feb. 24, 2010) [hereinafter 'UN Guidelines of Alternative Care']

[5] The Opening Doors for Europe's Children, Lessons Learned and Recommendations to Strengthen Families and End Institutionalisation of Children in Europe (2020), *available at:* https://eurochild.org/uploads/2021/01/OD_last_report_v5_NT_SCREEN.pdf (last visited on Dec. 25, 2020)

[6] UN Guidelines of Alternative Care, para. 29(c)(ii)

[7] Hans B. Bergsund, Tore Wentzel-Larsen and Heidi Jacobsen, "Parenting stress in long-term foster carers: A longitudinal study", 25(S1) *Child & Family Social Work* 53 – 62 (2020)

some remedial actions which are similar to those identified in western countries, however, being a new concept, the foremost challenge is changing mindset of people towards child care. Therefore, in order to revolutionize the caring culture, the most important aspect is to change the caring culture through different methods of awareness generation, motivation and encouragement of foster families, social media campaigns, which will not only decrease the number of children in Child Care Institutions, but will also encourage families to become foster families.

II. Legal Development of Foster Care in India

The system of establishing orphanages in India was started by British Government before independence to place orphan children of British and European soldiers who were residing in India and working for British Indian Army. A new community, namely Eurasians came into existence after the Revolt of 1857, due to their racial proximity with White community. Education became the focal point to make Eurasians employable and orphanages were established for poor Eurasian children or orphan children. The Lower Orphan School was the first Orphanage established in Kolkata in the year 1789 and subsequently, first floor of Lower Orphan School was reserved for orphans of European Army officers and was being called Upper Orphan School.[8] After independence the orphanages, now known as Child Care Institutions (CCI), continued to exist and tremendously increased in numbers. The Children Act, 1960[9] was the first Act specifically legislated for children and Section 9 of the Act empowered Administrators to establish a Children's Home for

[8] Teresa Hubel, "In Search of the British Indian in British India: White Orphans, Kipling's Kim, and Class in Colonial India", 38(1) *Morden Asian Stud.* 227 – 251(2004)
[9] Act No. 60 of 1960

Neglected Children. The Act described "neglected child" as any child who is found begging or has no place to live or parents are unable to care for their child or child lives in a brothel and mother happens to be a prostitute.[10] The Child Welfare Boards established under the Act had powers to give the custody of child to a parent, guardian or "other fit person".[11]

In the Juvenile Justice Act, 1986, the terminology was changed from "neglected child" to "neglected juvenile" and expanded its definition by including children who is being or is likely to be abused or exploited for immoral or illegal purposes or unconscionable gain.[12] The Juvenile Justice (Care and Protection of Children) Act, 2000 dropped the word neglected and rephrased it to "children in need of care and protection".[13]

With the passage of every legislation the definition of child who need care, safe environment and protection has been expanding and Section 2(14) of the present Juvenile Justice (Care and Protection of Children) Act, 2015[14] (hereinafter 'JJ Act') further expanded the definition and now includes children, who are orphan, abandoned, missing, run away, abused, found vulnerable, mentally or physically challenged, surrendered, and when parents unable to take care of them. The enlargement of definition of child who need care and protection also means enlargement of services that needs to be made available to children and one of the services was establishment of different types of shelter homes for different categories of children. For safety and protection of children who are without parental care, institutional care is imperative,

[10] Children Act, 1960, s. 2(l)
[11] Children Act, 1960, s. 16
[12] Act No. 53 of 1986, s. 2(l)
[13] Act No. 56 of 2000, s. 2(d)
[14] Act No. 2 of 2016

but as specified in the UNCRC, it should be the last option. Before a child is placed in institutional care, every possible effort should be made to place the child in the community and family-based care must be explored. The JJ Act includes a range of homes for different category of children, like Children Home, Observation Homes, Special Homes, Open Shelter and place of safety.[15]

According to the government report in 2018, India has around 9,589 number of registered CCIs, wherein 8,744 are run by non-governmental organizations and 845 with governmental support.[16] There is considerable rise in sexual abuse of children who are residing in these homes and lately attempts are being taken to ensure that alternative care options are being made available to these children.[17]

India submitted its Third and Fourth Period Combined Report to UN Committee on the Rights of the Child in 2014 and recalling the Guidelines for the Alternative Care of Children, the Committee observed that State parties shall establish foster care for children in alternate care and urged that requisite and suitable human, technical and financial resources to be made available for alternative care.[18] It also recommended to create awareness on foster care.[19] The Committee was concerned about the lack of information on processes with respect to foster care, be it assessment, selection, training, remuneration or supervision. The

[15] JJ Act, chap. VII

[16] Ministry of Women and Child Development (MWCD), Gov't of India (GoI), The Report of the Committee for Analysing Data of Mapping and Review Exercise of Child Care Institutions under the Juvenile Justice (Care & protection of Children) Act, 2015 and Other Homes Volume-I 40 (2018), available at: https://wcd.nic.in/sites/default/files/CIF%20Report%201.pdf (last visited on Dec. 24, 2020)

[17] *Id.* at 61 – 63.

[18] Committee on the Rights of the Child, Concluding Observations on the Combined Third and Fourth Periodic Reports of India, UN Doc. CRC/C/IND/CO/3-4, para. 56 (Jul. 7, 2014)

[19] *Id.* at para. 66

Committee recommended that there is requirement for legal provisions in the national law to arrange alternative care for children who are deprived of parental care.[20]

It would be pertinent to mention that the whole world is deviating from institutional care and adopting community and family-based care. The UN also took cognizance of harmful effects of institutionalization and adopted the Guidelines on Alternative Care of Children in 2009. These developments necessitated incorporation of foster care in our national law and it was integrated under Chapter VII dealing with Rehabilitation and Reintegration under the JJ Act in 2015. The concept was new to Indians and to help its implementation, the Ministry of Women and Child Development took the initiative to draft Model Guidelines for Foster Care[21] to guide the State Governments. The States either adopted or adapted the Guidelines according to their regional requirements and translated into local languages.

There is evidence that, good quality service provider, care givers, social workers and support services in collaboration are able to produce positive developmental outcome.[22] For better outcomes for children and families, the Centre on Developing Child, Harvard University maintained that for maximum effectiveness, the policies and services should harmonize effusive, relationships for children and families, enhance the fundamental

[20] *Id.* at para. 55 – 56

[21] MWCD, GoI, Model Guidelines for Foster Care, DO No. 14-5/2015-CW-II (Nov. 11, 2016) available at: https://wcd.nic.in/acts/model-guidelines-foster-care-2016 (last visited on Dec. 24, 2020) [hereinafter 'Model Guidelines for Foster Care']

[22] Kenneth A. Dodge *et al.*, "The Durham Family Initiative: A Preventive System of Care", 83(2) *Child Welfare* 109 – 28 (2004)

survival skills and decrease the origin of hardships in their lives.[23] Hence, it was expected that State Governments would create the systems, necessary for its implementation and pool in financial and human resources ensure its implementation.

III. The First Step: Recruitment

After carefully examining the foster care system of many countries and the UN definition, JJ Act defined foster care as "placement of a child, by the Committee for the purpose of alternate care in the domestic environment of a family, other than the child's biological family, that has been selected, qualified, approved and supervised for providing such care".[24]

Foster care is a long process involving many stages starting from recruitment of families to monitoring the placement of child. The User Guide developed jointly by National Commission for Protection of Child Rights (NCPCR) and Centre of Excellence in Alternative Care (CEAC) details various steps in the entire process of foster care, namely, selection (recruitment), assessment, approval and supervision.[25] Recruitment of foster families is the first step in foster care system. There is need to have enough number of foster carers to take care of children who need alternative care. Identification of foster family involves awareness, communication and engagement of people from the society. According to McNitt, it is observed that in many countries, the recruitment of foster

[23] Center on the Developing Child at Harvard University, Three Principles to Improve Outcomes for Children and Families (2017), available at: https://developingchild.harvard.edu/ (last visited on Dec. 24, 2020)

[24] JJ Act, s. 2(29)

[25] NCPCR and CEAC, User Guide on Foster Care (2018), *available at:* https://ncpcr.gov.in/showfile.php?lid=1672 (last visited on Dec. 24, 2020)

families is reactionary.[26] Upon learning the harmful effects of institutionalization, the whole world criticized the European countries, especially Romania, Moldova, Ukraine, Bulgaria for putting large number of children in institutions.[27] McNitt further states that sometimes its driven by crisis, the focus is more on having families without ensuring the standards of care required in the placement. The lack of planning is another reason for shortage of foster carers. The foster care organizations and agencies should be skillful and creative to motivate foster families to come forward to become foster parents.[28]

A study conducted by CEAC, an organization headed by the first author, highlights various challenges in the recruitment of families, which starts from change in mindset, as putting children in institutional care is prevalent and considered beneficial for children of poor families, who struggle to survive.[29] Another important factor that determines recruitment is motivational factors for foster parents *vis-à-vis* different cultural and contextual issues. Although, many western countries have developed foster care system in the last 60-70 years still, there is shortage of foster families.[30] The lack of pool of foster families, qualified and selected is becoming a global crisis. According to the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (hereinafter 'Model JJ Rules'), the District Child Protection Unit (DCPU) is the nodal agency

[26] Myrna McNitt, "Foster Parent Recruitment" in Danielle Douglas and Jean Anne Kennedy (eds.), *Ensuring the Rights of the Child, and Family-Centered Services* 164 (Conference Proceedings), IFCO 2014 European Conference organized by Waterford Institute of Technology, Ireland (Aug. 26 – 29, 2014)
[27] *Supra* note 2.
[28] *Supra* note 26 at 167.
[29] CEAC, Finding a Way Home: Pathways out of Institutional Care 3 (2019)
[30] Matthew Colton *et al.*, "The Recruitment and Retention of Family Foster-Carers: An International and Cross-Cultural Analysis" 38(5) *Brit. J. of Social Work* 866 (2008)

to implement foster care in the district[31] and should keep a roaster of selected and approved foster families, for quick placement of children.[32] Though, the whole process of recruitment of foster family needs planning at all levels, India is struggling with finding suitable families, in the absence of clear guidance, financial and human resources.

IV. Challenges of Foster Care in India

1. Paid or Unpaid Fostering

The whole world has debated for long whether, fostering should be paid or unpaid. Are foster parents' volunteers or paid service providers? To better understand let's look through the history when between 1854 and 1929 almost 3 lakh children were removed from the streets of New York and sent across the country to resettle with new families. Many children had good life, however, many were abused and used as punching bags or sex toys. It was only after the cases of abuse were reported, that child protection laws in US were legislated and monitoring became a prime factor in placement. Being voluntary in nature, the families were without any accountability. If a family was found abusing the child, the child was removed and placed into another family. It was argued at national level that payment to families would ensure accountability. Subsequently, fostering allowance started to ensure safety and security and fixed the accountability and responsibility when having children with them.[33]

Colton and Williams agreed that, there are discussions on the need to pay foster carers and is a controversial point in child protection. The Child Protection Law of Hungary has defined Foster Carer as civil servants,

[31] Model JJ Rules, G.S.R. 898, r.23 (2)
[32] *Id.*, r. 85 (xviii)
[33] National Orphan Train Complex, "New York daily Tribune - January 21, 1880", *available at:* https://orphantraindepot.org/history/artifacts-of-the-orphan-trains/new-york-daily-tribune/

thereby making them service providers.[34] The Indian law requires that prospective foster families should be financially sound.[35] The general mindset in child welfare system is that financial support should not be provided, and a small fraction of social workers believe that, since foster families are taking the responsibility of looked after children, and it's the extension of state responsibility, and hence, they must be compensated. The Model Guidelines for Foster Care provides for paying ₹ 2000 per child per family, till the time child continues to be in foster care. The Sponsorship and Foster Care Approval Committee has the power to decide upon applications for financial support.[36] Foster Families are given skills and trainings to care for children and getting compensated for fostering is nothing, but some help towards their financial burden of fostering kids and keep them motivated to support the child. Majority of the countries are paying to their foster parents. It is believed that paid fostering gives better results as compared to unpaid. Recruitment process should make it clear, if the foster care is paid or unpaid and the ways of availing the financial support, if available.

2. Gender and Age

Every prospective foster family while applying, has the choice to give preference for age group and gender of the child.[37] India being a patriarchal society, it is observed that male children are preferred over females. Interestingly, the CCIs have more boys as compared to girls, even though, Indian family prefers boys over girls.[38] Female feticide is

[34] *Supra* note 30 at 867.
[35] Model JJ Rules, r. 23 (12)(iv)
[36] Model Guidelines for Foster Care, at 24
[37] *Id.*, Annexure-A, Application Form
[38] *Supra* note 16 at 6.

very common practice in norther region of India.[39] The families either abandon their newly born girls or surrender them before CWC. The provisions to surrender the child was inserted in the JJ Act of 2000 through Amendment in 2006, to arrest feticide and save the life of child.[40] More than 60 per cent of prospective foster families prefer to foster young children hoping to adopt them later. Rule 44 (i) of Model JJ Rules states that children of 0 to 6 years of age shall not as far as possible be given into foster care. This has put social workers in a fix, as to whether these children can be given for fostering. In an interview with Ms. Nirmala Fernandes, the Executive Director of Family Service Centre, Mumbai, she interestingly informed that although across the country, the Special Adoption Agencies are CCIs, registered under JJ Act, their organization have identified around 23 families over a period of time who foster children. During the pendency of adoption proceedings, CWC hands over the children to the organization and they immediately place the children with these families to provide all necessary care specially health and nutrition, to ensure healthy development. She further apprised that her organization simultaneously initiates the adoption process in collaboration with government agencies.[41] Due process is followed to put the child into adoption, which sometimes might take more than a year to place in adoption.[42] The organization is able to provide family life in the initial stage and prevent the developmental harm, in line with the study

[39] Jonathan Abbamonte, "Beti Bachao: Female foeticide unabated in India", *Deccan Herald*, Aug. 17, 2019, *available at:* https://www.deccanherald.com/opinion/main-article/beti-bachao-female-foeticide-unabated-in-india-754898.html (last visited on Dec. 26, 2020)

[40] JJ Act, 2000, Ins. by Act No. 33 of 2006, s. 4

[41] Interview with Ms. Nirmala Fernandes, the Executive Director of Family Service Centre, Mumbai, on November 23, 2020

[42] Family Service Centre, 63rd Annual Report 2017-2018 3 – 4 (2018), *available at:* https://www.fscmumbai.org/AR/FSC_AR_17_18.pdf (last visited on Dec. 26, 2020)

which indicated that institutional care changes the brain structure of child, which results in long lasting impact on their adult life.[43] Unfortunately, fostering before adoption is very complex in India and conflicting law and theory has created a situation, which is impacting the motivation of social workers to promote foster care.

3. Awareness and Media

As mentioned earlier, foster care was legally implemented for the first time in India through the JJ Act in 2015, hence, it is imperative to create awareness among child protection workers, implementers and community at large. Any good initiative if unknown, will soon become extinct, whereas, if promoted correctly and judiciously, with reasons and significance, its impact could give better results.

Positive news and articles in the media can play a significant role by creating excitement in the community towards the new opportunity for the families who are empty nesters or have room for one more, or parents of single child or childless couple.[44] The requirement of families for millions of orphan children needs to be known by the community. They are required to be informed that government needs their support in providing family life to a child who would otherwise continue to stay at CCIs until an adult. The first author, while conducting awareness sessions through her organization, CEAC, found that many families expressed their ignorance about foster care, which could protect lives of many children and families could also get children.

[43] Paraskevi Tatsiopoulou *et al.*, "A Qualitative Study of Experiences During Placement and Long-Term Impact of Institutional Care: Data from An Adult Greek Sample", 116 *Child. and Youth Ser. Rev.* (2020)
[44] *Supra* note 26 at 167 – 68

While implementing foster care project in Bihar, she further realized that recruitment process involves planning. Without detailed planning enumerating all possible steps, it would be impossible to recruit foster families. The significance of family for a child needs to be propagated. Recruitment mobilization in the form of a campaign can be considered as one of the forms to recruit foster families. A single campaign was not able to attract the attention of foster families. Becoming a foster parent is an important decision and sometimes took months before, they made an enquiry call to the DCPU or Foster Care Agency. Continuous and ongoing foster care recruitment drive should be conducted on special days were more effective.

A conscious effort to create awareness and recruit families is essential for implementers. The month of May is Foster Care Month in USA and whereas in UK a fortnight in November is used for awareness. This time of the year with special focus on recruitment drive, with special slogans, tag lines in media like television, newspapers and big signages can be seen to start the conversation with families, talking about need of foster families and need of the children to live in families. "Walk me home" was used by National Foster Parent Association in USA. "Can I stay with you for a while" was the tagline in Azerbaijan. The catchy taglines create interest among families and helps the Foster Care Agencies to recruit the families.[45]

The Model JJ Rules very explicitly mentions that DCPU has the responsibility towards awareness generation and capacity building of stakeholders.[46] However, not a single noteworthy awareness event is

[45] *Supra* note 26 at 168
[46] Model JJ Rules, r. 83(xxi)

being reported to be conducted since the legislation has been passed. Time has come to think of new ways to reach out to people. Old fashioned strategies needs to be changed in line with use of social media as it has emerged as one of the most powerful tools to reach out to millions of people, especially during the COVID-19 pandemic, which has forced people to stay at home. DCPU needs to think on using different mediums to generate awareness in the district to generate interest in communities towards foster care.

4. Assessment of Needs

Recruitment of families should be based upon the needs and kinds of children to be fostered.[47] Understanding the needs and determining the goals are important for good performance. It needs to be determined by DCPU or local authorities, whether the requirement is for young children, infants, school going children, or special need children. Assessment will help in keeping district-wise database of children who are in difficult circumstances and need foster families.[48] On the basis of requirement, the local authorities, can engage with community. Recruitment of families who need young children, and then placing school going children would be waste of resources, time and energy and also not in the best interest of children. It will also frustrate the social workers, when placement might get disrupted due to compatibility issues. The authors believe that it's something like demand and supply theory. The supply increases when there is demand.

The survey before starting the recruitment process will help in finding the appropriate families. Targeting the demographics, where the families are

[47] *Supra* note 26 at 168
[48] Model JJ Rules, r 85 (viii)

likely to become foster family is an important aspect of recruitment. While working in Bihar, CEAC targeted the families who were interested in adoption but fell short of eligibility criteria or lost interest due to long process and waiting for years to adopt.[49] Geo-based approach tries to identify families within the local community, which helps the child to keep connections with friends and families and attend the same school, which is less traumatized. Finding families in neighbourhood should be the bedrock of recruitment process. The child belongs to community so do the foster families.[50]

5. Motivation to Foster

The utmost important and intricate point in recruitment is to know what motivates a family to foster a child. Rees Foundation's, study identified intrinsic and extrinsic factors which motives a family to foster.[51] The intrinsic reasons could be the interest to help a child as noted in Sweden, Australia and many more countries. Another reason emerged was providing companion to their own biological children. The extrinsic reasons, quoted by Sebba, are filling up the empty nest and awareness on foster care was the most influential reason to come forward and become foster parents in USA.[52]

While implementing foster care in the state of Bihar, the first author observed that the families have also cited the above reasons to become

[49] The first author while conducting training programs through her organization, CEAC noted this fact

[50] *Supra* note 26 at 168

[51] Judy Sebba, Why do people become foster carers? An International Literature Review on the Motivation to Foster 9 (University of Oxford, 2012), *available at:* http://www.education.ox.ac.uk/wp-content/uploads/2019/06/Why-Do-People-Become-Foster-Carers-An-International-Literature-Review-on-the-Motivation-to-Foster.pdf (last visited on Dec. 26, 2020)

[52] *Supra* note 51 at 11

foster families. An infertile couple sees fostering as a pathway to adoption. For many families the reason is humanitarian, where they want to help a child. Particularly in India, there are families opting for girls over boys, due to various schemes run by Government promoting girl's education. The financial aspect is not much an influential factor in motivating the families. There could be any reason for foster families that motivates them to foster and it's not a lucrative option as some people perceive. Fostering is a collective decision of family, which must be respected and the communication that children need families must be loud and clear. It's the state's responsibility to protect children and give the opportunity to live family life, which otherwise is missing in their lives.[53] The prospective foster parents while submitting the Application Form are asked to give reasons for becoming foster parents. Besides Application Form, Home Study Report for Prospective Foster Parents, has the column on Attitude and Motivation for foster care.[54] Despite all challenges, CEAC was able to recruit 98 families over one year period during 2019-20.

6. Recruitment procedure

Recruitment should not be considered as hiring of a family to care for a child. Its more than expressing the interest to become foster parents. A lot has gone within the family, before making the decision and calling the foster care agencies. Meeting the social worker and sharing the feelings and the decision needs to be encouraged. An international review of

[53] Constitution of India, art. 39. Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing . . . (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment; . . .

[54] Model JJ Rules, Form 30

literature by Seeba reported that in UK there was dropout rate of 70-95 per cent from enquiry to registration.[55]

CEAC in its report on Bihar to UNICEF mentioned that the dropout rate is between 85-95 per cent. Immediately, after the launch of Tollfree Number 1800 111 878 for foster carers on February 18, 2020, CEAC received 89 calls per day on an average, however, only 2 per cent of families were found to be eligible to become foster parents. An article published in *Hindustan*, a Hindi newspaper, dated February 20, 2020, on foster care created confusion and misled the general public that Government will make a payment of ₹ 4000 to foster families for keeping children, who were residing in CCIs. The people of State of Bihar all of a sudden felt interested in fostering, but upon informing the law, rules and regulations, eligibility criteria and mandatory conditions to be met, the whole enthusiasm dropped immediately.[56]

More than becoming the foster carer, retaining the foster carers is a tedious task for social workers. Rhodes, Orme, Cox and Buehler stated that crisis in recruitment is mostly linked to retention of foster carers. There is direct relation between supporting the prospective foster families and their retention. Similarly, there is direct relation between happy foster families and referral generated from them. The more satisfied are the foster families, the more referrals the Agency receives through words of mouth.[57]

[55] *Supra* note 51 at 10
[56] CEAC, Report on Mapping of Child Care Institutions in Bihar 2 (2020)
[57] Kathryn W. Rhodes *et al.*, "Foster Family Resources, Psychosocial Functioning and Retention", 27(3) *Social Work Research* 135 – 150 (2003)

7. Policy design vs. implementation

Every new government elected is desirous to announce new policies either replacing the old or to fulfil the political mandate. Andrew Graham, Professor at Queen's University, Ontario, Canada, reminds us that policy makers should embark upon implementation of new policies without realising that there is a consistent pattern of failure in implementing social policies by government across the world.[58] India's ever-increasing population makes it harder to implement any policy. The announcement of new policy is equated with achievement. Announcement or cutting ribbon with funfair and getting momentary attention in newspapers or news channels is considered sufficient.

The disconnect between designing the project and its implementation is another reason for its failure. Blocking of negative reviews/news reaching the top management, often the warning signs, underestimates the operational problems which may apparently appear to be minor ones but crucial for the success of the projects. Not addressing the issues, makes it complex and project starts to lose momentum and gears start to slip. The gap between policy makers and implementors is often the major reason for the failure of scheme. "We design it and you work on it" is the phrase used by Graham for such situations. The research, the need assessment and ground realities to roll out a welfare scheme is missing, which results in collapse of whole scheme. Many times, the original proposers move on and new officers have no interest to put their energy in someone else

[58] Andrew Graham, Why Governments are So Bad at Implementing Public Projects? (Feb. 14, 2019), *available at:* https://theconversation.com/why-governments-are-so-bad-at-implementing-public-projects-111223 (last visited on Dec. 27, 2020)

pet project. The response time to crisis is pivotal for the success of any scheme.[59]

The Integrated Child Protection Scheme (ICPS)[60] in India is one such scheme launched in 2009 with the promises to reach out to all vulnerable children, yet, the stakeholders find it difficult to implement due to bureaucratic red-tapism and lack of finances. In the last 11 years it has been revised only once and the critical issues are still unaddressed. In the revised scheme, limitations of ₹10 lakh per district per year has made it difficult to reach to most needy child.[61] The Scheme needs constant attention, revision and review to reach to the lost child. A National Consultation was done on 5th June, 2018 by Ministry of Women and Child to review ICPS Scheme. It was reported that states have not spent the money received from the Centre.[62] It amounts to abuse of child protection system and lack of seriousness and commitment towards child protection.

8. Lack of Political Will

Even today the law is still in nascent stage to get implemented, then one of obvious reasons could be lack of political desire to implement the law. It is also argued that children are not voters, hence, politicians pay little or no attention towards them, although it is observed that young adults

[59] *Ibid.*

[60] MWCD, GoI, Integrated Child Protection Scheme (2009), *available at:* https://bettercarenetwork.org/sites/default/files/attachments/The%20Integrated%20Child%20Protection%20Scheme.pdf (last visited on Dec. 27, 2020)

[61] MWCD, GoI, Revised Integrated Child Protection Scheme 47 (2018), *available at:* http://cara.nic.in/PDF/revised%20ICPS%20scheme.pdf (last visited on Dec. 27, 2020) [hereinafter 'Revised Integrated Child Protection Scheme']

[62] MWCD, GoI, Review of Child Protection Services, National Consultation on Child Protection Services, Jun. 5, 2018, *available at:* https://wcd.nic.in/sites/default/files/Review%20of%20Child%20Protection%205th%20June%20by%20JS%20.pdf (last visited on Dec. 27, 2020)

are being engaged as they are seen as potential voters. Every possible effort to lure them is one of the mandate of politicians which helps them in their win. The UNCRC urges States to include children while making any policy, but child rights activists have been crying for years that they voice is hardly heard. Their concerns, needs and wants are seldom important. Politicians fail to understand that strong family and children are the future of any country. They fail to realize the importance of investing in children and expect higher results.[63]

9. Insufficient resources

Financial and human resources to initiate and support the continuity of a scheme is paramount. The ICPS Scheme has provisions where Central Government gives certain percentage of grants to state governments to support the activities and implement the scheme. Primarily the grant is to be used for financially sponsoring the family living in difficult circumstances, to keep the family intact and support the educational needs of the child. The grant also needs to be funded and supplemented by State Government from its exchequer. The provision of ₹ 2000 per child per month for two children for a maximum period of 3 years can only reach out to handful of children. Annual Review by DCPU and CWC is an important feature of this scheme, which decides the continuation of financial support to a child. A close look at the Scheme will reveal that only 50 children can be supported a year in one district, whereas the requirement in any district at any given point is lot more. The insufficient funds by clubbing of sponsorship and foster care funds and putting a cap

[63] Robin Bansal, "India lacks political will to protect kids", *The Times of India*, May 17, 2007, *available at:* https://timesofindia.indiatimes.com/india/India-lacks-political-will-to-protect-kids/articleshow/2057155.cms (last visited on Dec. 27, 2020)

of ₹ 10 lakh per year per district will reduce the success of foster care and gradually, the stakeholders will lose interest and scheme will fade away.

Another, regretful feature of ICPS Scheme is contractual human resource. The whole Scheme is based upon temporary staff who are appointed for one year.[64] The CWC Members have the tenure of 3 years. There is no continuation of service and wages paid are based upon per sitting basis. As a result, majority of work force is left out of the social security network with no public health or pension benefits. CEAC while proposing the project to UNICEF stressed upon the importance of human resource and included 2 officers per district to focus only on foster care, if Government of Bihar, wants to make foster care a success in the State.[65]

10. Lack of Technical knowledge and Research

Foster Care has developed in different countries and has taken years to establish itself as a form of alternate care for children who are without parental care. Many countries took conscious decision when various research found out that institutional care is detrimental for child's development. The findings of the research conducted by Kevin in Eastern European countries was the turning point in the history of children, when the United Nation decided to come up with the Resolution on Alternative Care in support of children who are without biological parents and languishing in institutional care.[66]

A practice model consisting of best practices, uniqueness and creativity together will give the Foster Care agencies a model of practice. The PRIDE Model of Practice having 14 steps have composed the fostering

[64] Revised Integrated Child Protection Scheme at 12
[65] *Supra* note 56 at 10
[66] *Supra* note 2 at 486

process, detailing the process of recruitment and other steps.[67] Similarly, The User Guide on Foster Care of NCPCR details the needs in foster care, explaining each step detailing the reasons and process to successfully implement in the whole of country. The best practices helps Foster Care Agencies across the country in maintaining the standards of care in recruitment of families. The agencies can recognize the gaps in foster care and develop resources based upon their experience and international standards.

11. Support to end institutionalization

International and national laws recognize the right to family as one of the fundamental rights for every child. The UNCRC emphasizes that every child has a right of protection and in situations when child is without parents and needs protection, State should make arrangements to provide family life to the child.[68] Countries need to recruit families to protect children be it developed country or developing country. Developing countries, might have gone through civil war or political instability, which makes the protection and development of the child a challenge and also a necessity. These countries need technical knowledge and support to end institutionalization and promote family-based care.

Many countries like Romania, Bulgaria or Moldova took policy decision to shift focus on family-based care by borrowing the best practices from well-established foster care systems in the world and putting slow end to institutional care. Eurochild supported the countries in developing

[67] Child Welfare League of America, PRIDE Model of Practice, *available at:* https://www.cwla.org/pride-training/ (last visited on Dec. 27, 2020)
[68] UNCRC, art. 20

policies, procedures, mechanisms and system with the support of international agencies.[69]

I. Conclusion and Recommendations

Regardless of having many laws to protect children, India has failed to implement the same due to poor awareness among stakeholders and in the community. The lack of political will has further deteriorated the conditions of children.

Foster care is a long process requiring mind set change to accept the children in their family, which requires phase-wise strategies to make it popular and attractive for prospective foster families to opt for fostering. Staying in Child Care Institutions is violation of rights of children. The recommendation of UNCRC in its third and fourth Periodic Report to incorporate foster care in the national laws and set forth the process requires recruitment of families and place children in alternative care. Recruitment of families is the right of the child and the necessity and first step towards deinstitutionalization.

Borrowing technical support to build and strengthen the foster care system can resolve many issues like, developing of resources, training tool kits and Information, Education and Communication material. Research and Policy Making are two sides of same coin. A policy based upon evidence-based research is less likely to fail and must be encouraged in the country.

[69] *Supra* note 3.

From the above discussion it is quite apparent that despite challenges, when an organization in Bihar can recruit 98 families through planning, identifying the gaps, mapping of districts, reaching out to family through different methods, it can be said that a well-documented and informed practices guiding the child welfare agencies, NGOs and stakeholders the families will be interested to become foster families as discussed in this article. The collective responsibility of state and community towards our children with sufficient resources to recruit families will protect the next generation of our country.

CHILD TRAFFICKING: AN IGNOMINY TO INDIAN SOCIETY

Dr. Kumkum Agarwal[*]

Abstract

Child trafficking is deep rooted problem existed for many years and continues to grow across all continents and cultures. For some countries, it occurs within national boundaries and remains an essentially national issue. For many, it crosses borders and regions. The victims are separated from their families and end up in prostitution and other exploitative forms of work, such as agriculture, mining, begging, domestic service etc. Child trafficking is not only a serious crime against them but also a violation of their basic human rights. It deprives them to enjoy their childhood.

The Constitution of India and various legislations guarantees protection to children against any exploitation, forced labour and trafficking ensuring them healthy and safe environment, still this menace exists in society. Lack of education, poverty, unemployment, indebted family, forced marriage, child labour, sexual exploitation etc. are common causes to child trafficking. It is high time to take action to combat trafficking with a new strong will and enthusiasm and bring it to a speedy end, otherwise future of our nation may be threated. Government, NGOs, mainly parents and community together through imparting education, economic independency, effective law enforcement may emancipate this evil.

Through this paper, the author wants to highlight major causes and aftermath effects of child trafficking and convey suggestions how to prohibit it.

Key words: *child trafficking, factors & effects, legal and judicial control*

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Introductory Remarks:

"The exploitation of childhood constitutes the evil the most hideous, the most unbearable to the human heart".

Albert Thomas, 1st director of ILO

Human trafficking is a serious crime and a grave violation to human rights. Every year, thousands of women and children fall into the trap of traffickers in their own countries and abroad. Almost every country in the world is affected by trafficking, whether as country of origin, transit or destination. Human trafficking has been indicated as third largest source of profit to organized crime, following arms and drug trafficking. It is estimated that 6 to 8 lakh women and children are trafficked each year globally. They are generally trafficked for begging, organ trade, drug smuggling, bonded labour, domestic help, agricultural, construction & industry work, forced prostitution, sex tourism, pornography and also for entertainment and sports which include beer bars, camel jockey and circus troops.

Trafficking in human beings especially of children has become a matter of great concern. It's a global phenomenon and not confined to any geographical region or country. It has now become one of the most offensive crimes worldwide. Child Trafficking is denoted as an act of cruelty where child is illegally transported within and outside country for some commercial and exploitation motive. There are various modes by which traffickers approach to children but generally these children are promised for daily wages to support their family and in some cases parents themselves insist their children to earn money for family but in practice they are bought into forced slavery or transported to various areas for begging, labour and sexual exploitation. United Nations statistics

demonstrates that "every year more than a million people are traded and trafficked against their wish or forced to work into slavery and majority of victims are counted as children[1]".

On other hand, amongst all Asian countries, India is rated as one of the fastest growing countries in trafficking for modern sex slavery, where nearly 90 percent trafficking in human being, particularly children and women for commercial sex tourism that happens within state boundaries. At the same time, trafficking in children occurs cross border also specifically from Nepal, Pakistan and Bangladesh. In India, countless number of children are trafficked not only for sex slave or prostitution but also for other forms of humiliation namely; agricultural activities, debt bondage, domestic service, forced and compulsory labour, begging, organ donate and false marriage. The existence of poor socio-economic status, low financial resources, higher rate of illiteracy and unemployment, rural-urban migration, lack of knowledge and awareness are major prevailing factors that increases trafficking incidents throughout the world. Likewise, they are trafficked and procured across countries border through pimp networks and links. **James T. Walsh** rightly said, ***"The sexual abuse and exploitation of children is one of the most vicious crimes conceivable, a violation of mankind's most basic duty to protect the innocent."*** No doubt, child trafficking is a serious violation of basic human rights, dignity and respect. The victims are not only subjected to physical, mental torture but also face family and social outcaste. Especially, sexually exploited victims are most vulnerable to HIV/AIDS, STDs (Syphilis, Hep-B, LGV, Chancroid, etc.). Human trafficking, therefore, can be called as modern time slavery.

[1] Rashi, "Child Trafficking in India: Aftermath Effects and Challenges" 23 *IOSR-JHSS* 20 (2018).

Government organizations must take steps to eradicate this evil from society. Strict enactments are to be made to protect children and law enforcement agencies should be constituted to implement these laws. The Judiciary may play an active role to prevent such crime by issuing guidelines. Besides, the best way to prevent child trafficking is; parents should educate their children instead of child labour, poverty should be minimized and employment, knowledge and awareness should be maximized. The Immoral Traffic Prevention Act In 1956 and many other legislations were enacted such as Indian Penal (Amendment) Code, 2013, Prevention of Child from Sexual Offences Act, 2012, Juvenile Justice Care and Protection Act, 2015 to prevent exploitation of women and children from trafficking, still this crime is prevalent in Indian society. In fact, India is observed as Central hub of child trafficking. Therefore, every need to raise sensitivities regarding the issue and thereby devise appropriate policies and strategies to halt this menacing social evil.

I. Meaning & Approach of Child Trafficking:

Trafficking refers to the movement of men, women and children from one place to another through force, coercion or deception for their economic and sexual exploitation while exploitation of minors (under the age of 18) for commercial and sexual activities or other gain through above means refers *Child trafficking*[2]. No doubt, child trafficking is a disease that affects all nations because of porous borders and frail domestic laws[3]. About 600,000 to 800,000 people are trafficked across international borders each year for sexual and labor exploitation; 80 percent of these victims are women, and 50 percent are minors (U.S. Department of State,

[2] Stephanie L. *Mace, Child Trafficking: A Case Study of The Perceptions of Child Welfare Professionals In Colorado,* (2013) (unpublished dissertation, Colorado State University, Fort Collins).

[3] Arvind P. Bhanu, Rajni Kant Mishra, "Child Trafficking in India" 2 *IJL* 33 (2016).

2003). UNICEF (2002) believes that the number of children trafficked annually, within and across national borders, is around 1.2 million[4].

Trafficking in human is defined by **Article 3(a) of the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime, 2000,** otherwise known as **the Palermo Protocol** as: *" the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[5]".* Further, **Article 3 (c) of the Protocol** stipulates that, in case of children, "*the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article[6].*

This is the first internationally accepted definition of trafficking and it came into force from 25 December 2003. India has also signed this UN convention in 2011. Prior to it, there was no comprehensive definition of trafficking as an organized crime. It was only **The Immoral Traffic**

[4] Nilanjana Ray, "Wither Childhood? Child Trafficking in India" 29(3) *ICSD* 72-73 (2007).
[5] *Ibid.*
[6] International Programme On The Elimination Of Child Labour, "Child Migration, Child Trafficking and Child Labour In India", ILO Decent Work Team For South Asia And Country

Prevention Act, 1956 which defined trafficking[7] an offence only for prostitution. But in 2013, the then Govt. sets up Justice Verma committee after the aftermath of the tragic Delhi gang-rape incident. It brought Criminal Law Amendment Act 2013 by which major changes were made in relation to trafficking in sec. 370 of Indian Penal Code and new sec. 370A was added. Section 370 of IPC has been totally reframed by amendment Act and thereby enlarges the scope of offence of trafficking including within its purview not just the mischief of slavery but trafficking in general- of minors and of adults and also force and bonded labour, prostitution, organ transplantation and to some extent child-marriages. Human trafficking is defined by the amended **sec. 370 of the Indian Penal Code, 1860 in the following manner**: Whoever, for the purpose of exploitation, (a) recruits (b) transports (c) harbours (d) transfers or (e) receives, a person or persons by —

Firstly threats, or

Secondly using force or any other form of coercion, or

Thirdly by abduction, or

Fourthly by practicing fraud or deception, or

[7] The Immoral Traffic (Prevention) Act, 1956 (Act No. 104 Of 1956), s.5A. Whoever recruits, transports, transfers, harbours, or receives a person for the purpose of prostitution by means of, — (a) threat or use of force or coercion, abduction, fraud, deception; or (b) abuse of power or a position of vulnerability; or (c) giving or receiving of payments or benefits to achieve the consent of such person having control over another person, commits the offence of trafficking in persons. Explanation. —Where any person recruits, transports, transfers, harbours or receives a person for the purposes of prostitution, such person shall, until the contrary is proved, be presumed to have recruited, transported, transferred, harboured or received the person with the intent that the person shall be used for the purpose of prostitution.
Office For India (2013).

Fifthly by abuse of power, or

Sixthly by inducement, including by giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, **commits the offence of trafficking**.

1. The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.
2. The consent of the victim is immaterial in determination of the offence of trafficking.

Thus, inclusion of a comprehensive definition of Human Trafficking in IPC in 2013 has been proved a milestone towards the recognition of much larger manifestations of trafficking beyond commercial sexual exploitation.

II. Factors Contributing Child Trafficking:

The factors behind trafficking are varied and complex but poverty, lack of opportunities, economic gains to be made through exploitation of children, entrenched gender disparity and discriminatory cultural practices are main. Children without birth registration or identity proof also face heightened risk of trafficking. However, contributing factors leading child trafficking may be divided in to push and pull factors.

Push Factors include; poor socio-economic conditions of a large number of families, child marriage, unemployment, domestic violence, false promises of job or marriage/ love, natural disaster, traditional/religious prostitution (Devdasi), lack of education, skill and income opportunities for women (and for their family members) in rural areas, absence of awareness about the activities of traffickers, pressure to collect money for

dowries which leads to sending daughters to distant places for work, dysfunctional family life, low status of girl children, etc. Study reveals that extreme poverty and other causes of deprivation not only push people to fall in the jaws of traffickers, they also create for some an incentive for trafficking. Often the prostitutes, who have no option to come out of the exploitative environment, gradually develop intimate connections with the traffickers and follow in their footsteps[9].

Pull factors include; Migration, Hope for jobs / marriage, demand for cheap labour, Enhanced vulnerability due to lack of awareness, Creation of need & market by sex traffickers for 'experimental', sex tourism, Internet pornography, Organized crime generating high profits etc.

Along with push and pull factors, there are some other factors that also contribute to child trafficking:

Individual factors: Child neglect and abuse increases the possibility of child trafficking as it compels many children to run away from home to get away from abuse and therefore take risks that can lead to them being exploited by traffickers[10].

Economic factors: Poverty encourages children to run away from home to seek a better life. This greediness gives opportunity to the traffickers to catch out these vulnerable children[11].

Societal factors: Certain groups of children namely, children from minority, groups of ethnic populations as well as street children and

[9] Biswajit Ghosh, "Trafficking in Women and Children In India: Nature, Dimensions And Strategies For Prevention" 13 *IJHR* 731 (2009).
[10] ECPAT International, Child Trafficking for Sexual Purpose 10 (2009).
[11] *Ibid.*

disabled children are often at higher risk of being trafficked because they are discriminated against or outcaste by the society and are not treated at par with other children[12].

Cultural factors: Gender biasness is often responsible for different forms of child trafficking. Girls, who are considered misfortune, are very vulnerable to trafficking for sexual purposes while boys may be more trafficked for labour. In those cultures where boys are valued more than girls, girls may be less protected and more easily recruited from families and communities[13].

III. Child Trafficking: Violation of Human Rights

Child trafficking in India is one of the major social problems. The dilemma of this social problem is not only affecting the 'Liveworld' of Indian socio-legal systems but also affecting the very root of the Indian cultural values and definite norms. Trafficking is commonest used methods in 'flesh trade'. It not only violates basic Human rights of a child but infringes also their right to protection from exploitation, to play, to an education and to health and to family life and snatches their precious childhood life[14]. Besides, the fact of being trafficked, the traffickers deprive victims of their most basic human rights in the following manner-

- Denial access to education and basic needs of life.
- Face physical, sexual abuse, and remain under pressure against their wishes.

[12] *Ibid.*
[13] *Ibid.*
[14]Shatabadi Bagchi, Ambalika Sinha, "Human Trafficking in India: Theoretical Perspectives with special reference to the Human Trafficking scenarios in The North Eastern Part of India" 6 *IJRESS* 110 (2016).

- Forced to work extremely long hours in inhuman working conditions without any leisure time and any wages.
- No access to health or medical facilities.
- Face social stigma and social ostracism in their daily lives leading constant humiliation.
- Involvement in drugs and other addictions, and sometimes forcibly made addicts in order to ensure their continued dependence on the trafficker.
- Risk of health such as physical injury, STDs, HIV/AIDS, unwanted pregnancies, repeated abortions, occupational diseases, tuberculosis, and other diseases.
- Involve in organ trade such as sale of kidneys.
- Purchase and sale of babies for adoption, both within the country and abroad, against established laws and procedures for adoption.

I. Present Status of Trafficking In India:

Although, it is very complex to obtain comprehensive data regarding human trafficking in India, it's generally accepted that India is a source, destination and transit country for trafficking of persons including young girls. The number of trafficked children is unknown in India but expected to run into millions. The Government of India estimates 20 million child workers in India while NGOs put the figure at 60-100 million. Commercial sex work and labour accounts for a large share of trafficking[15].

The majority of trafficking in India is internal and it mainly concerns with forced labour i.e. debt bondage, working in brick kilns, rice mills, agriculture, and textile outlets including weaving and embroidery

[15] Global Fund for Children, Final Report on Scan of Issue Areas, Trends and Organisations Working in the Area of Child Trafficking in India (2019).

factories. Trafficking for sexual exploitation and forced labour are due to a complex web of drivers on the supply side, most of which are in some way linked to poverty and lack of livelihood opportunities[16]. The National Human Rights Commission reported that 71% of trafficked victims surveyed by them were illiterate. Likewise, the lack of local livelihood opportunities drives families and children towards cities[17].

Child trafficking is on rise in India. Every year, as reported by the National Crime Records Bureau (NCRB), thousands of children are reported to have gone missing in India. In 2019, about 73,138 children were reportedly missing. This means that an average of 200 children were reported missing each day and 8 each hour. The concerning aspect of this is that 71% of this number are girls. Girls made up 52,049 missing cases in 2019 while boys accounted for 21,074 cases. It has also been reported that 15 transgender children went missing in 2019. Compared to 2018, the total number of cases of missing children increased by almost 9%. The number of missing boys increased by 6.5% while that of missing girls increased by over 10. Since 2015, the number of children reported to have gone missing in a particular year is the highest in 2019. In the five-year period from 2015-2019, the number of missing children cases reported in a specific year increased by 21%, from 60,443 in 2015 to 73,138 in 2019. Further, the gender wise trend reveals that the number of girls reported missing each year has increased by an alarming 42.2%. In the case of boys, the number dropped by 17% and went below 20,000 in 2018. However, it has slightly increased by 6.5% in 2019.[18]

[16] *Supra* note 14.
[17] *Ibid.*
[18] Pavithra KM, Factly, Data: Number Of 'Missing Children' Cases Increases To 1.2 Lakh In 2019 *available at*: https://factly.in/data-number-of-missing-children-cases-increase-to-1-2-lakh-in-2019 (last visited Dec. 22, 2020).

National and international pressure to address child trafficking in India has failed to produce results. The Supreme Court of India has also issued directives to the government to take the matter seriously. But there has been little effort to link increasing cases of missing children with the flurry of trafficking. In fact, India is now a destination and a place of origin and transit for human trafficking. For two decades, there has been a steady rise in the trafficking of children from the region due to increasing trans-border mobility.

There is little effort on the part of the official agencies to link up child trafficking with cases of abduction, forced labour, child labour and child marriage. During 2019, a total of 96,295 kidnapped or abducted persons (22,794 male and 73,501 female) were found, out of which 95,551 were rescued alive. However, in 2019, 2,260 cases of human trafficking were also registered as compared to 2,278 cases in 2018, showing little decrement of 0.8%[19]. Anti-trafficking laws focus on sexual exploitation and have ignored more recent reasons for child trafficking which include domestic, commercial, industrial or bonded labour; tourism; and other forms of exploitation, such as organ sale, adoption, begging, criminal activity or camel jockeying.

Despite legal prohibition, India continues to have 10.1 million (3.9% of the total child population) child labourers. Cases of labour migration are also linked to child trafficking. Child marriage is also considered to be a major cause of child trafficking and there is hardly any respite from this rampant social evil even after the passing of the Prohibition of Child

[19] *available at:* https://www.deccanherald.com/national/average-79-murder-cases-in-india-daily-in-2019-kids-victim-in-66-kidnappings-ncrb-data-895294.htm (last visited on Dec. 21, 2020)

Marriage Act, 2006. Some facts[20] are given below regarding increasing human trafficking in India:

- Cross-border and cross-state trafficking is increasing. At the source location, it continues to be people known to the children that initiate the process.

- Women and girls choose sex work on their own choice as they earn more money here in comparison to other occupation.

- Earlier, sex work was brothel based. But it is now increasingly decentralized to a range of distant locations as well as to a range of venues. Likewise, sex trade is increasing more rapidly in smaller cities.

- Platforms like WhatsApp, facebook, Instagram and other social media apps are making it easier for consumers and pimps to interact and move at short notice. Traffickers are using technology to stay invisible as well as to lure victims. Likewise, online sex trafficking is increasing.

II. Legal milestone to Combat Child Trafficking in India:

Even though India has turned into a hotbed of human trafficking, the Indian government along with some international organizations has taken several anti-trafficking measures to protect child against traffickers.

1. The Constitution of India:

The Indian constitution explicitly prohibits trafficking of human beings and forced labor and makes both offences punishable. Art. 23(1) of the Constitution of India provides that: "traffic in human beings and forced labor are prohibited and any contravention of this of this provision shall be an offence punishable in accordance with law." Further, art. 39(e) &

[20] *Supra* note 14.

39(f) imposes a duty on the State to direct its policy towards securing "that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

2. The Immoral Traffic Prevention Act, 1956:

The Suppression of Immoral Traffic Act 1956, amended as the Immoral Traffic (Prevention) Act in 1978 and later in 1986, was in response to the ratification of the International Convention on Suppression of Immoral Traffic and Exploitation of Prostitution of Others in 1950. The Act provides severe punishment for trafficking in children, particularly by focusing on traffickers, pimps, landlords, and brothel operators while protecting underage girls as victims.

The ITPA is focused on trafficking for the purpose of prostitution. Accordingly, it outlaws the running of a brothel[21]; living on the earning of a prostitute[22]; procuring; inducing or taking a person for the sake of prostitution[23]; and detaining a person in a place where prostitution is carried on[24]. It also provides for rescue and rehabilitation of victims/survivors of trafficking[25], action against exploiters and increased punishment for trafficking offences involving children. In general, punishment is stringent under the Act and ranges from seven years to life imprisonment[26]. Various anti-trafficking actions have been taken to tackle child trafficking in India. In fact, **The Immoral Traffic**

[21] The Immoral Traffic (Prevention) Act, 1956 (Act No. 104 Of 1956), s.3.
[22] *Ibid*, s. 4.
[23] *Ibid*, s. 5.
[24] *Ibid*, s. 6.
[25] *Ibid*, s. 16.
[26] *Ibid*, s. 5B.

Prevention Act, 1956 is proved important legal instrument addressing trafficking of human beings in the country.

3. The Indian Penal Code, 1860:

The code in various ways makes trafficking an offence and provides severe punishment.

- Kidnapping or maiming a minor for the purpose of begging.[27]
- Procuring a minor girl for sexual exploitation;
- Importation of a girl from a foreign country for sexual exploitation.[28]
- The Criminal Law (Amendment) Act, 2013. though it's primarily concerned with rape and sexual assault, it incorporates a range of other offences dealing with exploitation of women and child for sexual and commercial activities i.e., Human trafficking. The amendment act substituted existing sec. 370 which dealt with buying or deposing of any person as a slave. The newly substituted sec. 370 criminalizes anyone who recruits, transports, harbors, transfer or receives a person using certain means (including threats, force, coercion, fraud, deception, abduction, abuse of power, or inducement) for purposes of exploitation.
- Section 370A (1) specifically deals with trafficking of children, Whoever, knowingly or having reasons to believe that a minor has been trafficked, engages such minor for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than five years, but which may also extend to seven years, and shall also be liable to fine.

4. Juvenile Justice (Care and Protection of Children) Act, 2015:

[27] The Indian Penal Code, 1860(Act 45 of 1860), s. 363 A.
[28] *Ibid*, s. 366B.

The JJ Act was one of the most comprehensive Acts to deal with the issue of children. It provides a universal definition of the child as 'any person below the age of 18 years.' To address the issues of children with greater sensitivity, the Act separates children into two broader categories:

- Children in need of care and protection;
- Children in conflict with law (a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence)

The Act identifies certain offences as special offences[29] against children and addresses trafficking of children for beggary and labour a crime. The Act recognizes sale and procurement of children for any purpose as a cognizable and non-bailable offence with punishment of rigorous imprisonment that may extend to five years and shall also be liable to a fine of one lakh rupees[30]. It also prohibits the use of children for begging, vending, peddling or smuggling of drugs and pychotropic substances, for labour, as child combatant by non-state, self styled militant groups and for illegal adoption[31].

2. Prohibition of Child Marriage Act, 2006 - Sections 12 (a), (b) and (c)

Although this law is essentially about prohibiting child marriage, recognizing that there is a lot trafficking for and through marriage, it categorically states that a child marriage is recognized as invalid and hence null and void especially where some of the following means are used for the purpose of marriage –

[29] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act No. 2 Of 2016), S. 74-89.
[30] *Ibid*, s.81.
[31] *Ibid*, s.78.

- use of force or,
- inducement or,
- kidnapping or,
- sale or,
- trafficking or,

If after the marriage the child bride is sold or trafficked for immoral purposes, then such marriage is also held invalid and declared null and void.

3. Protection of Children from Sexual Offences Act, 2012:

POCSO is one of the most recent legislation to deal with the crime of child sexual abuse. It brings in more stringent punishments and covers a wide range of sexual offences against children. Often, children are sexually abused either in the process of trafficking or after the process of trafficking and POCSO, being a special law with severe punishment provisions, has a greater role to prosecute both the actual perpetrators of sexual abuse and the traffickers who can be booked for abetment.

4. National Policy for Children, 2013

The State shall protect all children from all forms of violence and abuse, harm, neglect, stigma, discrimination, deprivation, exploitation including economic exploitation and sexual exploitation, abandonment, separation, abduction, *sale or trafficking for any purpose or in any form*, pornography, alcohol and substance abuse, or any other activity that takes undue advantage of them, or harms their personhood or affects their development[32].

[32] Ministry of Women and Child Development, Excract On National Policy For Children, 2013 (May, 2013).

Project on "strengthening the law enforcement response in India against trafficking in persons through training and capacity building":

The Government of India through the Ministry of Home Affairs, in association with the United Nations Office on Drugs and Crime has initiated a two-year project for training the Law Enforcement Officers on human trafficking in four States, namely Maharashtra, Goa, West Bengal and Andhra Pradesh. A Project Steering Committee has been constituted for steering, guiding and monitoring the project. Through a series of training programmes, the project is expected to raise the awareness levels of the Law Enforcement Officers (police & prosecutors) on the problem of human trafficking and further build up their capacity to better investigate the crime and prosecute the offenders perpetrating such crime.

Anti –Human Trafficking Units (AHTUs): The Ministry of Home Affairs approved a proposal to establish 332 Anti Human Trafficking Units (AHTUs) in various districts across the country. The Ministry provides financial assistance to the States for setting up the AHTUs. So far, 264 AHTUs have been set up all over the country[33].

Web Portal on Anti-Human Trafficking: A Website on Anti Human Trafficking (stophumantrafficking-mha.nic.in) was launched in February 2014. It is a vital IT tool for sharing information among stakeholders, States/UTs and civil society organizations for effective implementation of Anti-Human trafficking measures.

Ujjawala Scheme: The Ministry of Women and Child Development is implementing "Ujjawala" –a Comprehensive Scheme for Prevention of Trafficking and Rescue, Rehabilitation, Re-integration and Repatriation of Victims of Trafficking for Commercial Sexual Exploitation. The

[33] Lok Sabha Secretariat, New Delhi., Reference Note on Human Trafficking In India (July 2018)

number of beneficiaries under the scheme in the year 2017-18 and 2016-17 each is 6,175. The Schemes provide shelter, food and clothing, counseling, medical care, legal aid and other support, vocational training and income generation activities for the victims. Trafficked victims are also given shelter in 8 Short Stay Homes and Swadhar Homes, meant for women in difficult circumstances.

Bilateral and Multilateral Mechanisms: India has signed Bilateral Memoranda of Understanding with Bangladesh and UAE for prevention of human trafficking. India has been engaging with several countries and has responded positively to the proposals for entering into MOUs on human trafficking with interested countries to curb the menace. India is a signatory to the SAARC Convention on Prevention and Combating Trafficking in Women and Children in Prostitution. India has ratified the UN Convention on Transnational Organized Crime (UNCTOC), which has as one of its 9 Protocols, "Prevention, Suppression and Punishment of Trafficking in Persons, particularly Women and Children"[34].

Thus, presently trafficking of persons is dealt under the provisions of various Acts but there still remain some deficiencies in the existing legislations and therefore, after considering the issue relating to prevention, rescue and rehabilitation of victims of trafficking, the Union Government has drafted a comprehensive legislation, namely, ***the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018,*** covering all aspects related to trafficking of persons and is expected to be introduced in the Parliament.

[34] *Supra* note 32.

VI. Judicial Approach to Combat Child Trafficking:

The Supreme Court and various High Courts have been taking up steps for strengthening the machinery and various statutory agencies regarding trafficking. It has also been monitoring several schemes of rehabilitation for trafficked victims. The court, as a guardian and protector of the Fundamental Rights, has delivered many landmark judgments for strengthening Govt. response in combating trafficking. The Supreme Court has also set up various panels and committees to ensure the rights of trafficked victims and also to ensure Implementation of the laws. Apart from this, the courts have also been creating mechanism for victim protection and various guidelines for victims' rights in terms of court procedure. The Supreme Court has also stepped in and issued directions to control the problem of missing children. Some of the various proactive landmark judgment related to combating trafficking are mentioned below:

***People's Union for Democratic Rights* v *Union of India*[35],** While considering a PIL for the emancipation of Bonded Labour, the Supreme Court defined the meaning of Forced Labour vis a vis Article 23 of the Constitution of India. With increase in Labour trafficking across the country the judgment is very relevant in order.

***Laxmi Kant Pandey* v *Union of India*[36]** The court has laid down procedures to check and monitor inter-country adoptions so that the children can't be trafficked.

[35] (1982) 3 SCC 235.
[36] (1984) 2 SCC 244.

***Vishal Jeet* v *Union of India*[37],** The Supreme Court while putting on record the growing exploitation of young women and children for prostitution and trafficking reported that in spite of the stringent and rehabilitative provisions of law under various Acts, it cannot be said that the desired result has been achieved. The Court after bestowing deep concern on this matter laid down guidelines for formation of Advisory Committee in all States and Central Government to oversee and prepare programme for combating trafficking.

***Gaurav Jain v. Union of India*[38],** While clearly stating the violation of Right to Life of trafficked victims, the Supreme Court ordered the Union Government to form a Committee to frame the National Plan of Action and to implement it in mission mode.

***Prerna* v. *State of Maharashtra*[39],** the Court laid down process for care and Protection of Trafficked Children. It also made rule that Advocates cannot appear before the Child Welfare Committee to take custody of trafficked child.

Hori Lal* v *Commissioner of Police, Delhi & Ors Respondents (14.11.2002) Guidelines for search of Missing Children laid down by Supreme Court. The court observed that the Trafficking is an organized Crime and stringent measures are required to combat it.

***Bachpan Bachao Andolan* v *Union of India*[40] ,** In a writ petition concerning exploitation and trafficking of children in Circuses, the Supreme Court issued direction to form special scheme for rehabilitation of Children rescued from circuses.

[37] *(1990) 3 SCC 318.*
[38] (1997) 8 SCC.
[39] 2003 (2) Mah.L. J. 105.
[40] 2011 SCC (5) 1.

***Budhadev Karmaskar* v *State of West Bengal*[41],** The H'ble Supreme Court appoints a Panel to monitor and Suggest Rehabilitation scheme for Trafficked Sex Workers and Trafficked Victims.

These are some important and relevant Supreme Court rulings which highlight that child trafficking is pervasive in the Indian society since ages and to combat it, not only the Govt. took it seriously but the judiciary also came forward to check this menace and provide better protection and safety to the trafficked victim by safeguarding their human and fundamental rights.

VII. Conclusion & suggestions:

The above study makes clear that human trafficking, especially children, is a type of modern slavery and needs a holistic, multi-dimensional approach to solve this complex issue. It's a disease that hampers the dignity and health of sufferers. In battle against trafficking, governmental and non-governmental organizations, civil society, pressure groups and international bodies, all have to play an important role and work in concert. Law cannot be the only tool to address this complex social problem. Some suggestions are given below which may be fruitful to remove this menace from the society:

- By providing information and raising awareness among public about trafficking and its dire consequences. Media, television, radio, social media may be effective modes to implement it.
- Local authority should create compulsory high-quality education, employment opportunities and income generation programme.

[41] (2011) 11 SCC 538.

- Need to include gender centered education curricula in schools and introduce subjects of child sexual abuse and trafficking.
- Need to identify those children who are at risk. Before doing anything else, Governments and NGOs should figure out those groups of children which are most vulnerable and face the highest rate of risk of being trafficked.
- By enacting strict laws, arresting and imprisoning traffickers and sometimes also the exploiters. The aim should be to stop those who are involved in trafficking of children by putting them behind the bar.
- Need to demonstrate that those who commit such crime against children will be caught, prosecuted and punished.
- Trafficked children need to be protected and assisted. Guidelines should be issued to make sure that they receive support in which their best interest and rights are protected.
- Effective preventive efforts must also address reasons why children have been trafficked, and not only focus on addressing child trafficking or sexual exploitation when it happens.
- Need to set up programme or campaign to deal with cultural or societal values that encourage child trafficking.
- Need to encourage cooperation between groups in different countries to make sure that victims of transnational trafficking receive support and protection, and are not returned to unsafe situations.
- Community should be sensitive about trafficking; community members should be motivated to keep an eye for irregular movement of child victims across area regarding traffickers and hideouts.

If all above recommendations are duly abide, the future of our country will be safe as Children are backbone of a Nation. On their health and prosperity, the health and development of a Nation depends. John F.

Kennedy rightly quoted that *"Children are the world's most valuable resource and its best hope for the future".*

RE-ALIGNING THE INDIAN LEGAL EDUCATION SYSTEM FOR LEARNING, INNOVATION AND SERVICE

Dr. Amita Verma[*], *Smriti Kanwar*[**]

Abstract

While the goals and objectives of legal education have stayed consistent through the centuries, its curriculum and methodology have been frequently revised or 'modernised' to meet the socio-political needs of the times. As our lives and our worlds become more digital and technology-driven, many of the well-settled principles and traditional processes of law are facing unique challenges. These challenges within and beyond the legal system require a re-imagining of interdisciplinarity. Meaningful interdisciplinarity requires adequate resource allocation, administrative support and progressive collaboration between law schools and technological education institutions as well as law schools and the industry. It cannot be had by simply putting together a team of diverse experts and stakeholders; it must be incorporated in the national legal education regulatory framework and nurtured at institutional level. It requires that law students and innovators are provided the right exposure and training techniques to ensure legally nuanced and accountable adoption and promotion of technology. There are many international examples of such law-technology interdisciplinarity at the level of law schools or as public-private initiatives. For a sustainable and inclusive 'Digital India', such involved 're-imagination' of the role of the

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law schools in policy formulation, regulatory guidance and outreach programs is also essential.

Keywords: *legal education, India, technology, interdisciplinarity.*

Introduction

Discussions about legal education in the country often commence with an acknowledgement of importance of law in a society and end in a list of lingering systemic and infrastructural issues which have plagued legal education for the past few decades. One of the primary goals of every regulatory and reform policy is to provide a relevant and up-to-date curriculum which prepares the law students for the future and encourages law school-driven research to assist justice dispensation as well as policy formulation.

The present work seeks to focus on current needs and future readiness but from the perspective of the goals and objectives of legal education, the skills that it must impart as well as the challenges in meeting the objectives of law in a more technologically interconnected world. There is nothing wrong in conceptualising law in terms of the judicial processes – whether in a court, pertaining to ADR platforms or the intricacies of corporate law. But we have to remember that legal history is also often political and socio-economic history. This places a heavy burden on legal education – to develop and hone skills that anticipate and cater to the needs of all stakeholders in society. At times, this entails innovating and guiding the process of policy, regulation and enforcement to meet the challenges that many stakeholders may not be aware of. It is also important to remember that any proposed investment or improvement in

the field of legal education – infrastructural and otherwise, is modular and technologically neutral to allow for future functionality.

This work is divided into three parts. Part I introduces the goals of legal education especially in speaking to the future. The fact that the regulatory authorities are already grappling with gaps in the present policies makes it harder to achieve these goals. Part II deals with how the legal field approaches interdisciplinarity – in legislations, policies and judicial adjudication, and what are challenges therein. It focuses on the technology-oriented interdisciplinarity with wider socio-economic considerations which are essential for meaningful rule of law in the future. Part III lists some potential schemes that may be utilised to meet technology-related interdisciplinarity challenges in legal education.

Part I

1. Legal Education – Means to an End?

The aim of legal education is not just to produce lawyers for litigation. It seeks to 'sensitise the society to self-identify its problems and provide justice to all via rule of law' and to enhance 'human sensibility'. Further, law schools are expected to facilitate an understanding of law and government as well as productive participation in the society by means of critiques, contributions or research. And for all the products of a law school, education therein attempts to "furnish skills and competence, the basic philosophies and ideologies for creation and maintenance of just society".[1]

[1] University Grants Commission, Report of the 'The Curriculum Development Centre in Law, Vol. 1 (1990).

The traditional perspective of the legal education is well known and appreciated. It is important that law students grasp how the rules have developed, what is the underlying rationale, and what is the nexus between legal and social history. Such a foundation makes it easier for them to identify and extract the principles underlying the existing legal provisions. But legal education is also meant to provide the students with adequate experience to apply these provisions and rules, to challenge legal concepts, and to adapt their application as and when required.

After all, courts and litigation may form the primary focus of the legal profession, but the legal profession has a broader role in society. History shows that law school staff as well law graduates have to operate as "architects of social structures" and "designer of speaking to the future".[2] This requires a contextually-driven understanding of different ideologies and values at one end and the appreciation of competence-driven potential and limitations of the field on the other. They have to be mindful of the core values recognised, developed or protected through the ages as well as the need to adapt to changes in society and the myriad transactions it may engage in.

But the present brand of fast-evolving and globally deployed technologies pose a particular challenge for law - in terms of their impact on the society and rule of law. Technology impacts all aspects of lives – professional and private. It enables business transaction, governance,

[2] University Grants Commission, Towards a Socially Relevant Legal Education, A Consolidated Report of the UGC's Workshop on Modernization of Legal Education 1975-1977, available at https://www.ugc.ac.in/oldpdf/pub/report/1.pdf (last visited on Jun 06, 2020).

communication and now even dispensation of justice. Different technologies and the changing nature of our digital world affect law, its processes and accordingly, legal education. Technology has brought a global intertwined web of products and services in touch with more than seven billion people along with complicated terms and conditions as well as serious future implications on even their basic human rights. However, it is not clear whether the users, consumers and even the creators or policy makers understand the scope of these technologies and the framework within which they are presently operating.

If law schools wish to fulfil their role as 'specialists in the high art of speaking to the future', merely following the prescribed curriculum or mandating internships is not enough. They have to embrace and at times, initiate greater interdisciplinarity with subjects and areas not traditionally viewed as within the purview of law schools. They will have to innovate and think out of the box in order to dispense the heavy burden of equipping the entrants to the legal field with the updated tools.

2. Legal Education – Fight to Maintain Standards

The last decade has seen a sharp increase in the number of law schools in the country. Many of the 1500-plus centres of legal education struggle to meet the present Bar Council of India (BCI) standards despite regular evaluation and inspections, let alone prepare for the future.[3] Despite the

[3] The BCI is the nodal body which sets standards for legal education and grants recognition to Universities for imparting legal education. A degree from a recognised university/institution is necessary for enrolment as an advocate. The BCI also advises the University Grants Commission (UGC) in formulation of curriculum of law schools, especially the papers essential for training a professional lawyer. But it is the Curriculum Development Committee (CDC) of the UGC which fills in the details. Specifically, s. 7(h) of the Advocates Act 1961 (Act 25 of 1961) empowers the BCI "to promote legal education and to lay down standards of such

prescription of certain minimum standards, an increasing number of concerns are being voiced about the decreasing standard of education. It could perhaps be attributed to the lack of specificity and inherent lags in the prescribed standards. Some even blame the decreasing standards on a shift to commercialisation of education, instead of focussing on law as a service to society. There are frequent discussions about the lack of or the inadequacy of practical training in law schools and how the situation may be rectified.

The sharpest evidence in favour of the above alleged shortcomings in the prevailing legal education paradigm is the unanimous resolution passed by the General Council of BCI on 11th August 2019, imposing a three year moratorium on receiving new proposals and grant of fresh approvals to all law centres of legal education/institutions. BCI had taken a similar step in 2016 when a decision was made to halt approvals for new law colleges and State governments were requested to not issue any 'No Objection Certificate' (NOC) for a minimum of two years. Nevertheless, more than 300 NOCs were issued subsequently.

The above described conflict is important to highlight the current state of our legal education system and its shortcomings in meeting a developmental policy that was formulated in 2008 (including the BCI

education in consultation with the Universities in India imparting such education and the State Bar Councils" and s. 12 of the University Grants Commission Act 1956 (Act 3 of 1956) requires the UGC to take all such steps as they think fit "for the promotion and co-ordination of university education and for the determination and maintenance of standards of teaching, examination and research in universities".
Such a collaboration is intended to help foster 'core' litigation skills as well as promote other non-litigation tools and expertise which are essential for any legal professional, not only practising lawyers, to discharge their duties and excel in their profession.

draft Rules of Legal Education, 2019) but has, in fact, large similarities with policy on legal education from the 1970s. The urgency of reforms to refocus on quality over quantity is a dire need of the hour. But this point of view unfortunately overshadows the equally important and fast emerging challenge that legal education is facing - ability to prepare law students for a digital world and an interconnected society.

Part II

3. Interdisciplinarity

"Interdisciplinarity is a means of solving problems and answering questions that cannot be satisfactorily addressed using single methods or approaches."

- Julie Thompson Klein.[4]

There are two distinct ways of looking at interdisciplinarity. One that focuses on 'the interaction between two disciplines' and the other, where a discipline is used as an opportunity for application of another. The common understanding of 'interdisciplinary' within legal studies refers to the application of ready-made categories and logic of a particular discipline (economics, philosophy and sociology among others) to re-describe law and legal processes.[5]

[4] Rose Voyvodic and Mary Medcalf, "Advancing Social Justice Through an Interdisciplinary Approach to Clinical Legal Education: Legal Assistance of Windsor" 14 *Wash. U. J. of L. & Pol.* 115 (2004).

[5] Mariana Valverde, "Between a Rock and a Hard Place: Legal Studies Beyond Both Disciplinarity and Interdisciplinarity" 1 *C. A. L. J.* 52 (2014). Interdisciplinarity is different from multidisciplinarity, though these terms are used interchangeably at times. The former is aimed at promoting "reciprocal interaction between disciplines" for generating "new common methodologies, perspectives, knowledge", while the later refers to different disciplines "working on a problem in parallel or sequentially, and without

It is submitted that that unlike legal scholars who borrow the methodology of another discipline to apply it to the raw material of law (requiring selection, integration, and synthesis), practitioners of interdisciplinary analysis of law bring to the table some distinctive reflections and knowledge.[6] Such interdisciplinary research can be a 'catalyst for breakthroughs and innovations' and serve as an efficacious tool to meet the novel complex socio-economic and cultural challenges in an increasingly digital world.

3.1 The Present Outlook

There is a classic tale that talks about how different people viewing an elephant are unable to understand or assess what is, in fact, an elephant. Connolly argues that "legal problems are like elephants", and if one attempts to examine them from one perspective alone, he will end up with a "distorted image of the whole" and thus, unable to address the real issue at hand.[7] To identify, understand and resolve legal problems,[8] legal professionals often need to examine them from the perspective of multiple disciplines. This need to understand and work with experts from other fields applies not only to litigation but to almost all types of law-related professions. Such collaboration with other professionals is

challenging their disciplinary boundaries". - Daniel Le Métayer, Mathias Bossuet, *et al*, "Inter-disciplinarity in practice: Challenges and benefits for privacy research" 33 *Comp L & Sec. Rev.* 864-869 (2017).

[6] Hanoch Dagan and Roy Kreitner, "The Interdisciplinary Party" 1 *C. A. L. J.* 25 (2014).

[7] Kim Diana Connolly, "Elucidating the Elephant: Interdisciplinary Law School Classes" 11 *Wash. U. J. of L. & Pol.* (2003).

[8] Problem-solving in law is based on interdisciplinary framework as there are multiple factors giving rise to affecting the cause(s) of action. A client may narrate an incident with "several variables, causes and effects", which a legal professional may view as cause(s) of action to determine the way forward. Andrea L Johnson, "Teaching Creative Problem Solving and Applied Reasoning Skills: A Modular Approach" 34 *Cal. West. L. Rev.* 389, 391 (1998).

essential for legal professionals to meet the needs of their clients and fulfil their broader responsibility to society.

Barkan observes that:[9]

"Many legal decisions cannot be made apart from their economic, social, historical, and political contexts, and are often dependent upon business, scientific, medical, psychological, and technological information. Non-legal but legally relevant information is commonly used, among other reasons, to generate inferential support for factual premises, to support policy arguments, and to support or challenge legal rules. Secondary, interdisciplinary, and non-legal sources can suggest how cases and statutes should be used and why particular legal arguments should win. They can bring some coherence to legal thinking."

There are many studies that indicate practical utility of interdisciplinarity in law with reference to domestic violence,[10] family law,[11] environmental law,[12] among others within the formal legal setup. It helps litigants, lawyers and judges determine whether intervention is needed as well as the appropriate method and intensity of such intervention. The approach has shifted the focus from fact-finding from a social distance to situation-driven and accordingly 'more realistic and effective resolutions'.

[9] *Supra* note 7.
[10] Lisa Colarossi and Mary Ann Forgey, "Evaluation Study of an Interdisciplinary Social Work and Law Curriculum for Domestiv Violence" 42 *J. Soc. Work Educ.* 307 (2006).
[11] Barbara A Babb, "An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective" 72 *Ind. L. J.* 802 (1997).
[12] Dave Owen and Caroline Noblet, 'Interdisciplinary Research and Environmental Law" 41 *Ecol L. Q.* 894 (2015).

Legal professionals must know when to seek the assistance of professionals or experts' from other fields.[13] They must develop and nurture 'mutual understanding' which in turn will eliminate confusions and delays, and help avoid poor decision-making caused by professionals unprepared to interact with one another. For instance, many countries require patent attorneys to either have a scientific degree or significant scientific/technical training.

As law is often viewed and taught in reference to something else – law 'of' something, it is safe to presume that a large percentage of law subjects (and classes) embrace interdisciplinarity at a theoretical level. In an Asian context, undergraduate law programs tend to lean towards a general training in different aspects of law. But in recent years, there has been a shift even at the undergraduate level wherein 'industry-focus' and 'socio-legal orientation' have been catch-phrases to ensure effective acquisition of related knowledge, skills, and experience as well as its productive application or diffusion.

3.2 Benefits of Interdisciplinary Education

An interdisciplinary approach enables students to connect ideas and concepts across different disciplines, enhances their learning experience, and permits exploration of fruitful application of knowledge so gained. Given that every learner gets to pick his elective subject as per his interest and professional goals, it may result in greater investment on part of the learner and make the education more purposeful. It also encourages the development of critical thinking skills such as comparing and contrasting,

[13] Joan S Meier, "Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice" 21 *Hofstra L. Rev.* 1296-97 (1993).

consolidating and synthesising along with hypothesising and application.[14] Thus, an interdisciplinary approach makes the classes more interesting for law students and those in or associated with the legal field, in addition to:[15]

a) development of essential analytical skills,

b) development of essential practical skills,

c) provision for teamwork training,

d) enhancement of future marketability with greater skills and specialisation,

e) understanding and appreciation of the important roles of non-lawyer actors, and

f) recognition of limitations of legal training.

Interdisciplinarity also reinforces the unity-of-knowledge ideal and encourages cooperation to minimise blind spots. Newcomers play an important part by acting as the "deliberate outsider" – someone willing to ask questions and challenge acknowledged or unacknowledged presumptions and processes.[16] The discussions in such collaborations can be purpose or output-specific which may require either a narrow and focused perspective or a broad overview. It encourages better utilisation of intellectual and physical resources of academic institutions.

[14] *What are the Benefits of Interdisciplinary Study?* Open Learn (Apr 09, 2015) *available at*: http://www.open.edu/openlearn/education/what-are-the-benefits-interdisciplinary-study (last visited on Apr 21, 2018).

[15] *Supra* note 7. 'Their cognitive development allows them to see relationships among content areas and understand principles that cross curricular lines. Their psycho-social development gives them the ability to understand people and to look at situations from various viewpoints' - *Supra* note 8 at 79.

[16] Neil H Buchanan, "*Why Interdisciplinary Legal Scholarship Is Good for the Law, the Academy, and Society at Large"* (Jan 19, 2012) *available at*: https://verdict.justia.com/2012/01/19/why-interdisciplinary-legal-scholarship-is-good-for-the-law-the-academy-and-society-at-large (last visited on Apr. 21, 2018).

3.3 The Interdisciplinarity That We Need

In view of ever-increasing complexity of society and its processes, there is a need to merge specialisation in law and an interdisciplinary approach, but the same is proving to be a challenge for the legal field.[17]

Interdisciplinarity plays an important role in knowledge creation and research funding. Similarly, outsourcing of legal services, development of artificial intelligence (AI) attorney platforms such as ROSS that is geared to eat up the jobs of lawyers specialising in finances and taxation among other factors have started a belated investigation into what digitalisation and 'Information, Communication and Technology' (ICT) means for law, legal field and legal education.[18]

In an interconnected world, the stakes are high for everyone regardless of their location, socio-economic status and political leanings. Popular schemes of e-governance, artificial intelligence-driven applications in the medical or financial field, etc cannot be studied in isolation. The lines between public and private functioning blurs when funding, R&D or infrastructure of one is utilised by the other. Additionally, these technology-driven schemes and the technology used therein impact our fundamental freedoms and rights, governance structures and communities.

[17] Jan M Smits, "Law and Interdisciplinarity: On the Inevitable Normativity of Legal Studies" 1 *C. A. L. J.* 76 (2014).
[18] *Supra* note 17 at 79.

It is important that law schools initiate, participate and promote discussions with the policy-makers, industries and the public on:

a) the ethics, regulations, and laws that apply to technology,

b) the role of technology in delivery of legal services, justice systems, and the law itself.

However, such projects can succeed only when staff and law students are first exposed to factors affecting the development, utility and enforcement of concerned laws and associated fields. Many law colleges treat their online legal database subscriptions as advertising tools to showcase their 'progressive' outlook and 'future-readiness'. But a limited set of login IDs to be shared between teaching staff, researchers and students does not prepare one for a lifetime of reading and research that one may be required to undertake as educators, policy makers, practising lawyers, etc.

We have to be careful to not equate efficiency with justice. There already are many examples of conflict between technology and the application of existing laws and regulations.

Use of technology in justice dispensation systems requires a conversation about whether it allows for social nuances or enables case-specific application in different legal forums, and promotes inclusivity. And if yes, how. We must enquire how the concepts of fairness, accountability, and transparency associated with the judicial process and the rule of law will be impacted by technology. A default design built on a faulty data set can do a lot of harm especially given the general lack of transparency in algorithmic functioning. Similarly, the design of different platforms

and services along with the cost of different systems can impact the legal system as well as rule of law.

Technology also has a role in case management and delivery of legal services. It impacts how lawyers prepare and argue, whether and how litigants can participate at different stages of the dispute resolution process as well as how judges access or view material that will determine their decision. There are additional requirements within the formal legal setup with its unique but well established notions of confidentiality and privileged communication that may differ from the broader jurisprudence on the topic. Just like public discussions in policy matters, open courts in the legal system and oversight mechanisms over the private sector allow for a system of transparency and fairness, the processes and procedures enabled, assisted or made possible by technology also need to have an accountability mechanism. Further, technology has to take in the requirement of allowing space for participation of all stakeholders, even those who are not digital natives.

The role that law schools play in policy guidance especially in technological innovations is changing as seen in the European Union. To address the questions about the value of general regulations versus field specific rules requires that the law school facilitate a practical, if not thorough understanding, of the associated fields. The work from law schools, the research from their centres or collaboration and efforts of their graduates can help guide policy which appreciates the interconnection among different fields. Additionally, to undertake research that furthers the goal of law and promotes justice, researchers should understand the process of creation and deployment of technology before studying its impact.

4. Challenges in Implementing Interdisciplinarity

". . . Simply bringing together a group of professionals does not necessarily ensure that they will function effectively as a team or make appropriate decisions. Effective teamwork does not occur automatically".

- Elizabeth Cooley.[19]

The 'black letter' law cannot be ignored to cater for solely socio-legal research or impact of technology in our society. But the requirements of legal practice cannot be the only focus of law schools.[20]

Interdisciplinary legal clinics, research centres and think tanks are considered essential for any good law school. But we have to understand that the goal and value of interdisciplinarity depends on prior preparation of those engaged in the same. Potential interdisciplinarity requires that collaboration and team-work be taught at law school. Participants have to be equipped with tools and techniques to help them anticipate and meet the needs of the other team members to make the interaction productive.[21]

Because legal education tends to involve solitary learning, it is easy to overlook the importance of collaboration at the planning and implementation stage with outside departments and instead, rely on the final research of such departments. Further, conventional curriculum and

[19] *Supra* note 7.
[20] *Supra* note 17 at 78.
[21] '[I]t is no easy task to achieve cooperation in a group of professional individuals with different educational backgrounds, value systems and problem solving methods to move toward a common goal or to solve a common problem'. *Supra* note 7 quoting Carolyn S Bratt.

methodologies used in most law schools do little to promote the development of 'self-assessment skills' which can help law students examine the impact of their behaviour (or omissions) upon others or to nurture the ability to relate, interlink and measure one's 'personal experience and professional development'.[22] This ability is important to spot policy and legislative lacunae as well as foresee future challenges of present acts and omissions. However, one must also acknowledge the great structural differences in subject matter, relationship, paradigms and theories in STAM/STEM sciences versus those in law and legal education. Similar differences are also noticeable when we compare social sciences and law.

Generally, interdisciplinary programs face problems of –

a) competing ideologies,

b) barriers to acquiring the skill of collaboration, and

c) cultural differences between professions, among others.

Connolly has identified a few problem areas that hinder interdisciplinarity in law schools, namely:[23]

a) Physical and psychological isolation,

b) Logistics,

c) Faculty marginalisation,

d) Nature of instruction,

e) Potential overreaching,

f) Professional Identity and Accreditations,

g) Parochialism and Costs, and

h) Appropriate Methodology and Documentation.

[22] *Supra* note 4 at 125-126.

[23] *Supra* note 7.

There is also a lack of quality research on how new technologies connect, impact and even divide us. This may be attributed to lower levels of awareness of their importance or the scope of technological interconnectedness. The struggle of universities and colleges to meet the basic standards also aggravates the problem further - it accords a low priority to future-proofing, associated training and research. This may result in a vicious circle of constantly playing catch-up, instead of discharging their responsibility towards their students, society at large and rule of law.

Part III

5. Suggestions

The ideals of modernisation and social relevance have always been important for reforms in legal education and the legal profession. The advent of technology and in particular, ICT, has made them a top priority. Universities must create an environment where their staff and students can engage with technology and explore what the future holds. Apart from some medium and long-term strategies with broad goal markers, certain stop-gap measures are also advisable.

Legal Aid Clinics are in an ideal position to empower and familiarise clients with technology-assisted justice dispensation as well as train students to recognise the problem areas therein. Existing programs can be expanded further with the involvement of State Bar Councils, local lawyer associations, Legal Aid Authorities and NGOs. Universities can undertake grassroots research in their private-public partnerships aimed at innovation while appreciating legal mores.

In addition to the space and supporting infrastructure, it is important that the law schools create positions, provide resources and actively seek funds for a diverse staff. The way academic publications add value to an institute's portfolio, different research and potential service models and product prototypes emerging from such programs or collaborations could also bring credit - academic and social, to an institution.

For instance, European legal professionals participated in the European Union's (EU) 'PrivAcy pReserving Infrastructure for Surveillance' project (PARIS). Similarly, many information law centres of notable universities provided valuable input and feedback in the formulation and implementation of the EU's General Data Protection Regulation (GDPR). The staff and researchers at these centres are producing work that is of great importance to the EU, its member states, the European Court of Justice, transnational corporations and European citizens. Their work also holds great value for users of technology elsewhere, providing not only technology-related insights but also highlighting the broader set of regulations required ensuring meaningful protection and exercise of the basic human rights.

Commitment to establish and nourish university or college-level centres, institutes or projects which focus on the different issues emerging from the intersection of law and technology would go a long way. For instance, an interdisciplinary pilot project at the Faculty of Law, University of Helsinki - Legal Tech Lab, focuses on the examination and experiments

on legal tech and digitalisation of legal practices.[24] Similarly, technology-focussed educational institutes are also seeking more in-depth collaboration with law schools as seen in Stanford and Massachusetts Institute of Technology (MIT) among others.

Incubation-stage law and technology collaboration provides a distinct advantage in innovation, business and governance. A fruitful collaboration would help experts from different fields to quickly identify non-viable solutions and lay groundwork for innovative remedies. Such collaborations would also help streamlining processes and the creation of common functional terminology to avoid confusion. But the technical engagement must be of a high quality - enabling development of reasonable legal perspectives on issues ranging from problem definition, design, data collection and data cleaning, to training, deploying, monitoring, and maintaining products, platforms and systems.

The training would also help ensure that law students and legal professionals are able to clearly communicate about complex and multi-dimensional legal issues with the other experts and professionals. This will help minimise the dangers of unintentionally exacerbating socio-economic inequalities or biases and even avoid absurdity due to inappropriate application of law.

There is empirical evidence to suggest that a considerable number of stakeholders in a digital society and economy are unaware of how

[24] Riikka Koulu, Lila Kallio, *et al.*, "Law and Digitalisation - An Agenda for the Future" (Legal Tech Lab, University of Helsinki, May 2017) *available at:* https://www.helsinki.fi/sites/default/files/atoms/files/ltl-report3.2.pdf. (last visited on Jun 06, 2020).

technology impacts them. This results in extremely low levels of multi-stakeholder engagement even when the governments or authorities seek feedback and suggestions from the public at large. A safe and permissive law school environment that encourages law students - prepped with interdisciplinary exposure, to examine, compare, praise or criticise already existing or proposed legislations, amendments and policies could lead to new or alternative solutions based on diverse viewpoints.

[Note: Majority of the law schools already face chronic infrastructural issues. Policy and fiscal commitments for improving the same are urgently required. It is also submitted that these investments are likely to provide high rates of return given the higher levels of innovation, greater levels of legal protection, and evolution of situation-appropriate legal processes they will make possible.]

Conclusion

"You can't have everything. Where would you put it?"

-Steven Wright.[25]

The pedagogical aim on an interdisciplinary curriculum in law schools has to be to provide a systematic approach while introducing a broad array of materials to stimulate holistic learning. The courses must prepare law students to appreciate and connect the dots that will arise in their professional lives – to enable students to see how law, technology, society, and the economy are all closely interwoven and that the world is improved when individuals from diverse backgrounds collaborate to

[25] *Supra* note 6 at 25.

create value.[26] We must also acknowledge the benefits of knowledge and methods of other disciplines that helps improve the functioning of law and the law itself and thus, our 'policies and society' as a whole.[27]

It may be also argued that those operating in the legal system are more adept at recognising whether the internal legal standard for incorporation has been met or not. [28] Thus, there must be a caveat included that the processes and results of interdisciplinary approach have a minimum of two distinct audiences with their unique requirements and accordingly, neither of them ought to be given precedence or function in isolation.[29] This has also led to a demand of academic lawyers who can better appreciate and satisfy the internal demands of laws in practice than an average social scientist.[30]

To prevent an interdisciplinary approach overshadowing the 'legal approach', greater rigour in the manner of incorporation of other disciplines as well as equal emphasis on maintaining connection to the legal profession is essential.[31]

[26] David Orozco, "The Evolution of an Interdisciplinary Course: Intellectual Property and Business Strategy" 19 *Tech & Innovation* 525 (2017).
[27] *Supra* note 16.
[28] Theunis Robert Roux, "The Incorporation Problem in Interdisciplinary Legal Research: Some Conceptual Issues and a Practical Illustration" 2 *Erasmus L. Rev.* 59 (2015).
[29] *Supra* note 28.
[30] *Supra* note 28.
[31] *Supra* note 28. A 2017 paper exploring the interactions between HSS and HS research has found that though Chinese scholars of humanities and social sciences are increasingly taking an interdisciplinary approach to research from the 'hard sciences', it has been noted that research from hard sciences require better 'practical integration and effective communication between scholars' to derive such benefits. The paper also notes that the an interdisciplinary approach is aimed at 'generating new perspectives and solving problems' in a particular field instead of mastering multiple disciplines. Accordingly, the authors recommend special focus on integration of knowledge among different fields, allowing apt yet different methodologies to be adopted in each field as per its requirements. - Meijun Liu, Dongbo Shi and Jiang Li,

There is always a danger that interdisciplinary courses may not be comprehensible to some students or that the course material is uncoordinated or superficial and thus, results in illusory knowledge of no substantive worth. At the same time, economic turmoil along with declining employment avenues in the legal field mandates that law schools prepare their students for a world that is changing.

Law is a discipline in transition. While the need for reform-oriented legal research has been acknowledged multiple times in the past, the present scenario poses different challenges brought to the forefront by 'an interlocking and interdependent world'.[32] Judges worldwide are in a similar situation. They need legal research or scholarship that deals with the novel issues of law, characterised by fast evolving technology and 'de-territorialised' connectivity in a space with obvious lack of and/or lag in express legislative provisions, so that 'generalist judges delving into a case in an unfamiliar field' are better informed, can think about the consequences of their methods and decisions, and may take an 'out-of-box' approach to these new challenges.[33]

This is also a great opportunity for the law schools to showcase their role in society. Their outreach programs and research can help formulation of pro-people policies and laws. This is particularly important given that a

"Double-edged Sword of Interdisciplinary Knowledge Flow from Hard Sciences to Humanities and Social Sciences: Evidence from China" 2017 (12) 9 PLoS ONE (Sept. 21, 2017) 12, *available at*: http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0184977 (last visited on Apr. 21, 2018).

[32] Martha C Nussbaum, 'Cultivating Humanity in Legal Education' 70 *Uni. of Chi. L. Rev.* 265 (2003).

[33] Erwin Chemerinsky, "Why Write?" 107 *Mich. L. Rev.* 890 (2009).

large percentage of Indians who struggle in accessing justice are also likely to be unfamiliar with the new technologies which have come to invisibly impact their livelihoods, healthcare and even socio-cultural norms. Law graduates with the right exposure will further this cause as they move on to their distinct career paths – better able to analyse the process of creating technologies, the consequent challenges in implementing law, and the impact of merger of real and virtual worlds on the rule of law.

"In the end, it is often the ability to integrate different disciplinary strands of thought that give the best chance of contributing to the advancement of new knowledge and the creation of new frameworks and perspectives. Lawyers are law schools' best known product, but it takes a university to create the environment necessary to truly 'train' lawyers by educating them."

- Alfred C. Aman, Jr.[34]

[34] *Supra* note 7.

NEGOTIATING THE BOUNDARIES:
An analysis of *The Gambia v. Myanmar*

Ankur Sood[*]

Abstract

In the backdrop of the alleged actions of Myanmar against the Rohingyas in Rakhine, Kachin and Shan States and the proceedings initiated before the ICJ by The Gambia against Myanmar, this paper examines the scope and ambit of the international law on state responsibility for genocide. The paper opens with a brief introduction. The first part of the paper examines the manner in which genocide came to be included as a crime under international law and seeks to provide a legal understanding of the concept. The second part deals with the dispute between The Gambia and Myanmar, and the proceedings before the ICJ. The third part discusses the author's analysis and concluding remarks in respect of the dispute in the context of the international legal principles on genocide. The paper also moots the possibility of preventive directions by the ICJ in cases where commission of genocide is not found, but a group nonetheless remains vulnerable.

Keywords: *Rohingyas, genocide, international law, human rights.*

I. Introduction

The United Nations Human Rights Council (**UNHRC**) by its resolution no. 34/22 dated 24th March 2017 established the Independent International Fact-Finding Mission on Myanmar to investigate

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allegations of human rights abuse by Myanmar State forces in Rakhine, Kachin and Shan States. The Fact-Finding Mission issued its Report on 17th September 2018 pointing to human rights violations against the ethnic Rakhine and systemic oppression and persecution of the Rohingya community.

Following the Report, the Gambia approached the International Court of Justice (**ICJ**) to initiate proceedings against Myanmar for acts of genocide perpetrated in violation of the Convention on the Prevention and Punishment of the Crime of Genocide (the **Genocide Convention**).[1]

In the backdrop of the alleged acts of Myanmar State against the Rohingyas in Rakhine, Kachin and Shan States and the proceedings initiated before the ICJ by The Gambia against Myanmar, this paper examines the scope and ambit of the international law on state responsibility for genocide. Specifically, the paper delves into the requirement of *dolus specialis* – an essential element of genocide – and explores the distinction of the crime of genocide from the broader contours of international human rights regime. The paper opens with a brief introduction. The first part of the paper examines the manner in which genocide came to be included as a crime under international law and seeks to provide a legal understanding of the concept. The second part deals with the dispute between The Gambia and Myanmar, and the proceedings before the ICJ. The third part discusses the author's analysis and concluding remarks in respect of the dispute in the context of the international legal principles on genocide. The paper also moots the

[1] Convention on the Prevention and Punishment of the Crime of Genocide (Adopted 9 December 1948, entered into force on 12 January 1951) 78 UNTS 277.

possibility of preventive directions by the ICJ in cases where commission of genocide is not found, but a group nonetheless remains vulnerable.

II. Genocide: History and Conceptual Foundations

The word genocide was first invented by Raphael Lemkin, a jurist and lawyer from Poland. Deeply affected by the Armenian genocide and the Holocaust in Poland,[2] he campaigned for the recognition of genocide as an international crime on the basis that 'if the killing of one man was a crime, and is not a matter of negotiations between the guilty and the policemen, the destruction of millions of people should also be a crime'.[3]

Later, in his seminal work titled 'Axis Rule in Occupied Europe', he defined the term "genocide" in the following manner:

'By 'genocide' we mean the destruction of a nation or of an ethnic group. This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing)…. It is intended rather to signify a coordinated plan of different actions aiming at

[2] See United States Holocaust Memorial Museum, 'Coining a word and championing a cause: The story of Raphael Lemkin', available at < https://encyclopedia.ushmm.org/content/en/article/coining-a-word-and-championing-a-cause-the-story-of-raphael-lemkin>, accessed 15 February 2021.

[3] Raphel Lemkin, *Totally Unofficial Man,* in Samuel Totten, Steven Jacobs (eds.) *Pioneers of Genocide Studies* (Transaction Books, New Brunswick) p 365 – 399, p. 367.

the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.'[4]

Genocide, as per Lemkin's original idea, encompassed a wide spectrum of acts – including not just killing or physical destruction, but also economic, political, intellectual, and cultural destruction.[5] At this time, genocide was not recognized, under international law, as a criminal act. Lemkin, along with other similarly minded persons, made remarkable efforts towards the addition of genocide as a crime under international law. The Nuremberg Trials, after World War II, accorded some recognition to the term 'genocide' by using it as a descriptive term, but not as an independent criminal act.[6] On 11 December 1946, the General Assembly of the United Nations (**UNGA**), for the first time, declared that genocide is a crime under international law condemned by the civilized world.[7]

The declaration of the UNGA defined genocide as the denial of the right to existence of a human group. As per the declaration, such an act shocks the conscience of mankind and violates the moral laws accepted by all of humanity. The UNGA resolution recognized that genocide would constitute a crime under international law.[8]

[4] Raphel Lemkin, *Axis Rule in Occupied Europe: Laws of occupation, analysis of government, proposals for redress* (Carnegie Endowment for International Peace, Division of International Law, Washington D.C., 1944) p. 79.
[5] Douglas Singleterry 'Ethnic Cleansing' and Genocidal Intent: A Failure of Judicial Interpretation? [2010] Genocide Studies and Prevention p. 39, p. 44. See also Lemkin, n. 5, pp. xi-xii.
[6] UN Office on Genocide Prevention and the Responsibility to Protect, Guidance Note 1 'When to refer to a situation as "Genocide".
[7] United Nations General Assembly (11 December 1946) The Crime of Genocide, Document A/Res/96(1).
[8] ibid.

The UNGA declaration also called upon the Economic and Social Council to undertake studies to prepare a draft convention on the crime of genocide that would be considered for adoption by the UNGA.[9]

Ultimately, the Genocide Convention was adopted by the UNGA on 9 December 1948. Article 1 of the Genocide Convention confirms that genocide, whether committed in time of peace or war, is a crime under international law.[10] Article 2 defines the term 'genocide' in the following manner:

> 'In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.'

[9] ibid.

[10] Article 1 of the Genocide Convention states: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'

Article 3 lays down the acts connected with genocide that are liable for punishment under the convention – genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and even complicity in genocide. Article 8 permits the signatories to the Genocide Convention to apply to the competent organs of the United Nations (**UN**) to take appropriate action to prevent genocide. Article 9 provides for submission of disputes relating to interpretation, application or fulfilment of the Genocide Convention to the International Court of Justice.

The Genocide Convention moved away from Lemkin's broad and all-encompassing conception of genocide to the narrower confines of violent activity.[11] The narrower definition under the Genocide Convention abandoned Lemkin's broad concept laid down by Lemkin by excluding economic, political, intellectual, and cultural destruction.[12]

Thereafter, the ICJ was called upon by the UNGA to render an advisory opinion on the position of a State that attached reservations to its signature of the Genocide Convention. The ICJ opined that if the reservations made by a State are compatible with the object and purpose of the Genocide Convention, the State will be regarded as a party to the

[11] Martin Shaw, *What Is Genocide?* (Polity Press, Cambridge, 2007) p. 20.

[12] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* [2015] ICJ Rep 3 p. 64, paragraph 139, where it was held that: 'The Court recalls that, in 2007, it held that the intent to destroy a national, ethnic, racial or religious group as such is specific to genocide and distinguishes it from other related criminal acts such as crimes against humanity and persecution.' citing to Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). Judgment. 26 February 2007. I.C.J. Reports 2007, 43, pp. 121–122, paragraphs 187–188).

Genocide Convention.[13] On the other hand, if the reservations made by a State are incompatible with the object and purpose of the Genocide Convention, the State will not be regarded as a party to the Genocide Convention.[14] The Gambia has acceded to the Genocide Convention without any reservations, while Myanmar has ratified the Genocide Convention with limited reservations to Articles VI and VIII.[15] Both countries are accepted as parties to the Genocide Convention.

Since then, genocide has been recognised and accepted as an international crime in a number of treaties, including the Rome Statute of the International Criminal Court (**ICC**)[16], the Statute of the International Criminal Tribunal for Rwanda (**ICTR**)[17] and the Statute of the International Criminal Tribunal for the former Yugoslavia (**ICTY**)[18]. The definitions under these statutes are similar to the one used in the Genocide Convention. Genocide has also been specifically added as a crime in the domestic laws of some countries. For instance, in the United Kingdom, The Genocide Act of 1969 criminalised genocide in line with the Genocide Convention. This was followed by the International Criminal

[13] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Reports 1951, p. 15.
[14] ibid.
[15] Myanmar's reservations to the Genocide Convention are: '(1) With reference to article VI, the Union of Burma makes the reservation that nothing contained in the said Article shall be construed as depriving the Courts and Tribunals of the Union of jurisdiction or as giving foreign Courts and tribunals jurisdiction over any cases of genocide or any of the other acts enumerated in article III committed within the Union territory. (2) With reference to article VIII, the Union of Burma makes the reservation that the said article shall not apply to the Union.' Myanmar has not made any reservation to Article IX which deals with the jurisdiction of the ICJ.
[16] Rome Statute of the International Criminal Court (17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 Article 6.
[17] art. 2/2.
[18] art 4/2.

Court Act, 2001 which extended the UK's jurisdiction to prosecute British nationals or residents for genocide committed abroad after 2001.[19]

A key and essential element for establishing the commission of genocide is the existence of a 'genocidal intent'. The Guidance Note 1 issued by the UN Office on Genocide Prevention and the Responsibility with the intention of providing guidance on the correct usage of the term[20] clarified that the element of 'intent', which is often hard to prove, is an essential pre-condition to be established by a careful analysis of the facts before rendering that a finding that genocide has been committed.[21]

In its ruling in *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ inter alia dealt with the issue of 'intent', which is an essential element in establishing genocide.[22] It was held that genocide consists of 'acts' and an 'intent' – in addition to the physical act, a specific mental intention to destroy an identified group must also be clearly manifested.[23] The ICJ laid emphasis on the element of 'specific intent' or '*dolus specialis'* for establishing genocide. The ICJ also distinguished the '*dolus specialis'* from the element of intent inherent in the acts themselves – the intent

[19] Joint Committee on Human Rights of House of Lords and House of Commons (11 August 2009) 24th Report titled 'Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims'. HL Paper 153 and HC 553. Session 2008-09.

[20] UN Office on Genocide Prevention and the Responsibility to Protect, Guidance Note 1 'When to refer to a situation as "Genocide"' states that: 'It is extremely important that United Nations officials adhere to the correct usage of the term, for several reasons: (i) its frequent misuse in referring to large scale, grave crimes committed against particular populations; (ii) the emotive nature of the term and political sensitivity surrounding its use; and (iii) the potential legal implications associated with a determination of genocide. This note aims to provide guidance on the correct usage of the term "genocide," based primarily on legal rather than historical or factual considerations.'

[21] ibid.

[22] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] I.C.J. Reports 2007, p. 43.

[23] Paragraphs 186, 187 and 189.

manifested must be to destroy the protected/ identified group. In the absence of such 'specific intent' or '*dolus specialis'*, genocide cannot be said to have occurred.

The ICJ has distinguished 'ethnic cleansing' from 'genocide'. The ICJ relied on the travaux preparatoires of the Genocide Convention to point out that while drafting the Genocide Convention, a proposal to include 'measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment' was not accepted as it was found to deviate from the original concept and meaning of genocide.[24] The ICJ decided that the '*dolus specialis'* required for genocide is different from that of ethnic cleansing.[25] Thus, ethnic cleansing, though a crime distinct crime under international law, cannot be equated with genocide.

On the other hand, the Commission of Experts established by the Security Council took the position that ethnic cleansing, which is often perpetrated through murder, torture, arbitrary detention, extrajudicial executions, rape and sexual assault, confinement of civilian population, forcible removal and displacement of population, military attacks on civilians or threats thereof and destruction of property, constitutes a crime against humanity and could fall within the acts proscribed under the Genocide Convention.[26] On 18 December 1992, the UN General Assembly also

[24] ibid [190]; *Prosecutor v. Stakic* Judgement ICTY-97–24-T (31 July 2003) at 519.
[25] ibid.
[26] UNSC, 'Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution' (1994) UN Doc s/1994/674.

passed a resolution *inter alia* noting that ethnic cleansing and mass expulsions of civilians are a form of genocide.[27]

While some texts suggest that there exists possibility of an inter-linkage between ethnic cleansing and genocide[28] and even that ethnic cleansing is a warning sign that genocide may follow[29], the prevailing view amongst scholars is that ethnic cleansing would not, by itself, constitute genocide.[30] The central reasoning for the distinction is the element of intent: in ethnic cleansing, the prevailing intent is the expulsion of a population, whereas the *dolus specialis* required for genocide is the physical destruction of a population.[31] The Gambia, in its application before the ICJ against Myanmar, acknowledges and accepts that the acts of ethnic cleansing and genocide are distinct.[32]

It is also well established that the principles laid down in the Genocide Convention are a part of customary international law.[33] Meaning thereby that irrespective of States' ratification of the Genocide Convention, they

[27] UNGA, 'The situation in Bosnia and Herzegovina, UN Doc' (1992) UN Doc A/RES/47/121.
[28] Norman Naimark, *Fires of Hatred: Ethnic Cleansing in Twentieth-Century Europe* (Harvard University Press, Cambridge MA, 2001) pp. 3–4.
[29] William Schabas, *Genocide in International Law*, (2nd edn. Cambridge University Press, Cambridge, 2009) p. 234.
[30] ibid [227 and 233]; See also Martin Shaw n. 12, at 37.
[31] Singeterry n. 6 at p. 46.
[32] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (Application Instituting Proceedings and Request for Provisional Measures) < https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf> accessed 21 September 2020 [4].
[33] ICJ. Advisory Opinion, n. 14, Paragraph 23, where it was opined that: 'The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge"'. See also ICJ. Bosnia and Herzegovina v. Serbia and Montenegro, n. 23, p. 110-111, paragraph 161.

would be bound by the principle that acts of genocide are prohibited under international law and all States have an obligation to prevent and punish genocide. The ICJ has previously ruled that the prohibition of genocide is a pre-emptory norm of international law[34] and already existed in customary international law.[35]

III. Contours of and Developments in The Gambia v. Myanma

Gambia's Application and Submissions before the ICJ

The Gambia's application before the ICJ alleged Myanmar has adopted, taken and condoned acts, including killing, causing serious bodily and mental harm, inflicting conditions that are calculated to bring about physical destruction, imposing measures to prevent births, and forcible transfers, against the Rohingya community – a distinct ethnic, racial and religious group that resides primarily in Myanmar's Rakhine State and has done so for centuries.[36]

The Gambia placed strong reliance on multiple UN investigations and reports of international bodies, including the account of Ms. Yanghee Lee – the UN Special Rapporteur – and the findings of UN Human Rights Council's Independent International Fact-Finding Mission on Myanmar (**UN Fact Finding Mission**).[37] Based on these reports, The Gambia alleged in its application that:

[34] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, [2006] I.C.J. Reports 2006, p. 6, Paragraph 64.
[35] Croatia v. Serbia, n. 13, Paragraph 95.
[36] The Gambia's Application, n. 33, p. 1, Paragraph 2; Gambia v. Myanmar, Record of the Public Sitting of the ICJ (10 December 2019), p. 22.
[37] ibid 3 and 4; UNHRC (2018) n.1.

1. The people of Myanmar fall under many distinct ethnic, cultural, linguistic and religious groups. The Bamar, who are predominantly Buddhist, are Myanmar's largest ethnic group comprising 60-70% of the population.[38] The Rohingya – who reside primarily in Rakhine State – constitute an ethnic and religious minority in Myanmar and even in the Rakhine State.[39] Prior to the events in issue, the Rohingya lived in villages where the large majority of inhabitants were ethnic Rohingya.[40] In 2012, many Rohingya were confined in enclosed camps by the Myanmar military[41] and Myanmar forcibly transferred Rohingya men, women and children into displacement camps.[42]
2. Myanmar's laws discriminate against the Rohingya, including: exclusion from 'national races' which disentitles them from citizenship[43], discriminatory restrictions are imposed on the right to marry and bear children[44] and on movement[45].

[38] ibid [26]; UNHRC (2018) n. 1 at 84 & 100.
[39] ibid [27].
[40] ibid [28].
[41] Ibid. 3 and 14, Paragraphs 6 and 35. See also UNHRC, n.1 at 512 and 525.
[42] UNHRC (2018) n. 1 at 520; See also *Gambia v. Myanmar*, n. 37 at 37 & 38.
[43] ibid [32]; Section 3 of the Burma Citizenship Law, 1982 provides that: 'Nationals such as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period anterior to 1185 B.E., 1823 A.D. are Burma citizens.' Section 4 provides that: 'The Council of State may decide whether any ethnic group is national or not.' Myanmar has prepared a list of 135 legally recognised ethnic groups of Myanmar. Persons outside this group are not entitled to full citizenship and are only entitled to acquire Associate Citizenship or Naturalised Citizenship. Section 11 of Constitution of Myanmar (ratified on 29 May 2008) provides that: 'For National races with suitable population, National races representatives are entitled to participate in legislature of Regions or States and Self-Administered Areas concerned.' In terms of Section 17(c), such participation is mainly to undertake their national race affairs.
[44] ibid [33]; See also Regional Order 1/2005 of the Maungdaw Township Peace and Development Council adopted in 2005.
[45] ibid [34]; See also UNHRC (2018) n. 1, at 525

3. Myanmar is conducting a systematic campaign of hate propaganda, which is evident from the derogatory, racist and exclusionary statements issued by State officials against the Rohingya.[46] Myanmar has also promoted a campaign of dehumanization of the Rohingya by non-State actors.[47]

In the backdrop of the above, the main allegations in the Application emanate from the alleged actions and 'clearance operations' against the Rohingya by the Myanmar military (the Tatmadaw) and other Myanmar security forces starting from October 2016.[48] These operations, it is alleged, intend to destroy the Rohingya as a group through mass murder, rape and other forms of sexual violence, and the systematic burning and destruction of their villages. The main allegations pertaining to the 'clearance operations' are described below:

1. October 2016: It is alleged that following a minor incident of violence by the Rohingya against the Border Guard Police of Myanmar, the Tatmadaw and other State Authorities commenced brutal and targeted 'clearance operations' against the Rohingya community in a designated 'lockdown zone'. In these operations, the State forces inter alia shot, killed, forcibly disappeared, raped,

[46] ibid [37], [45]; See also UNHRC (2018) n. 1, at 85, 224 & 606.
[47] ibid [37] - [44]. See also Kjell Anderson (17 October 2014) 'The Enemy Next Door: Hate Speech in Burma'(*The Sentinel Project*, 2014) <https://thesentinelproject.org/2014/10/17/the-enemy-next-door-hate-speech-inburma/.> accessed 7 March 2020; 'Myanmar's Investigative Commissions: A History of Shielding Abusers' (*Human Rights Watch*, September 2018) <https://www.hrw.org/sites/default/files/supporting_resources/201809myanmar_commissions.pdf.> accessed 1 April 2020.
[48] ibid [19] [47]

gang raped, sexually assaulted, detained, beaten and tortured the Rohingya; burned down and destroyed their homes, mosques, shops and Qur'ans burnt and destroyed[49]; and carried out mass executions.[50] Myanmar military and security forces committed large scale sexual violence against the women.[51] No steps have been taken to hold any person or agency accountable – a Government Investigation Commission absolved the Forces of any wrongdoing.[52]

2. August 2017: Following certain minor attacks by the Arakan Rohingya Salvation Army (**ARSA**), the State Forces once again commenced 'clearance operations'.[53] In these operations, the State Forces used rocket launchers, mortars, guns, tortured, raped and killed the inhabitants and burnt their houses.[54] The killing was deliberate and targeted, which is evident from the manner in which the State Forces moved from house to house, pulling people out of their homes and shooting them.[55] There was widespread, systematic, deliberate, organized and targeted destruction of Rohingya-populated areas in the three northern

[49] ibid [48] [54]; See also UNHRC (2018) n. 1; In *Prosecutor v. Akayesu* (Judgment) (ICTR-96-4-T), Chamber 1, 2 September 1998, paragraph 731, the International Criminal Tribunal for Rwanda held that when committed with the requisite intent, rape and sexual violence can constitute genocide.
[50] ibid 21, [52]; See also UNHRC (2018) n. 1 at 1085 & 1086
[51] ibid 24, [62]; See also UNHRC (2018) n. 1 at 1091 & 1092
[52] UNHRC (2018) n. 1, at 1071 & 1564; Ambassador Bill Richardson (former United States Permanent Representative to the United Nations) and Kobsak Chutikul (a Thai diplomat) resigned from Myanmar's Advisory Board for the Committee for Recommendations on Rakhine State citing that the Board's investigation was a sham and would only divert attention from the issues. See Human Rights Watch (September 2018), n. 48.
[53] The Gambia's Application, n. 33 at 69 to 98
[54] UNHRC (2018) n. 1, at 752, 961, 884 & 911
[55] The Gambia's Application, n. 33 at 77; See also UNHRC (2018) n. 1 at 893.

Rakhine State townships of Maungdaw, Buthidaung, and Rathedaung.[56]

3. On-going Actions: The Gambia's application also points out that contrary to Myanmar's public stand, the UN Fact Finding Mission's September 2019 report finds that the Rohingya continue to be a target of government attack – there has been no change[57] with 30 Rohingya villages being destroyed in November 2018 and May 2019.[58] The Myanmar Government has severely restricted the Rohingyas' access to food and adopted a policy of forced starvation by denial of access to rice fields and markets, confiscation of agricultural lands, confiscation of food, and killing/ confiscating of cattle and livestock.[59]

The Gambia stated that it approached the ICJ because Myanmar resisted all calls from The Gambia and the international community to stop the genocidal activity[60] and is, instead, deliberately destroying evidence of the genocide[61].

On the key and essential issue of 'genocidal intent', The Gambia's stand is that 'genocidal intent' has to be objectively assessed from

[56] UNHRC (2018) n. 1.
[57] The Gambia's Application, n. 33, at 99; UNHRC 'Detailed findings of the Independent International Fact-Finding Mission on Myanmar' (2019) UN doc. A/HRC/42/CRP.5, at paragraph 2.
[58] The Gambia's Application, n. 33 at 100; See also UNHRC (2019) n.58, at paragraph 128.
[59] The Gambia's Application, n. 33, at 102 to 109; See also UNHRC (2019) n. 58 at 116, 156, 158, 159, 139, 123, 126, 161, & 163.
[60] The Gambia's Application n. 33, at 117; *The Gambia v. Myanmar*, Record of the Public Sitting of the ICJ (10 December 2019), n. 37, p. 19.
[61] The Gambia's Application n. 33, at 118.

the facts and in the case of Myanmar, the 'genocidal intention' is palpably visible. The Gambia's application refers to the following facts and materials to establish existence of 'genocidal intent':

1. The UN Special Rapporteur on the situation of human rights in Myanmar and the UN Special Advisor on the Prevention of Genocide both observed that the situation in Myanmar reflects a genocidal intent.[62] The UN Fact Finding Mission also concluded that: 'the factors allowing the inference of genocidal intent are present. '[63] In fact, it was specifically recommended that Tatmadaw should be investigated and prosecuted in an international criminal tribunal for genocide.[64] \

2. This conclusion was reiterated and strengthened in the UN Fact Finding Mission's Report in September 2019.[66] In the Report, seven indicators were identified to infer 'genocidal intent'[67]:

[62] The Gambia's Application, n. 33, at 7 & 9; See also UN OHCHR (12 March 2018) Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22806andLangID=E> accessed 15 March 2020

[63] The Gambia's Application n. 33 at 12; UNHRC (2018) n. 1, at 1441.

[64] UNHRC (2018) n. 1, p. 1; On 2 March 2019, the OIC passed a resolution endorsing this view. See OIC (2 March 2019) Resolution No. 61/46-POL on The Work of the OIC Ad hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas at 176-177 <https://www.oic-oci.org/docdown/?docID=4444andrefID=1250> accessed 13 January 2020.

Correspondents: Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, on his visit to Bangladesh to assess the situation of Rohingya refugees from Myanmar <https://www.un.org/sg/en/content/sg/note-correspondents/2018-03-12/note-correspondents-statement-adama-dieng-united-nation> accessed 15 December 2019.

[66] UNHRC n. 58, at 58 & 213.

[67] ibid [224].

(i) the extreme brutality exhibited by the Tatmadaw against the Rohingya;

(ii) the level of organization in the Tatmadaw's destructive activities;

(iii) the extent of the sexual violence that occurred during the 'clearance operations';

(iv) the derogatory, racist and exclusionary statements made by Myanmar officials;

(v) the discriminatory plans and policies that were aimed at reducing the proportion of Rohingya population;

(vi) the State's tolerance for hate statements against the Rohingya by public officials and others;

(vii) the failure to investigate and prosecute even egregious violations of human rights law.

3. The existence of 'genocidal intent' can also be inferred from Myanmar's laws that explicitly discriminate against the Rohingya. Moreover, the public statements of Myanmar's State officials and the authorities' tolerance – even promotion – of rhetoric of hatred and contempt against the Rohingya also point to the existence of genocidal intent.[68]
4. The Gambia also relied on the systematic and concerted manner in which the actions against the Rohingya were carried out.[69] The glorification of the actions of the Tatmadaw, Myanmar's assigning blame to the Rohingya and the lack of any accountability against

[68] The Gambia's Application, n. 33, at 32 & 37; *The Gambia v. Myanmar* n. 37, p. 28 to 30.
[69] The Gambia's Application n. 33 at 54.

the perpetrators were cited as strong indicators of 'genocidal intent'.[70]

Myanmar's Submissions before the ICJ

Myanmar's stand is that The Gambia's application failed to present a true picture as it ignored the historical underpinnings of the issue and dispute.[71] Myanmar strongly emphasized the lack of any 'genocidal intent', which is the critical element for establishing the crime of genocide.[72] The Gambia, as per Myanmar, had sought to infer 'genocidal intent' from conduct that is insufficient to for this purpose.[73]

The conduct adverted to in The Gambia's application does not solely point to a 'genocidal intent' – other explanations are very much possible – and, therefore, the application fails to make out a case for genocide.[74] Myanmar explained the situation in Rakhine state as part of an ongoing conflict between the ARSA, an organized armed Buddhist group, and Myanmar's Security Forces.[75] The ARSA is seeking independence or autonomy for Rakhine or Arakan from Myanmar.[76] The resulting conflict

[70] The Gambia v. Myanmar n. 37 pp. 30 to 35; See also Yanghee Lee, Isabel Todd, 'Myanmar's military companies should be sanctioned' (*Al Jazeeera*, 26 November 2019) <https://www.aljazeera.com/indepth/opinion/myanmar-military-sanctioned-191120120-104014.html> accessed 13 January 2020.

[71] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (Verbatim Record 11 December 2019), < https://www.icj-cij.org/files/case-related/178/178-20191211-ORA-01-00-BI.pdf> last accessed 21 September 2020 p. 12.

[72] Ibid 24 and 25.

[73] *Croatia v. Serbia* n. 13 at 510.

[74] The Gambia v. Myanmar n. 37, p. 26 to 28.

[75] ibid 13; See also El Lwin, 'Arakan Army claims responsibility for ferry attack in Rakhine' (*Myanmar Times*, 2 December 2019 <https://www.mmtimes.com/news/arakan-army-claims-responsibility-ferry-attack-rakhine.html> accessed 13 January 2020.

[76] The Gambia v. Myanmar, n. 37 at 13.

has caused displacement of civilians on a large-scale due to which Myanmar had to impose security restrictions, curfews and check-points to restrain movement due to the security situation.[77]

Myanmar addressed The Gambia's main allegation surrounding the 'clearance operations' in the following manner:

1. The term 'clearance operations', as per Myanmar, has been misinterpreted. In Myanmar's language, the correct term is '*nae myay shin lin yeh'* – i.e., clearing a locality or an area of insurgents or terrorists.[78] The operation is not targeted at any specific community, but rather at persons who are engaged in terrorist activity.

2. In October 2016, the ARSA attacked Maungdaw and Rathedaung Townships in Rakhine State and caused the death of nine police officers with hundreds of civilians being left dead or missing. The ARSA gradually grew in strength and scaled up its attacks that became more co-ordinated and comprehensive.[79] The so called 'clearance operations' are just the result of the Myanmar's Security Forces' attempts to respond to the violent acts committed by the ARSA. This was the start of an internal armed conflict between ARSA and Myanmar's Security Forces which lasted until late 2017. The conflict led to the mass exodus of Muslims from Rakhine

[77] ibid.
[78] ibid 15.
[79] 'Asia Report No. 292, (*International Crisis Group*, 7 December 2017) <https://legal-tools.org/doc/22qmxu> accessed 14 January 2020; See also The Gambia v. Myanmar, n. 37, p. 18.

into neighbouring Bangladesh. While on occasions excessive force was used in this conflict, the forces did not act with any 'genocidal intent'.[80]

3. The conflict is continuing on with even the Myanmar's army bases and military columns being attacked by the ARSA and insurgents.[81] There is no specific intent to physically destroy the Rohingya community, rather it is only an internal armed conflict. Even as per the UN Fact Finding Mission there have been only 10,000 deaths out of a population of well over one million.[82]

Myanmar denied that it has not taken any action against errant officials, but contended that such action has to follow the military justice system under Myanmar's Constitution of 2008.[83] Myanmar pointed to a number of legal inquiries, prosecutions and actions initiated by it into offences committed in the Rakhine State and to ensure that errant officials are punished. In this context, Myanmar referred to the following measures:

1. The Independent Commission of Enquiry (**ICOE**), an independent special-investigation procedure into allegations

[80] The Gambia v. Myanmar, n. 67, pp. 13 to 15, 18 and 20.
[81] ibid 20.
[82] ibid 38.
[83] Section 20(b) of Constitution of Myanmar (ratified on 29 May 2008) provides that: '(b) The Defence Services has the right to independently administer and adjudicate all affairs of the armed forces.' Section 293 of Myanmar's Constitution divides the judicial power between the regular courts, the Constitutional Tribunal and the Courts-Martial. Section 343 of Myanmar's Constitution provides that:
'343. In the adjudication of Military justice:
(a) the Defence Services personnel may be administered in accord with law collectively or singly;
(b) the decision of the Commander-in-Chief of the Defence Services is final and conclusive.'

relating to the offences in Rakhine State, established by the President of Myanmar. As on November 2019, the ICOE had collected 1,500 witness statements from all affected groups in Rakhine and interviewed 29 military personnel and 20 police personnel.[84]

2. The court martial launched by Myanmar's Office of the Judge Advocate General for allegations linked to the Gutar Pyin village incident on 25.11.2019.[85] The Office of the Judge Advocate General in Myanmar is well resourced with more than 90 staff members and a presence in all regional commands throughout the country.[86]

Myanmar emphasized that the events and situation in the Rakhine State have to be understood in the backdrop of decades of communal violence coupled with the prevailing low development and high poverty.[87] It was emphasized that measures are being taken to ensure Muslim youth attend university, a social cohesion project has been started in Maungdaw Township and a closure strategy for internally displaced persons camps has been adopted. Myanmar also committed to voluntary, safe and dignified repatriation of the displaced persons.[88] In fact, Myanmar has

[84] The Gambia v. Myanmar, n. 67, p. 16.
[85] ibid 16.
[86] ibid 17; With regard to formation of a Military Court of Inquiry to investigate incidents of terrorist attacks in Buthidaung-Maungdaw region in May 2019, see also Office of the Commander in Chief of Defence Services <http://cincds.gov.mm/node/2135> accessed 1 April 2020.
[87] ibid [19].
[88] ibid 20; See also Paragraph 37 of Chairman's Statement of The 35th ASEAN Summit Bangkok/Nonthaburi (3 November 2019) <https://asean.org/storage/2019/11/Chairs-Statement-of-the-35th-ASEAN-Summit-FINAL.pdf.> accessed 2 April 2020.

already entered into a MOU dated 23.11.2017 with Bangladesh to provide an organized framework for repatriation of displaced persons and another MOU with the UN Development Programme (**UNDP**) and the UN High Commissioner for Refugees (**UNHCR**) in June 2018 in relation to the repatriation effort.[89]

As per Myanmar, its prosecution and punishment of officers and soldiers and the steps taken by it for upliftment of the Rohingya muslims clearly establish the lack of any 'genocidal intent'. Myanmar pleaded for permitting its domestic justice system, based on co-operation between the civilian government in Myanmar and the military, to complete its process. The issue should not be externalized before the domestic process is completed.[90]

Myanmar also referred to the Application filed against it before the International Criminal Court alleging the crime against humanity of deportation given the huge cross-border flows from Myanmar into Bangladesh in 2017 based on the same incidents that form subject matter of the present case.[91] In terms of the Application, the specific intention alleged was to deport the Rohingya to Bangladesh as opposed to physical destruction of the Rohingya community, which would be the necessary pre-requisite for a case of genocide. This alternative specific intent was

[89] Ibid 65. See also UNHCR (22 August 2019). UNHCR Statement on Voluntary Repatriation to Myanmar <https://www.unhcr.org/news/press/2019/8/5d5e720a4/unhcr-statement-voluntary-repatriation-myanmar.html> accessed 2 April 2020.
[90] ibid 18.
[91] International Criminal Court, Prosecution's Request for a Ruling on Jurisdiction under Article 19 (3) of the Statute. Application under Regulation 46(3). 9 April 2018. Available at <https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF> accessed 12 March 2020, [42].

upheld by the Pre-Trial Chamber constituted by the ICC.[92] As per Myanmar, the contradictory claim regarding the specific intent before the ICC itself establishes that other explanations than 'genocidal intent' are possible.[93]

Myanmar challenged The Gambia's reliance on the statements of certain officials on the ground that Ms. Yanghee Lee did not make any direct reference to 'genocidal intent' and at the highest made general statements referencing the 'hallmarks of genocide' without giving any rationale.[94] Similarly, the other commentators did not give any definitive conclusion – hence, their statements cannot be relied on as the basis for finding 'genocidal intent'.[95] Myanmar also challenged the conclusions reached by the UN Fact Finding Mission on the grounds that the material was insufficient, it blurred important and established standards, lacked objectivity, and failed to make an impartial assessment.[96] The role of the UN Fact Finding Mission, as per Myanmar, was limited to reporting on the factual situation, it did not encompass making legal findings.[97] Thus, the UN Fact Finding Mission over-stepped its boundaries in rendering legal findings.

[92] International Criminal Court. People's Republic of Bangladesh/Republic of the Union of Myanmar. (ICC-01/19). Decision Pursuant to Art. 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, paragraph 108 available at <https://www.icccpi.int/CourtRecords/CR2019_06955.PDF>, [108] The finding of the Pre-Trial Chamber was: 'a reasonable prosecutor could believe that coercive acts towards the Rohingya forced them to flee to Bangladesh, which may amount to the crime against humanity of deportation.'

[93] The Gambia v. Myanmar n. 71, p. 29.

[94] ibid 31 and 32.

[95] ibid. 32 – 34.

[96] ibid 34.

[97] ibid 36; See also UNHRC 'Situation of human rights in Myanmar' UN Doc. A/HRC/RES/34/22 [11].

a) Provisional Measures Order of the ICJ

On 23rd January 2020, the ICJ issued an order in respect of the 'Request for the indication of provisional measures'.[98] In the order, the ICJ reached the following conclusions:

(a) Prima facie, pursuant to Article IX of the Genocide Convention, it has jurisdiction to examine and adjudicate the case;[99]

(b) Prima facie, The Gambia has the standing to submit to the dispute to the ICJ;[100]

(c) The existence of 'genocidal intent' is not required to be examined at this stage and the rights claimed by The Gambia are plausible;[101]

(d) There exists a link between the rights claimed and the provisional measures requested;[102]

(e) There is a real and imminent threat of irreparable prejudice to the rights invoked by The Gambia.[103]

In view of the aforesaid findings, the ICJ indicated the following provisional measures inter alia directing Myanmar to: (i) take all

[98] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*). (23 January 2020). Provisional Order on the Request for the indication of provisional measures.
[99] ibid [37].
[100] ibid [42].
[101] ibid [56].
[102] ibid [63].
[103] ibid [75].

necessary and possible measures to prevent the commission of acts falling under the ambit of Article II of the Genocide Convention; (ii) to ensure that its military and allied forces refrain from committing any such acts; (iii) to take measures for preservation of the evidence; and (iv) to submit a report to the ICJ on the measures taken.[104]

In the Provisional Measures Order, the ICJ specifically declined to give any finding on the central issue regarding the existence or non-existence of 'genocidal intent' at the current stage[105] and left the issue open for a later stage.

IV. Analysis and Concluding Remarks

There are two distinguishing features of genocide that deserve consideration in the present case:

1. Physical destruction: Under the Genocide Convention, the conduct constituting genocide does not include economic, political, intellectual, and cultural destruction, but is limited to the narrow confines of violent physical destruction.[106] This necessitates an

[104] ibid [86].
[105] ibid [56].
[106] See Stakic n. 25 where it was held that:
'518…. The element of physical destruction is inherent in the word genocide itself, which is derived from the Greek "genos" meaning race or tribe and the Latin "caedere" meaning to kill. It must also be remembered that cultural genocide, as distinct from physical and biological genocide, was specifically excluded from the Convention against Genocide….
519. It does not suffice to deport a group or a part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide. As Kreß has stated, "[t]his is true even if the expulsion can be characterised as a tendency to the dissolution of the group, taking the form of its fragmentation or assimilation. This is because the dissolution of the group is not to be equated with physical destruction". In this context the Chamber recalls that a proposal by Syria

examination of the specific conduct of Myanmar to assess if it qualifies as the violent physical destruction of the Rohingya.

2. *Dolus specialis*/ genocidal intent: The legal position that establishing 'genocidal intent' is essential to a finding of genocide is beyond the pale of doubt. The ICJ has consistently recognised the necessity of establishing 'genocidal intent'.[107]

The Gambia's allegations relating to Myanmar's discriminatory laws and hate speech targeting the Rohingya community, even if true, would reflect the poor human rights conditions in Myanmar. Such acts may not – by themselves – come under the ambit of violent physical destruction of the community that would constitute the crime of genocide. In this context, the ICJ in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*) laid down that the *travaux préparatoires* of the Genocide Convention show that the scope of 'genocide' was consciously limited to the physical or biological destruction of a community or group.[108]

The unequal legal rights regime and hate speech pointed out by The Gambia reflects the abhorrent treatment and a systematic human rights violation of the Rohingya at the hands of Myanmar's State authorities, but it is not indicative of an intention of physical destruction of the

in the Sixth Committee to include "[i]mposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" as a separate sub-paragraph of Article II of the Convention against Genocide was rejected by twenty-nine votes to five, with eight abstentions.'

[107] UN Office on Genocide Prevention and the Responsibility to Protect, (n. 21); *Bosnia and Herzegovina v. Serbia and Montenegro* (n. 23).

[108] *Croatia v. Serbia,* (n. 13) [136].

Rohingya. Given that the Genocide Convention encompasses only acts carried out with the intent of achieving the physical or biological destruction of the group, the unequal legal rights regime and hate speech would not – by themselves – be sufficient to constitute the offence. Myanmar's heavily criticised two child policy for the Rohingyas has been explained by it as necessary for maintaining balance of population and maintaining peace as the Rohingya's birth-rate is higher than that of other communities, which is acting as a source of ethnic tension in the region. While the policy is a measure that restricts births within the group, a viable alternative explanation does exist for the law. Moreover, the policy only restricts (as opposed to preventing) births. As such, the law by itself may not rise to the strict standard required for a genocide offence.

That leaves us with the key question of the 'clearance operations' carried out by Myanmar's Security Forces. While The Gambia and Myanmar agreed that these 'clearance operations' involved violence, both had starkly different understandings of the nature of the operations. The Gambia classified them as systematic and organised shooting, killing, rape, sexual assault and torture of the Rohingya. On the other hand, Myanmar treated them as *bona fide* operations to clear an area of insurgents and terrorists. The '*dolus specialis*', therefore, acquires great importance since The Gambia and Myanmar are clearly at odds on this aspect.

Previously, it has been recognised that intent being a mental factor which is difficult – even impossible – to determine, in the absence of a

confession, has to be inferred from a certain number of presumptions of fact.[109] In the present case, the facts and records disclose that:

1. The 'clearance operations' commenced after Myanmar's Security Forces were attacked by ARSA. The Gambia contends that ARSA's attacks were used as an excuse by Myanmar, while Myanmar cites these attacks as large scale internal armed conflict between ARSA and Myanmar's Security Forces.
2. As a result of the violence, there has been large scale displacement of Rohingya refugees, running into nearly a million, to Bangladesh.[110] As per the UN Fact Finding Mission's Report, there have been 10,000 Rohingya deaths as a consequence of the 'clearance operations'.[111]
3. Myanmar has entered into agreements and arrangements with Bangladesh, the UNDP and the UNHRC for repatriation of displaced persons. The displaced persons themselves have

[109] See. *Prosecutor v Musema* (Judgement) ICTR-96-13-T (27 January 2000) [166] – [167]; In Akayesu (n. 50) [523] it was held that: '523. On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.'

[110] See Moe Thuzar 'Repatriating the Rohingya: What Regional Cooperation Can and Cannot Do' 2019, Yusof Ishak Institute ISEAS 1, p. 4 where it is noted that: 'Over 700,000 Rohingya from northwestern Rakhine State fled across the Myanmar-Bangladesh border in August 2017 following the harsh and disproportionate military retaliation to ARSA attacks.' See also 'Rohingya Refugee Crisis: Learn the Facts' <https://www.unrefugees.org/news/rohingya-refugee-crisis-learn-the-facts/> accessed 3 February 2020.

[111] See ICC decision n. 92, at 71 and 106.

> expressed a desire to return to Myanmar but only if they are assured of dignified treatment, including respect for their religion, their ethnic identity, the return of their possessions, and a sustainable future for their children.[112]

The aforesaid facts reflect Myanmar's poor human rights record – perhaps even extending to targeted discrimination and persecution – vis-à-vis the Rohingya and a policy aimed at displacement or deportation of the Rohingya. However, the scale of the Myanmar Security Force's operations and the effect thereof – i.e., the resultant refugee crisis – do not necessarily reflect an intent to physically and violently wipe out the Rohingya.[113] The ICC's decision on the Rohingya crisis supports this view inasmuch as it finds that the acts of the Tatmadaw against the Rohingya amount to the crime of deportation and persecution on grounds of ethnicity and/or religion.[114] The finding that the intent of the actions was identified as deportation of the group rather than its complete

[112] ibid [107].

[113] In a somewhat similar fact situation, the International Commission of Inquiry in Report on Darfur to the United Nations Secretary General (25 January 2005) rendered the following findings at Paragraphs 514 and 518:

'the intent of the attackers was not to destroy an ethnic group as such, or part of the group. Instead, the intention was to murder all those men they considered as rebels, as well as forcibly expel the whole population so as to vacate the villages and prevent rebels from hiding among, or getting support from, the local populations….

the Government of Sudan has not pursued a policy of genocide…one crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.' International Commission of Inquiry. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General. 25 January 2005. U.N. Doc. S/2005/60 available at <http://wvw.un.org/News/dh/sudan/com-inq-dartfur.pdf> accessed 21 March 2020.

[114] ICC decision n. 92.

physical or biological destruction negates the *dolus specialis* required for genocide.

The current legal position with regard to the *dolus specialis* is that there must be a specific intention aimed at the physical destruction of the targeted group. A mere policy of forced deportation or displacement to render an area ethnically homogenous would not suffice. In *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ held that:

> '190… Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement….'[115]

Moreover, there exists a distinction between the individual intent of a single person and the over-arching objective of the enterprise which has to be discerned from the actions themselves.[116] The *dolus specialis* would have to exist and be discernible vis-à-vis the State agencies of Myanmar

[115] *Bosnia and Herzegovina* n. 23, See also Stakic n. 25, where it was held that: '519. It does not suffice to deport a group or a part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.'

[116] *Prosecutor v Krstic* (Judgement) IT-98-33-T 2 August 2001 [549].

as an over-arching objective rather than the mere intention of some individuals.[117]

Applying the aforementioned standards to the present facts, the acts alleged against the Myanmar's Security Agencies would constitute a serious violation of the essential human rights and reflect a targeted policy of deporting or displacing them. However, the current legal position on the *dolus specialis* for genocide requires a high threshold to be met, which does not appear to be satisfied. As was held in a previous judgment, 'the attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition.'[118]

The focus and intent of the actions against the Rohingya, as well as their major effect, has been to drive out the Rohingya population to neighbouring Bangladesh and not large-scale physical destruction of the population. The actions, therefore, point to ethnic cleansing and violation of human rights law, but the *dolus specialis* of complete physical destruction required for genocide is not necessarily made out.

That being said, with the advent of the Genocide Convention, all States undertook an obligation to prevent and punish genocide.[119] The obligation was undertaken by all States as an *erga omnes* obligation – i.e., an obligation owed to international community at large so that a breach

[117] International Commission of Inquiry on Darfur, supra note 109. See also Abass A (2007) Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur, Fordham International Law Journal 31:4: 871 – 910, p. 875.
[118] *Prosecutor v Galic* (Judgement) IT-98-29-T5 December 2003 [593]
[119] Article 1 of the Genocide Convention. See also *Bosnia and Herzegovina* (n. 21) pp. 110 and 111.

of that obligation enables all States to take action.[120] The States undertook a duty and responsibility that was not restricted to merely punishing, extended to actively preventing acts of genocide.

In view of the strong emphasis in the Genocide Convention on the obligation to prevent acts of genocide from occurring and the importance under international law of the commitment to prevent genocide, in the author's view, the role of the ICJ in terms of Article IX would, and indeed should, encompass not only punishment in cases where genocide has occurred, but also – where appropriate – directing measures for preventing any occurrence of genocide. In the present case, even if the facts are insufficient for rendering a finding that Myanmar has committed breach of obligations under the Genocide Convention, it is apparent that the Rohingya as a group remain extremely vulnerable to the risk of facing genocide. Thus, this case, in the author's view, may be a good opportunity for the ICJ to issue strong preventive directions affording necessary protection to the Rohingya.[121] Directions from the ICJ, in the final order, directing Myanmar to refrain from and even to actively prevent any genocidal activity and for filing regular reports with the ICJ, it is hoped, would go a long way towards ensuring compliance with the obligation under international law to prevent genocide and affording due protection to the Rohingya against the threat of genocide.

[120] See Fifth Commission of the Institut de Droit International (27 August 2005) Resolution titled 'Obligations and rights erga omnes in international law', Article 1(a); See also (n 12) p 7, where it is observed that: 'The Convention was manifestly adopted for a purely humanitarian and civilizing purpose.'

[121] See *The Gambia v. Myanmar* 23 January 2020 Provisional Order on the Request for the indication of provisional measures; Separate Opinion of Vice President Xue, [10] – [11]; *The Gambia v. Myanmar*, Provisional Order dated 23 January 2020, Separate Opinion of Judge Trindade, [55] – [59].

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Amity Law School

The School has been consistently ranked as one of the Top Law Schools in the Country since 2006. In the survey of the India's Best Law Colleges by India Today (THE INDIA TODAY NIELSEN SURVEY), the National Magazine, Amity Law School Delhi(ALSD) bagged 4th rank in India in 2017 moving up in ranks from Rank 11 in the same in 2016. In THE WEEK (HANSA RESEARCH SURVEY) ALSD was ranked at 12th in 2016 and 11th in 2015. THE OUTLOOK (OUTLOOK GFK MODE SURVEY), ALSD was ranked 10th in 2016.

The Amity Law School, Delhi(ALSD) has the unique distinction of being the first Law School in Delhi to start a 5-year integrated LL.B (H) programme in 1999. The School was established under the Ritnand Balved Education Foundation (RBEF) to achieve world-class legal education in the country. Dr. Ashok K. Chauhan, the Founder President of the Law School is a great philanthropist and a man of extraordinary vision. This great vision has been translated into practical reality through the establishment of various educational institutions including the Amity Law School. His vision for the Law School is to provide excellence in legal education and to produce quality lawyers with good moral principles and great human values. The President RBEF, Dr. Atul Chauhan has been providing dynamic leadership intervention in strengthening the vision of the Founder President. Presently the academic values are being inculcated by Prof. (Dr.) D. K. Bandyopadhyay, (Former Vice-chancellor, GGSIPU) Chairman, Amity Law Schools.

Amity Law School Delhi has been granted affiliation by the Guru Gobind Singh Indraprastha University, Delhi for running a 5-year Integrated LL.B (H) programme and the affiliation has been approved by the Bar Council of India. The programme is designed to incorporate teaching methods for realizing holistic legal education.

The programme offered by Amity Law School Delhi seeks to promote multi-disciplinary analysis of the socio-legal problems by designing/pursuing/giving effect toits course-structure and teaching methods to realize these objectives. The methods of teaching in the Law School include lecture, discussions, case law analysis, moot court training, project assignment and placement programmes. In addition, the School organizes seminars on contemporary legal issues, conducts clinical courses and train students in legal research and legal writing. By the time a student completes the 5-year programme he/she will be fully equipped with the required theoretical knowledge and practical experience in the field of law to become a full-fledged responsible member of the legal profession.

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