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Law Centre-I
Faculty of Law
Chhattra Marg
University of Delhi
Delhi-110007
India

Phone: +91 11 2766 7991
E-mail: jolti.editor@gmail.com
Websites: http://lc1.du.ac.in/
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Editor's Note

The flagship Journal of Law Centre-I (LC-I), JOLT-India, is immensely proud to successfully bring out its Tenth Volume, thus completing 11 years of its publication in 2021. The journal started its onward journey eleven years ago under the able lead of the then Professor-in-Charge of Law Centre-I, Prof. Ashwani Kumar Bansal. We lost the professor to COVID-19 in April 2021. It left all of us at LC-I saddened.

Late Professor Bansal was a visionary who had the wisdom and far sightedness of establishing legal scholarship in the form of this Journal, way back in 2010. He maintained that it was important to keep one's mind sharp and focused, and most importantly to have a standpoint on things of socio-legal relevance.

He was a stalwart of intellectual property laws and had a gifted keen eye for detail. His legacy is a profound and lasting one and the vacuum he creates would be difficult for us to fill; but try we must.

It is only in the fitness of things that we dedicate this issue of the journal to him.

Over the past eleven years, the journal has strived to contribute to the academic discourse surrounding various social and legal issues of timeless or contemporary significance. The journal has managed to rope in submissions from within the country and outside of it; from teachers, research scholars and some from students in the form of long/short articles, notes essays and case comments etc.

JOLT-India is firmly established as a journal that does not compromise on quality and deadlines and we are proud of the same. Our newly constituted (one year old) Advisory Board manages to keep our confidence high by constantly reassessing and suggesting revisions in the publication worthiness of submissions, and the editorial process. We are thankful for their constant guidance.

This year too the Editorial Board has continued with its tireless mission to fetch and edit quality contributions from across the legal fraternity. Dr. Sunanda Bharti, the Editor along with the able team has devoted countless hours fighting work pressures and deadlines, on the 10th volume. The journal is thankful towards their tireless spirit. The journal also owes tremendously to the team of reviewers for reading through the

contents of various submissions and giving articulate feedback to the authors.

It is always a pleasure to finally release our years' efforts into the public. This year, JOLT-India has an array of writings to offer. To begin with, the journal opens with a thought provoking and moving issue of *Child Rapes* in India. The article aims to assess the deterrent effect of capital punishment for the crime. It is followed by another submission around the theme but focusing on the need to *Protect Disclosure of Identity of Rape Victims*. Both are informative and well researched articles.

In this Union of States that is India, issues tend to crop up around state borders, particularly where India shares it boundary with other countries. There is a submission dwelling on the *Troubled Borders of Assam*, which presents an interesting analysis of the matter in the light of the constitutional provisions. The next article explores the extent to which our neighbour China has discharged its R2P, that is, *Responsibility to Protect*. It is a work of joint authorship.

A significantly relevant social issue is touched upon in *Manual Scavenging in India* which has been presented, and rightly so, as a blot on human dignity. The author presents a structured narrative in lucid language.

Treatment of women under the Indian Constitution is assessed by the author where she tries to trace the inclusivity/exclusivity of legal norms that have been considered while constructing the equality principle. The title comes as *Remedying the Effects of Hetero Male Norms*.

Three differently themed article submissions appear in the form of discussions on the aspect of *Privatisation in Outer Space Operations*, an analysis of the Standard of Proof for Business Practices Having Anti-Competitive Effects, and the burning environmental issue of *Plastic Waste.*

The Notes, Comments *&* Essays section has four entries. One is an evaluation of the *Rights of Hindu in Agricultural Property* through the Indian Supreme Court's decision in *Babu Ram* v. *Santokh Singh*, which the submission claims to be shrouded in uncertainty for Hindu Women.

Then there is a short note examining the international humanitarian law and its implementation from a gender perspective. It aims to Deconstruct the *Gender Binary Schisms in the Geneva Conventions*.

A highlight of the issue is the submission by one member of the Advisory Board from Bangladesh. It explores the *Changing Perspectives of Legal Education: Issues and Challenges in Bangladesh*. The *Critique of Three Farm Laws* which were rolled back recently comes as the last accepted submission. It has been retained for academic and discussive value because the volume was already in the penultimate stages of finalisation. The note consequently starts with an appropriate addendum.

The last entry is a succinct review of a book.

Though the Editorial Board has, as usual, dedicated itself to the pursuit of perfection in bringing out this volume, we would be glad to consider all suggestions for improvement.

Hope that this year's issue is also able to live up to the high expectations set in place by its dedicated contributors and readers.

Dated: 31 January 2022

Prof. Sarbjit Kaur
Prof-in-Charge, LC-I

Capital Punishment for Child Rape in India: Assessing Deterrent Effect through Statistical Prism

Monica Chaudhary[*]

Introduction

The escalation of sexual violence against women and children in India has triggered significant legislative interventions by the Indian Parliament in the past decade. Apart from the enactment of the Protection of Children from Sexual Offences Act, 2012 (hereinafter POCSO Act), which penalises a wide variety of sexual offences against children, including penetrative sexual assault or child rape, stringent provisions have also been introduced in the Indian Penal Code, 1860 (hereinafter IPC) through the Criminal Law (Amendment) Act, 2013 (hereinafter 2013 Act) and the Criminal Law (Amendment) Act, 2018 (hereinafter 2018 Act), both of which were preceded by their respective Ordinances. The 2018 Act *inter alia* provided for capital punishment as one of the options for rape of girls below twelve years of age. These Amendment Acts also amended the Code of Criminal Procedure, 1973 (hereinafter CrPC), the Indian Evidence Act, 1872 (hereinafter IEA) and the POCSO Act to make the criminal justice system more victim friendly. Since the IPC provisions are gender specific, the POCSO Act was further amended by the Protection of Children from Sexual Offences (Amendment) Act, 2019 to bring the punishment under its gender neutral provisions at par with the amended sections dealing with child rape in the IPC. These amendments were intended to deter child rape and to provide swift punishment to child rapists. Since these amendments were triggered by social outrage over brutal sexual assaults on young women and children, including infants in some cases, the focus was on enhancing the punishments for sexual offences,

[*] Dr. Monica Chaudhary is an Assistant Professor with the Faculty of Law, University of Delhi and can be reached at monica.chaudhary5@gmail.com.

with the expectation that stringent punishments will act as a deterrent to potential offenders. This paper analyses available empirical data relating to investigations and trials in child rape cases post these amendments, to analyse whether the provision for capital punishment itself is likely to act as a deterrent in child rape cases, in the current scenario. This paper also examines the gaps between the timelines set for investigations and trials through these recent amendments and the ground realities. The data has been co-related to the measures required to bridge the gap between the legislative promise and the real experiences of the victims in child rape cases. This paper does not seek to address the philosophical arguments relating to abolition or retention of capital punishment generally, or for child rape specifically. It only seeks to analyse whether in the current state of the criminal justice system as reflected in the analysed data, the provisions for capital punishment are likely to have the desired deterrent effect on child rapists. The data used for the analysis in this paper is primarily sourced from the 2014 to 2019 editions of *Crime in India*, the annual publication of the National Crime Records Bureau (NCRB), Ministry of Home Affairs, India.[1] Data regarding the pending POCSO Act cases has also been taken from *In Re Alarming Rise in the Number of Reported Child Rape Incidents'*.[2]

Overview of the 2013 and 2018 Amendments

Amendments to the IPC

The 2013 Act expanded the definition of rape in section 375, IPC to include all forms of penetrative assaults as well as application of mouth to private parts. It raised the age of consent from sixteen years to eighteen years, bringing it at par with the POCSO Act. Rape was made punishable with imprisonment ranging from seven years to imprisonment for life.[3] Higher sentence of imprisonment ranging from ten years to imprisonment for the remainder of the convict's natural life was provided for aggravated forms of rape involving accused persons in positions of trust and authority, as well as cases where the

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1 *Crime in India 2020,* National Crime Records Bureau, Ministry of Home Affairs, *available at* https://ncrb.gov.in/en/crime-india (last visited May 05, 2021).

2 (2020)7 SCC 130.

3 Indian Penal Code, 1860 s. 376(1).

victim was younger than sixteen years of age.[4] Infliction of an injury in the course of commission of rape leading to death of the woman, or causing her to be in a persistent vegetative state, was made punishable with imprisonment ranging from minimum twenty years and extendable up to remainder of the offender's natural life, or with death. [5] Punishment for non-consensual sexual intercourse with separated wife and for sexual intercourse by persons in authority was also enhanced.[6] Gang rape was made punishable with imprisonment ranging from minimum twenty years to remainder of the offender's natural life.[7] For repeat offenders, imprisonment for the remainder of the convict's natural life, or death sentence was prescribed.[8]

Despite the stringent punishments introduced by the POCSO Act and the 2013 Act, sexual assaults on women and children, including infants in some cases, continued. Some of these cases received a lot of media attention due to the brutality involved in them. These cases triggered social outrage and writ petitions in the Constitutional courts asking for more stringent and swifter punishment to the offenders involved in such cases, particularly cases of child rape. The Legislature responded to the situation through the promulgation of the Criminal Law (Amendment) Ordinance, 2018 on April 21, 2018 which was replaced by the 2018 Act on August 11, 2018.

The 2018 Act further enhanced the minimum punishment for rape as defined in section 375 of the IPC to ten years.[9] Rape of girls under sixteen years of age was made punishable with minimum imprisonment for twenty years extendable up to remainder of the offender's natural life.[10] Rape on girls under twelve years of age was made punishable with imprisonment ranging from twenty years to imprisonment for the remainder of the offender's natural life, or with death.[11] Gang rape on a woman under sixteen years of age was made punishable with imprisonment for the remainder of the offender's

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4 *Id*., s. 376(2).
5 *Id*., s. 376A.
6 *Id*., ss. 376B, 376C.
7 *Id*., s. 376D.
8 *Id*., s. 376E.
9 *Id*., s. 376(1).
10 *Id*., s. 376(3).
11 *Id*., s. 376AB.

life.[12] Capital punishment was provided as the alternate punishment for gang rape of girls below twelve years of age.[13] Since rape is defined as a gender specific offence under the IPC, the enhanced punishments could only be imposed in cases where the victim was a woman, meaning 'a female human being of any age'[14] and the offender was a man, meaning 'a male human being of any age'.[15]

Amendments to the POCSO Act

Unlike the gender specific definition of rape in the IPC, the corresponding offence of 'penetrative sexual assault' (PSA) punishable under section 4 of the POCSO Act is gender neutral. With the introduction of capital punishment in the IPC for certain categories for rape, a need was felt to make corresponding changes in the POCSO Act, to ensure that equal punishment is provided for rape of children, irrespective of their gender. Hence, the POCSO (Amendment) Act, 2019 amended the gender neutral provisions of the POCSO Act to bring the punishments at par with the corresponding IPC provisions. Section 6 of the POCSO Act was amended to make 'aggravated penetrative sexual assault' (APSA) punishable with imprisonment ranging from minimum twenty years to remainder of the natural life of the convict, or with death. APSA includes PSA by persons in position of trust, power, and authority as well as gang PSA and PSA on a child below twelve years of age. The POCSO (Amendment) Act, 2019 came into force on August 16, 2019. The provisions of the POCSO Act are in addition to, and not in derogation of the existing laws and in case of any inconsistency, the POCSO Act will have an overriding effect.[16] If an act or omission is punishable under the POCSO Act and the relevant sections of the IPC, the offender will be punished under the provision that provides for higher punishment.[17]

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[12] *Id*., s. 376DA.

[13] *Id*., s. 376DB.

[14] *Id*., s. 10.

[15] *Id*.

[16] Protection of Children from Sexual Offences Act, 2012, s. 42A.

[17] *Id*., s. 42.

Procedural Amendments

The recent amendments to criminal laws aim to make the criminal justice delivery system more victim friendly for victims of sexual offences. The POCSO Act provides for mandatory reporting of offences under the Act.[18] Failure to do so is made punishable.[19] Non registration of FIRs for sexual offences under the IPC was also made punishable under the IPC by the 2013 Act.[20] To ensure swifter investigation in rape cases, section 173(1A) of the CrPC which provided that 'investigation into rape of a child may be completed within three months' was amended in 2018 to provide that 'investigation into rape cases shall be completed within two months'.

For speedy trial of offences under the POCSO Act, it is provided that for each district, a Court of Session should be designated as a Special Court to try the offences under the Act.[21] Section 35(2) of the POCSO Court provides that the Special POCSO Court 'shall complete the trial, *as far as possible*, within a period of one year from the date of taking cognizance of the offence'. The State Government is required to appoint a Special Public Prosecutor for every Special Court for conducting cases only under the POCSO Act.[22] The evidence of the child must be recorded within a period of thirty days from the date of cognizance being taken by the Court.[23] Reasons have to be recorded for delay, if any, in doing so.

To ensure time bound completion of proceedings, Section 309 CrPC was amended in 2013 to provide that inquiry or trial in rape cases '*shall, as far as possible*, be completed within two months from the date of filing of the charge sheet'. In 2018, it was further amended to provide that inquiry or trial in rape cases '*shall* be completed within two months from the date of filing of the charge sheet'. It was also provided that appeals against sentence in rape cases by a convict or

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[18] *Id*., s. 19.
[19] *Id*., s. 21.
[20] *Supra* n.3, s. 166A.
[21] *Supra* n.16, s. 28(1).
[22] *Id*., s. 32(1).
[23] *Id*., s. 35(1).

the state shall be disposed of within a period of six months from the date of filing of such appeal.[24]

Ground Realities Post the 2013 Amendments

Reporting of sexual offences, including child rapes, has drastically improved post 2013 as a combined effect of the 2013 amendments, the POCSO Act and the *Lalita Kumari* judgment.[25] The *Crime in India*, 2014 data reveals that a total of 13,766 cases of child rape were reported in the country during 2014 as compared to 12,363 in 2013, accounting for an increase of 11.3% during the year 2014.[26] 4,930 cases were registered under section 4 and 6 of the POCSO Act during 2014. 10,934 child rape cases were reported under section 376 IPC and 8,833 under section 4 and 6 of the POCSO Act during the year 2015.[27] Post 2015, the data for sections 4 and 6 of the POCSO Act and section 376 IPC has been reported together in *Crime in India*. This data showing the total number of child rape cases reported from 2014 to 2019, is reflected in Table 1.1. The data has been compiled from the 2014 to 2019 editions of *Crime in India*.[28]

The data submitted to the Hon'ble Supreme Court *In Re: Alarming Rise in the Number of Reported Child Rape Incidents* revealed that 1,66,882 cases were pending under provisions relating to rape and the POCSO Act as on March 31, 2018. Out of the total POCSO cases pending trial, about 56 percent cases were those of PSA and APSA (See Table 1.2).[29] This data also revealed that, in the FIRs registered under the POCSO

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[24] Code of Criminal Procedure, 1898, ss. 374(4), 377(4).

[25] *Lalita Kumari* v. *Govt. of U.P.*, 2013 (13) SCALE 559. In this judgment, a Constitution Bench of the Supreme Court held that registration of FIR is mandatory under section 154 of the CrPC, if the information given to the police discloses commission of a cognizable offence.

[26] *Crime in India 2014 Compendium* National Crime Records Bureau, Ministry of Home Affairs, 2014, p. 98, *available at* http://ncrb.gov.in/StatPublications/CII/CII2014/Compendium%202014.pdf (last visited May 01, 2021).

[27] *Crime in India, 2015 Compendium*, National Crime Records Bureau, Ministry of Home Affairs, 2014, p. 3, *available at* http://ncrb.gov.in/StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf (last visited May 01, 2021).

[28] *Crime in India, 2019*, National Crime Records Bureau, Ministry of Home Affairs, *available at* https://ncrb.gov.in/en/crime-india (last visited May 01, 2021).

[28] *Supra* n.2.

[29] *Id.,* para 1.

Act in the pending cases, 80 per cent of the victims were girls (See Table 1.3).[30] 17 percent of the victims were in the below 12 years age group and a whopping 77 percent were in the below 16 years age group (See Table 1.4).[31]

Table 1.1: Total Number of Child Rape Cases

Year	*Total number of child rape cases under s. 376 IPC*	*Total number of child rape (PSA/APSA) cases under ss. 4 and 6 of POCSO Act*
2014	13,766	4,930
2015	10,934	8,833
Year	*Total number of child rape cases under ss. 4 and 6 of POCSO Act*	
2016	19765	
2017	17382	
2018	21401	
2019	26192	

Table 1.2: Percentage share of offences under the POCSO Act

Offences under the POCSO Act	*Percentage share of offences under the POCSO Act*
PSA	32.1
APSA	24
Others	45

Table 1.3: Gender-wise percentage of victims in FIRs under the POCSO Act

Victim's Gender	*Gender wise percentage of victims in FIRs under the POCSO Act*
Girls	80
Boys	6
Others	14

Table 1.4: Age profile of victims under the POCSO Act

Age Group of Victims (in years)	*Percentage of Victims*
0-6	4
6 to 12	13
13-16	60
16-18	22

[30] *Id*.

[31] *Id*.

The *Crime in India* data also shows that in most of the cases of child rape, the accused are persons known to the victims. The exact percentage of the accused who were persons known to the victims in child rape cases from 2014 to 2019 are shown in Table 1.5. For the year 2014, separate data for child rape was not available. So the data for rape, including child rape, has been used.

Table 2.5: Percentage of cases in which accused were persons known to the victims

Year	*Percentage of cases in which accused were persons known to the victims*
2014	86
2015	94.8
2016	94.6
2017	93.6
2018	94.9
2019	94.2

According to the data placed before the Supreme Court regarding the pending POCSO cases, in 91 percent of the pending cases, the accused are persons known to the victim (See Table 1.6).[32] The specific categories of the persons known are shown in Table 1.7. Such high percentage of known accused raises concerns about the safety and security of the victims, especially in absence of an effective witness protection scheme despite the Supreme Court's order regarding the same.[33] The immense pressure on the victims or/and their families during the trials of such cases, especially those relating to incest, with capital punishment being one of the possibilities is also an area of concern.

Table 3.6: Percentage of cases in which accused were known to the victims

	Percentage of Cases in which Accused were Persons Known to the Victims
Known	91
Unknown	9

[32] *Id*.

[33] *See*, *Mahender Chawla* v. *Union of India*, 2018 SCC OnLine SC 2679.

Table 4.7: Victim's relationship with the accused

Victim's Relationship With Accused	*Percentage of Cases*
Friends/Neighbours	27
Relatives	7
School Staff	1
Other Known Persons	56
Strangers	9

Delay at the Investigation Stage

The *Crime in India* data reveals that the rate of chargesheeting under sections 4 and 6 of the POCSO Act has almost always remained over 95 per cent (See Table 1.8). The police pendency rate of such cases is approximately between 25 to 30 per cent.

As mentioned above, section 173(1A) of the CrPC mandates that 'investigation into rape cases shall be completed within two months'. However, the data placed before the Supreme Court in the *suo motu* writ petition reveals that investigation is completed within two months in only 35 per cent of the POCSO cases. In fact, in 20 per cent of the cases, investigation continues beyond one year (See Table 1.9).[34]

Table 1.8: Rate of Chargesheeting and Police Pendency Rate

Year	*Rate of chargesheeting under s. 4*	*Pendency rate under s. 4*	*Rate of chargesheeting under s. 6*	*Pendency rate under s. 6*
2014	97.4	31.2	97.6	25.8
2015	97.3	21.8	98	25.6
Year	*Chargesheet rate under s. 4 and s.6*		*Pendency rate under s. 4 and s. 6*	
2016	94.8		31.4	
2017	95.5		32.4	
2018	95.7		29.9	
2019	95.3		28.3	

Table 1.9: Time taken in completion of investigation

Number of days taken in completion of investigation	*Percentage of cases*
Within 30	18
31-60	17
61-180	29
181-365	16
More than 1 year	20

[34] *Supra* n. 29.

Delay in Receipt of the Reports from the Forensic Science Laboratories

Proper collection and analysis of forensic evidence is very important in rape cases. The data placed before the Supreme Court reveals that police can deposit samples with the Forensic Science Laboratories (FSLs) in approximately half of the total cases within a month. In fact, in 13 per cent of the cases, the samples are only deposited after six months (See Table 1.10).[35] Delay in receipt of the reports from the FSLs has been recognised as one of the reasons for delay in winding up the investigations and trials. The ideal requirement would be designated FSLs in every district of the country for the purposes of the POCSO Act and the suggestion has been placed before the Supreme Court.[36] The Hon'ble Apex Court has directed the Directors of the State FSLs and the concerned State Government authorities to ensure that the existing FSLs should function in an effective manner and send the reports in POCSO cases promptly.[37] The States have also been asked to file status reports on FSLs for POCSO cases.[38]

Table 1.10: Time taken by Police in depositing Samples with FSLs

Number of days taken	*Percent of cases in which samples submitted*
Within 30	51
31-60	19
61-180	17
181-365	6
More than 365	7

Pendency Rate at Trial Stage

Section 35(2) of the POCSO Act provides that trials of cases under the Act should be completed within one year, *as far as possible*. However, at the ground level, in 20 per cent of the cases even investigation is not completed within one year (See Table 1.9).[39] According to the data

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[35] *Id*.

[36] *See*, *In Re: Alarming Rise in the Number of Reported Child Rape Incidents*, MANU/SC/1204/2019, Order dated July 25, 2019, para 3.

[37] *Id*, para 4.

[38] *See*, *In Re: Alarming Rise in the Number of Reported Child Rape Incidents*, (2020) 7 SCC 130, Order dated January 08, 2020, p. 135, para 13.

[39] *Supra* n. 29.

placed before the Supreme Court, almost two-thirds of the POCSO cases are pending trial for more than one year (See Table 1.11). Lack of awareness and lack of dedication in completing investigation, etc. within the time frame stipulated and inadequacy of the number of POCSO courts have been cited before the Supreme Court as major reasons for noncompliance with the statutory time lines.[40]

Table 1.11: Pendency of POCSO Act Cases

Period for which case pending trial	*Percentage of cases*
Over 4 years	8
3-4 years	10
2-3 years	17
1-2 years	28
Less than 1 year	37

The data from *Crime in India* reveals that the pendency of cases had slowly built up ever since the POCSO Act, 2012 and the 2013 amendments came into force (See Table 1.12).

Table 1.12: Court pendency of child rape cases

Year	*Cases pendency rate under s. 4*	*Cases pendency rate under s. 6*
2014	94.4	97.7
2015	91.2	90.6
Year	*Cases pendency rate (Since 2016 data for ss. 4 and 6 have been merged)*	
2016	89.6	
2017	90.1	
2018	90.1	
2019	88.4	

With the improved reporting of sexual offences post the POCSO Act and the 2013 amendments, by the year 2016, the pendency relating to POCSO cases in courts had reached an alarming level. A Report by Nobel Laureate Kailash Satyarthi's Children's Foundation calculated approximate number of years needed to complete the pending trials in POCSO cases in the year 2016.[41] The Report '*The Children Can't Wait*',

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[40] *Id*., para 3.

[41] *The Children Can't Wait, Status of Pending Trials in Child Sexual Abuse Cases in India* (Kailash Satyarthi's Children's Foundation, 2018) *available at*

presented a 'state-wise timeline of pendency of cases of child sexual abuse, calculated as per the response of the Ministry of Home Affairs, Government of India to a *Lok Sabha* question number 2544 (August 1, 2017) related to the prosecution of cases of crimes of child sexual abuse under the POCSO Act between 2014 and 2016'. According to the Report, on the assumption that case disposal rate during 2016 remained constant, India would take about twenty years to clear the back log of 2016. At the state level, the projection of number of years required to clear the backlog varied from two years in Punjab to more than 60 years in Arunachal Pradesh, Gujarat, Manipur, West Bengal, and Kerala. Despite such projections, as per figures presented in the *Lok Sabha* on August 01, 2018, only 620 of 681 Districts had designated POCSO Courts.[42]

In the year 2018, sexual assault on an eight month old female child triggered the filing of a writ petition in the Supreme Court. A three judge bench of the Apex Court directed the High Courts to ensure that the cases registered under the POCSO Act are tried and disposed of by the Special Courts and the presiding officers of the said courts are sensitised in the matters of child protection and psychological response. The Hon'ble Apex Court further directed that the Special Courts be established as per the statutory mandate and be assigned the responsibility to deal with the cases under the POCSO Act. It was directed that the Special Courts should be instructed to fast track the cases by not granting unnecessary adjournments and following the procedure laid down in the POCSO Act and thus complete the trial in a time-bound manner. The Chief Justices of the High Courts were requested to constitute a committee of three judges to regulate and monitor the progress of the trials under the POCSO Act. One Judge Committees were directed to be constituted where three Judges were not available. The Police Chiefs were directed to constitute a Special Task Force to ensure that the investigation is properly conducted, and witnesses are produced on the dates fixed before the trial courts. All High Courts were directed to take adequate steps to provide child

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https://satyarthi.org.in/wp-content/uploads/2020/02/the-children-cannot-wait.pdf (last visited May 30, 2021).

[42] MHA response to Lok Sabha question number 2544, August 1, 2017.

friendly atmosphere in the Special Courts keeping in view the provisions of the POCSO Act so that the spirit of the Act is observed.[43]

As stated earlier, the continuing spate of sexual violence and the enormous pendency that was building up in the courts, despite the legislative and judicial measures, led to the *suo motu* writ petition recorded as '*In Re Alarming Rise in the Number of Reported Child Rape Incidents*' in the Supreme Court in 2019. The Court asked the Registrar of the Supreme Court, Mr. S. S. Rathi, to collect and collate data relating to the pending POCSO cases from the courts, so that the necessary measures to ensure timely completion of investigations and consequential trials in such cases could be undertaken. The data revealed that 1,66,882 cases were pending under provisions relating to rape and the POCSO Act as on March 31, 2018. In July 2019 a three judge bench of the Apex Court, headed by the then Chief Justice of India, Ranjan Gogoi, J. issued the following directions to be implemented by the Union of India and the State Governments:

> '(i) In the districts having more than 100 cases under the POCSO Act, an exclusive/designated special POCSO Court should be set up, which will exclusively try offences under the POCSO Act.
> (ii) Such Courts will be set up under a Central scheme and will be funded by the Central Government, which fund will not only take care of the appointment of the Presiding Officers, but also the appointments of support persons, Special Public Prosecutors, court staff and infrastructure, including creation of child-friendly environment and vulnerable witness court rooms, etc.
> (iii) While drawing up the panel(s) of support persons in each district, which should not exceed a reasonable number, keeping in mind the total number of cases to be tried by the Special Court to be set up in each district, care should be taken to appoint persons who are dedicated to the cause and, apart from academic qualifications, are oriented towards child rights, are sensitive to the needs of a child and are otherwise child friendly. The same standards would also apply in the matter of appointment of Special Public Prosecutors.' [44]

The Court also directed the Ministry of Women and Child Development to spread awareness regarding prevention and

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[43] *Alakh Alok Srivastava* v. *Union of India*, MANU/SC/0489/2018, para 23.

[44] *Supra* n.2, 2019, para 2.

prosecution of child abuse through screening of short video clips in movie halls and on television channels at regular intervals. It was also directed that a child helpline number should also be displayed in such clips and at various other prominent places, in schools and other public places. [45] The Supreme Court expressed the hope that the exclusive POCSO Courts will start functioning within 60 days from the date of the order. [46] The Supreme Court has also expressed the hope that the Central Government will play a much more proactive role to ensure that trials of cases under the POCSO Act are completed within in the time frame laid down in the Act. The Court further directed all State Governments as well as the Union of India to take the necessary measures to ensure that all stages of investigation as well as trial, as contemplated under the Act, are completed within the time frame, by creation of an additional force for investigation. The Court also directed the Union of India and the State Governments to take steps for sensitisation of investigation officials and also for creation or assignment of dedicated POCSO courts on top priority so that charge sheets are filed within the mandatory period and trials are completed within the time frame contemplated under the Act.[47] In its order dated December 16, 2019 the Apex Court further directed that in districts having more than 300 POCSO cases pending, at least two exclusive POCSO Courts should be set up.[48]

Pursuant to the Hon'ble Supreme Court's directions, the Central Government drew a 'Scheme on Fast Track Special Courts For Expeditious Disposal of Cases of Rape and Protection of Children against Sexual Offences (POCSO) Act, 2019'.[49] The Scheme proposed to set up a total of 1023 Fast Track Special Courts (FTSCs) all over India. It identified 389 districts in the country where the number of pending

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[45] *Id*.

[46] *Id*., para 5.

[47] *Supra* n. 29, para 5.

[48] (2020) 7 SCC 112, p. 117, para 7.

[49] Department of Justice, Ministry of Law and Justice Government of India, *Scheme on Fast Track Special Courts (FTSCS) For Expeditious Disposal of Cases of Rape and Protection of Children Against Sexual Offences (POCSO) Act, 2019*, a*vailable at* https://doj.gov.in/sites/default/files/Fast%20Track%20Special%20Courts%20Scheme%20guidelines%202019_0.pdf(last visited July 02, 2021).

cases under the POCSO Act exceeded 100 cases. It proposed to set up one exclusive POCSO court in each of these districts and these Courts will try no other cases, as per the Hon'ble Supreme Court's directions. It was further proposed that the remaining 634 FTSCs will deal with either rape cases or both rape and POCSO Act cases depending on the pendency and requirement. Each FTSC is expected to dispose off, 41-42 cases in each quarter and at least 165 cases in a year.[50] Depending upon the pendency of POCSO cases, the State/UT Governments in consultation with the High Court can decide if a greater number of exclusive POCSO Courts need to be established within the overall number of FTSCs provided under the Scheme. The Scheme proposed to set up the FTSCs for one year, spread over two financial years: 2019-20 and 2020-21. The decision on extension of the scheme beyond one year was made dependant on the recommendations in the external evaluation to be carried out in the third/fourth quarter of the Scheme, and subsequent approvals of the competent authorities.[51]

The proposal to set up FTSCs to deal with the increasing pendency is well intentioned and much required to meet the promise of quick delivery of justice that is meted out in the recent amendments to the Criminal Laws. However, it is also imperative to note that fast track courts in India have been plagued by many problems in the past like inadequate staff and IT infrastructure, delay in getting reports from the understaffed forensic science laboratories, frivolous adjournments and over-listing of cases in the cause list.[52] The National Crime Records Bureau (NCRB) data reveals that the fast-track courts set up in several states to allow quick trials in cases of serious crimes such as rape, take longer than those in regular courts.[53] For an effective implementation of the Supreme Court's directions and the Central Government Scheme regarding fast track courts in POCSO cases, it is imperative to ensure resolution of the problems that emerge in the

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[50] *Id*., p. 3.

[51] *Id*., p. 4.

[52] Arunav Kaul, *The Hard Realities of India's Fast-Track Courts*, The Hindu (7th Aug, 2019).

[53] *See*, Vijdan Mohammad Kawoosa, *Trials in Fast-Track Courts Last Longer Than Regular Ones: Data*, The Hindustan Times (Delhi, 10th January 10, 2020). *See also*, Bibek Debroy, *There is Nothing 'Fast' About Fast-Track Courts*, The Indian Express (Delhi, 14th Nov, 2019).

functioning of the fast track courts. Moreover, the fast track courts should be mindful that 'expeditious disposal is undoubtedly required in criminal matters and that would naturally be part of guarantee of fair trial. However, the attempts to expedite the process should not be at the expense of the basic elements of fairness and the opportunity to the accused. What is paramount is the cause of justice and keeping the basic ingredients which secure that as a core idea and ideal, the process may be expedited, but fast tracking of process must never ever result in burying the cause of justice.'[54]

Exclusive Public Prosecutors for POCSO Courts

Section 32 of the POCSO Act mandates that the State Government should appoint a Special Public Prosecutor for every POCSO Court, for exclusively conducting cases under the Act. *In Re: Alarming Rise in the Number of Reported Child Rape Incidents*, the Supreme Court has observed that the Special Public Prosecutors under the POCSO Act should not deal with other cases. The Court observed that:

> 'Public Prosecutors must be trained to deal with child victims and child witnesses. They need to understand the psychology of children. They need to empathise with children. They need to know how to bring out the truth from children who are victims of sexual abuse and have to undergo the trauma again while recounting the traumatic experience.'[55]

In view of the onerous job that they must perform with great care and sensitivity, the Court has emphasised the need for training programmes for Special Public Prosecutors in order to enable them to deal with the legal as well as the psychological, health and other related issues that may arise in their Special Courts. Therefore, the Court directed all the States present before the Court to take steps to appoint exclusive Public Prosecutors in all the exclusive POCSO Courts. The Chief Justices of all High Courts were requested to ensure that such training programmes are developed in the Judicial Academies of the States to impart training to Special Public Prosecutors attached to the POCSO Courts in law as well as child

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[54] *Anokhilal* v. *State of Madhya Pradesh*, (2019) 20 SCC 196, p. 224, para 26.

[55] *In Re: Alarming Rise in the Number of Reported Child Rape Incidents*, (2020)7 SCC 130, p. 134, para 8.

psychology, child behaviour, health issues etc. The Director of the National Judicial Academy was requested to develop training programmes for training of master trainers who can then work in the Judicial Academies in each State, to further train the Special Public Prosecutors in the POCSO Courts.[56]

Rate of Conviction

Despite the high percentage of charge sheeting and the child friendly procedures provided under the POSCO Act, as per the data placed before of the Supreme Court, the conviction rates under sections 4 and 6 of the POCSO Act remain abysmal, hovering around approximately 30 per cent (See Table 1.13). Support persons were provided only in four per cent of the cases (See Table 1.14) and compensation is paid to the victims in only one per cent of the cases (See Table 1.15).[57]

Table 1.13: Conviction rate for child rape

Year	*Conviction rate under s. 4*	*Conviction rate under s. 6*
2014	21.6	37.5
2015	40.9	31.8
Year	*Conviction Rate Under Ss. 4 and 6, POCSO Act (From 2016 onwards, data for ss.4 and 6 have been clubbed)*	
2016	28.2	
2017	32.2	
2018	31.6	
2019	34.7	

Figure 1.14: Percentage of cases in which support person is provided

Percentage of Cases In Which Support Person Is Provided	
Not Provided	96
Provided	4

Table 1.15: Percentage of cases in which interim/final compensation provided

Percentage of cases in which interim /final compensation provided	
Not Provided	99
Provided	1

[56] *Id*., para 9-10.

[57] *Supra* n. 29.

With a high charge sheeting rate of over 90 per cent and such low conviction rates, most cases are not holding up in the courts. With stricter punishments, including capital punishment, the courts are likely to insist on even stronger evidence. Such evidence may not be available, unless there is substantial improvement in the manner of investigation of cases. Thus, benefit of doubt may be given in more cases, resulting in further dipping of the conviction rate. Also, in absence of proper implementation of the provisions relating to victim friendly procedures and time bound investigations and trials introduced through the amendments in the past decade, these provisions will just remain empty promises. The data clearly reveals that there is a long way to go for effective implementation of these beneficial provisions.

Capital Punishment by the Courts

According to the Annual Statistics Report, 2019 published by Project 39A, National Law University, Delhi,[58] the year 2019 saw an increase in proportion of death sentences imposed for sexual offences. The Report notes that:

> 'Despite the drop in the total number of death sentences imposed by Sessions Courts from 162 in the year 2018 to102 in the year 2019, the proportion of sexual offences in these cases increased from 41.35 per cent (67 out of 162) in 2018 to 52.94 per cent (54 out of 102 sentences) in 2019. The trend of prominence of cases of murder involving sexual offences is evident in the High Courts as well, with 65.38 per cent (17 out of 26) of the confirmations in murders involving sexual offences, with this being the highest number of confirmations by the High Courts in four years. In contrast, offences of murder involving sexual offences comprise only 26.79 per cent (15 out of 56) of the commutations by the High Courts. In the Supreme Court, however, 64.71 per cent (11 out of 17) of the death sentences commuted were cases of murder involving sexual offences, with 57.14 per cent (4 out

[58] *Annual Statistics Report, 2019*, Project 39A, National Law University, Delhi, *available at* https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/5e25a02b5dfafe47d399d2ad/1579524149035/Project+39A+Annual-Statistics-04-PG-Web.pdf (last visited May 23, 2021).

of 7) of the confirmations in cases of murder involving sexual offences.'[59]

The Report also notes that in the year 2019, 'the Supreme Court acquitted 10 persons across 3 cases, who had been on death row for at least 5 years with the maximum time of 13 years spent on death row by 5 persons' [60] which again highlights the unpredictability of sentencing in capital offences generally. Such long periods on the death row after the final sentencing by the courts of law has also become a norm in most cases. The delay, which often results from lack of time bound disposal of mercy petitions and the related remedies, is often a ground for commutation of the death sentence. Such delay and the resultant commutation is also likely to reduce the deterrent effect of capital punishment.

Conclusion

The alarming pendency rates of child rape cases and of other sexual offences against children and the humongous task of capacity building required to deal with the existing pendency and to prevent such build up in the future, require urgent attention of all stakeholders. The problems created by such high pendency rates are further aggravated by the uncertainties and the ambiguities that plague the 'rarest of rare' doctrine that is used to decide the cases deserving of capital punishment. Sentencing in capital offences is plagued by judicial subjectivity, *per incuriam* judgments [61] and fallibility of individual judges, which may be very dangerous in matters of life and death.[62] Media reporting seems to have a role in deciding which cases shock the 'collective conscience' of the society to the extent that it will expect

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[59] *Id*., p.6.

[60] *Id*., p. 37.

[61] *See*, *Santosh Kumar Bariyar* v. *State of Maharashtra* (2009) 6 SCC 498; *Dilip Tiwari* v. *State of Maharashtra* (2010)1 SCC 775 and *Rajesh Kumar* v. *State* (2011)13 SCC 706.

[62] *See*, *Matters of Judgment* (National Law University, Delhi Press, New Delhi, 2017) *available at* https://www.project39a.com/moj (last visited May 25, 2021). It is an opinion study on the criminal justice system and the death penalty with 60 former judges of the Supreme Court of India who adjudicated 208 death penalty cases between them at different points during the period 1975-2016.

the holders of judicial power to give capital punishment to the concerned offenders. In some cases, the difference of opinion between the subordinate and the constitutional courts regarding which cases deserve capital punishment is striking. In many cases where one court deemed the case to be fit for imposition of death sentence, the other(s) have acquitted the offender. Even after final decision of the courts in the three-tier system, with all its delays, various remedies like review petition, curative petition, mercy petition and even challenging the rejection of the mercy petition are available to the offenders, with no time limits fixed for doing so, as was witnessed with the *Nirbhaya* case convicts. The '*Nirbhaya* Fund', meant to finance schemes for making public spaces safer for women and for rehabilitation of victims of sexual assault and violence, which was set up in the budget of 2013, with an initial corpus of 1000 crores remains underutilised by most States. In this scenario, prescribing stringent punishments, including capital punishment, for child rapists is unlikely to have a deterrent effect in the current state of the criminal justice system and it seems to be more of a case of legislative populism. The statistical data clearly reveals that the there is a long way to go for meaningful implementation of the victim friendly procedures and provisions for time bound trials and investigations. In absence of such implementation and capacity building measures and comprehensive reforms in the criminal justice system at a war footing, these beneficial amendments and the stringent punishments will fail to have the desired effect and will just remain promises on paper.

Rape, Silence and Privacy:
Revisiting the Need to Protect Disclosure of Identity of Rape Victims

Nanditta Batra[**]

Introduction

On the old wintry night of 16th December 2012, a macabre act, involving the gory gang rape of a young girl in a moving bus on the roads of Delhi, shook the conscience of nation.[1] The victim ultimately succumbed to injuries on 29th December 2012 at Mt. Elizabeth Hospital, Singapore. The incident led to widespread protests across the country and a clamour to change the rape law.[2] While the media had initially revealed the identity of the victim but later referred to her as 'Nirbhaya'. The word 'Nirbhaya' means fearless in Hindi, but it was not her real name but a pseudonym. It was figuratively used to connote the fight of women against continued indifference of a patriarchal state to male sexual violence.[3]Importantly, another reason for using the pseudonym was Section 228A of the Indian Penal Code, 1860 [hereinafter referred to as 'IPC']. Section 228A, IPC criminalises the disclosure of identity of rape victim. Strangely, soon after the death of the victim, her parents were ready to disclose the name publicly on

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[**] Nanditta Batra is an Assistant Professor of Law with the National Law University of Odisha, Cuttack and can be reached at nanditta.batra@nluo.ac.in.

[1] *See Mukesh* v. *State (NCT of Delhi)*, AIR 2017 SC 2161.

[2] Haripriya Suresh, *Unprecedented protests, change in laws: How the Nirbhaya case moved the needle*, The News Minute (March 20, 2020) *available at* https://www.thenewsminute.com/article/unprecedented-protests-change-laws-how-nirbhaya-case-moved-needle-120693 (last visited August 25, 2021).

[3] Anureet, *Nirbhaya' – A Patriarchal Word to Compensate for Our Collective Guilt*, Shethepeople: The Women's Channel, October 20, 2020) *available at* https://www.shethepeople.tv/home-top-video/nirbhaya-meaning-patriarchal-word-to-compensate-for-our-collective-guilt/ (last visited August 26, 2021).

the condition that revised anti-rape law was named after the victim.[4] However, that did not happen but three years later, the mother of the victim Asha Devi, made public the name of her deceased daughter and lamented that 'the stigma around rape continued to create a conspiracy of silence, even though the shame was that of the rapist's and not of the woman's.'[5] She said,

> 'I am not ashamed of taking my daughter's name. Whoever has suffered should not hide their name. It is the offenders who should be ashamed and hide their name. I want to tell everyone that my daughter's name was Jyoti Singh. From today, everyone should know her as Jyoti Singh.'[6]

Despite that there has been no change in the law regarding disclosure of the name of the victim. Either rape victims are nameless or the media refers to them using a pseudonym like Guria, Veera or Unnao rape victim.[7] However, there are many voices of dissent against such practice of using pseudonyms or no names at all to refer to rape victims. There is a section of people who argue that media uses pseudonyms as a tool of sensationalism.[8] There are others who argue that it is against the dignity of woman and reinforces the patriarchal stereotypes of finding honour and shame in the sexuality of women. The law has also been used to silence the opposition in our democratic country. The twitter account of Rahul Gandhi, Congress leaders and five thousand Congress workers were temporarily blocked for

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[4] Swati Mathur and Durgesh Nandan Jha, Delhi gang rape: Nirbhaya's parents ready to disclose name if anti-rape law is named after her, The Times of India (January 3, 2013) *available at* http://timesofindia.indiatimes.com/articleshow/17863648.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited August 28,2021).

[5] *My Daughter's Name is Jyoti Singh': Nirbhaya's Mother 3 Years After Delhi Gang-Rape,* NDTV (December 16, 2015) *available at* https://www.ndtv.com/india-news/my-daughters-name-is-jyoti-singh-mother-of-delhi-braveheart-1255660 (last visited August 26,2021).

[6] *Id.*

[7] Anna MM Vetticad, *Nirbhaya...Gudiya...Veera: Stop the name game for rape survivors, please*, The Scroll (December 16, 2014) *available at* https://scroll.in/article/694404/nirbhaya-gudiya-veera-stop-the-name-game-for-rape-survivors-please (last visited August 25, 2021).

[8] *Id.*

tweeting Mr. Gandhi's photo with the parents of 9-year-old rape victim of Delhi's Nangal.[9]

It is therefore appropriate to revisit the law that guarantees protection against disclosure of name of rape victim and other sexual offences. In this paper, the author traces the legislative history of Section 228A IPC. Secondly, she analyses other general and special laws that have a similar provision against disclosure of the identity of the victim and compare them with Section 228A, IPC. Thirdly, the author critically analyses the continued utility of such a protection from a liberal and feminist perspective. The author submits that protection against disclosure of identity should not be used as tool to silence the voice of rape victims or subvert the democracy. There should not be a blanket ban on the disclosure of the name. The need to protect the privacy of the victim should be balanced with her autonomy. Furthermore, State paternalism should not be indefinite. While the State should initially prevent the disclosure of the name of the victim, it must obtain informed consent of the victim or next of kin for subsequent protection against such disclosure.

Legislative History of Section 228A

Section 228A, IPC penalises the printing and publishing of identity of rape victim. However, for the purposes of investigation, police officer can disclose the identity. The victim, herself, can authorise the disclosure of identity. But the authorisation must be in writing. Authorisation can also be given by next of kin of victim in case the victim is dead or a minor or of unsound mind. However, in such cases the authorisation must be given to the chairman or secretary of any recognised welfare institution.

The section was added to the statute book only in 1983 as a part of rape law reforms undertaken in wake of public anger and momentum generated against the verdict of the Supreme Court of India in *Tukaram*

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[9] Aashish Aryan, *Explained: Twitter's action against Congress and its leaders, and what next*, The Indian Express (August 12, 2021) *available at* https://indianexpress.com/article/explained/congress-rahul-gandhi-twitter-accounts-blocked-violation-of-laws-7450264/ (last visited August 25, 2021).

v. *State of Maharashtra*.[10] In that case Supreme Court of India had acquitted two policemen accused of raping a teenage girl labourer inside the police station. The Court perversely mistook the failure to raise an alarm as her acquiesce and absence of injury marks as evidence of consent. Aspersions were cast on her character due to her active sexual life. The court seemed oblivious to the conspicuous power imbalance that existed between the perpetrators and the victim and the site where the incident took place. The judgment was condemned by jurists and civil society alike and served as a catalyst to revise the substantive law, procedure and evidence relating to rape. One of the demands was to criminalise the disclosure of identity of victim.[11] It was felt by the women and civil society organisations clamouring for a change that there was widespread underreporting of the rape cases due to stigma attached to rape and social ostracism that victim and her family members have to face.

The Law Commission of India also recommended insertion of Section 228A to preserve the anonymity of the complainant in sexual offences.[12] This was largely to prevent embarrassment to victim and her family members. However, the Law Commission also recommended the protection of name of the accused. But the recommendation of Law Commission had certain flaws in so far as it restricted the disclosure of the name of both the victim and accused only at the stage of trial. They did not recommend it for the stage of investigation.

The Criminal Law (Amendment) Bill, 1980 also advocated for protection against disclosure of the name of the victim. The Bill was referred to a Joint Parliamentary Committee. While the Report of the Joint Committee[13] endorsed the need to protect the disclosure of

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[10] *Tukaram* v. *State of Maharashtra*, AIR 1979 SC 185.

[11] *See,* the Petition No.2 signed by Shrimati Lata Mani of Forum against Rape, Bombay and others regarding changes required in rape law, First Report, Committee on Petitions (Seventh Lok Sabha) (Lok Sabha Secretariat, New Delhi, 1980) *available at* https://eparlib.nic.in/bitstream/123456789/57257/1/cop_07_01_1980.pdf#search= (last visited August 25, 2021).

[12] Law Commission of India, *Eighty Fourth Report on Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence* (1980) 28-31.

[13] Lok Sabha, *The Criminal Law (Amendment) Bill, 1980: Report of the Joint*

identity of the victim, but it was subject to various qualifications. It was cognisant of the fact that a blanket ban might be counterproductive to victims' own interests or the proper investigation and therefore suggested as follows,

> '[…] the Committee feel(sic), publicity may be necessary for proper investigation and bringing the offenders to book. The Committee are, therefore, of the opinion that if it is in the interests of the victim, for the purposes of investigation and to ensure that the offenders do not go scot-free, the police officer investigating into the offence should be permitted to allow the printing and publication of the name or any matter which may make known the identity of the victim in good faith. Similarly, if the victim so desires, and in case the victim is dead or is a minor or is of unsound mind and the next of kin of such victim so desires, the publication may be made with the authorisation in writing of the victim or the next of kin. However, to ensure that the authorisation given by the next of kin of the victim is not misused, it should be made obligatory that such authorisation should be given only to the Chairman, or the Secretary of any Welfare Institution or Organisation recognised for the purpose by the central or State Government.'

The suggestions of the Joint Committee were accepted and reflected in Section 2 of the Criminal Law (Amendment) Act, 1983 which added Section 228A to the Indian Penal Code, 1860. The intention of the law makers was that the victim of such offences should not be identifiable so that they do not face any hostile discrimination or harassment in the future.[14]

It may be pertinent to note that IPC forbids disclosure of identity of only major sexual offence of rape, aggravated rape and gang rape and not minor sexual offences like outraging the modesty of women.

Committee, Lok Sabha Secretariat (1982) *available at* https://eparlib.nic.in/bitstream/123456789/757970/1/jcb_07_1982_criminal_law_eng.pdf (last visited August 25, 2021).

[14] *Nipun Saxena* v. *Union of India*, (2019) 2 SCC 703.

Other Laws that Protect the Identity of Victim:

The prohibition in law is to prevent the disclosure of 'identity' of victim. Identity is not confined just to the name of the victim; it is wider in scope and includes any information that can enable one to trace the person in question. Photographs of parents, name of school, email id, phone number, and name of locality or even village can lead to identification of victim and therefore must not be disclosed. In *Court on its own motion* v. *Union of India*[15]the Delhi High Court held that the use of a proper noun which was phonetically like the name of victim amounts to identification.

Apart from Indian Penal Code, there are provisions in other laws that also aim to protect the identity of rape victims. Some of them are as follows:

A. Criminal Procedure Code, 1973 [hereinafter referred to as 'CrPC']

CrPC deals with investigation, inquiry, and trial of offences. Every detail about a case, starting from first information report to judgment, is recorded in writing. However, it may so happen that during any of these stages, the name of victim inevitably creeps in the state records leading to identification. Judiciary, particularly the Supreme Court of India, has been cognizant of this issue and through its successive pronouncements have tried to protect the privacy and identity of rape victim.

At the stage of investigation, 'First Information Report' ['FIR'] is recorded by the officer in charge of police station in cognizable offences.[16] It is invariably bound to have certain statements that might lead to identification of rape victim. Further, FIR is a public document[17] and available online pursuant to the directions of Supreme Court of India in *Youth Bar Association of India* v. *Union of India*[18]. However, the direction to upload the FIR does not apply to sensitive offences like

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[15] *Court on its own motion* v. *Union of India*, LNINDORD 2019 Del 3124 (Delhi High Court).

[16] Criminal Procedure Code, 1973, s.154.

[17] Indian Evidence Act, 1872, s. 74. *See, Shyam Lal* v. *State of U.P.*, 1998 Crl. L.J. 2879 (Allahabad High Court) and *Chnnappa Andanappa Siddareddy* v. *State*, 1980 Crl. L.J. 1022 (Karnataka High Court).

[18] *Youth Bar Association of India* v. *Union of India* AIR 2016 SC 4136.

sexual offences to protect the identity of victim. Even under the Right to Information Act, 2005 such information cannot be obtained by other persons.[19] The direction to protect the identity of rape victim is, however, not limited to recording of FIR but applies to each aspect of investigation including collection and analysis of forensic and medical evidence. Apex Court, in *Nipun Saxena* v. *Union of India*,[20] proposed to use 'sealed covers' to protect the identity of rape victim and held,

> 'Some examples of matters where her identity will have to be disclosed are when samples are taken from her body, when medical examination is conducted, when DNA profiling is done, when the date of birth of the victim must be established by getting records from school etc. However, in these cases also the police officers should move with circumspection and disclose as little of the identity of the victim as possible but enough to link the victim with the information sought. We make it clear that the authorities to which the name is disclosed when such samples are sent, are also duty bound to keep the name and identity of the victim secret and not disclose it in any manner except in the report which should only be sent in a sealed cover to the investigating agency or the court. There can be no hard and fast rule in this behalf, but the police should ensure that the correspondence or memos exchanged or issued wherein the name of the victim is disclosed are kept in a sealed cover and are not disclosed to the public at large. They should not be disclosed to the media, and they shall also not be furnished to any person under the Right to Information Act, 2005. We direct that the police officials should keep all the documents in which the name of the victim is disclosed in a sealed cover and replace these documents by identical documents in which the name of the victim is removed in all records which may be scrutinised by many people. The sealed cover can be filed in the court along with the report filed under Section 173 CrPC.' (Emphasis supplied)

The next avenue during criminal process where there is a lurking threat of disclosure of identity of rape victim is the stage of committal proceedings. During committal proceeding, the accused is required to be supplied the copies of all the documents that prosecution seeks to

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[19] *Supra* n. 14.

[20] *Id*.

rely upon.[21]However, the Supreme Court of India has balanced this fundamental right and statutory right of the accused to fair trial with the right to privacy of victim of sexual offences.[22] In *P. Gopalkrishnan* v. *State of Kerala*[23], one of the evidences that the prosecution relied upon was the memory card on which the act of rape of the victim was recorded. The same was not supplied to the appellant-accused. He wanted to obtain a cloned copy of that memory card and filed an application before the Magistrate. However, the Magistrate rejected the said application, essentially on the ground that acceding to the request of the appellant would be impinging upon the esteem, decency, chastity, dignity and reputation of the victim and also against public interest. The said order was assailed before the High Court of Kerala at Ernakulam which confirmed the order of the Magistrate. The said order was appealed before the Supreme Court of India in this case. The victim filed an intervention application and opposed the appeal on various grounds including, *'the appellant is none other than the master-mind of the conspiracy who wanted to circulate the video of the rape. If a cloned copy of the contents of the memory card is made available then it would be misused by the accused-appellant to execute the conspiracy of undermining the privacy and dignity of the victim*'. The question before the Court was whether it is open to the Court to decline the request of the accused to furnish a cloned copy of the contents of the subject memory card containing the alleged incident of rape on the ground that it would impinge upon the privacy, dignity and identity of the victim involved in the stated offence? Answering in affirmative, Supreme Court devised a mechanism to balance the right to fair trial of accused with privacy of the victim by allowing the appellant or his lawyer or expert only right of inspection.

Finally, the site of trial and judgment can also be potential hotspots where the identity of victim can become public. This is particularly so as criminal proceedings[24] in India are generally held in open courts which are accessible to public. To avoid this problem, the law was

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[21] Criminal Procedure Code, 1973, s. 207. *See also, Sidhartha Vashisht@Manu Sharma* v. *State (NCT of Delhi)*, AIR 2010 SC 2352.

[22] *P. Gopalkrishnan* v. *State of Kerala*, AIR 2020 SC 1.

[23] *Id*.

[24] The Code of Criminal Procedure, 1973, s. 327 (1).

amended in 1980 to carve an exception for rape trial.[25] These are held in camera than open court. The implication of having in camera proceedings is that it makes illegal the publication of any matter related to such proceedings without the previous permission of the Court.[26]

While Section 228A, IPC does not apply judgments of High Court or Supreme Court, the Supreme Court of India has directed the trial courts to avoid disclosing the name of the victim of sex crime in their orders and judgments. This is done with a view to maintain the confidentiality of the proceedings and prevent embarrassment to the victim[27];the victim can be simply referred to as the 'prosecutrix'.[28] In *Bhupinder Sharma* v. *State of Himachal Pradesh*[29] Supreme Court of India referred to social object of preventing social victimisation or ostracism of the victim of a sexual offence for which Section 228-A has been enacted. It observed that in the judgments, be it of a High Court or a lower court, the name of the victim should not be indicated; the Apex Court itself chose to describe the prosecutrix as 'victim' in the judgment. Recently, while dismissing a special leave application, the Supreme Court took an exception to the judgment of the Sessions Judge where the name of rape victim is mentioned. Depreciating the practice of naming the rape victims in their judgments and orders, the court asked all the subordinate courts to be careful in future.[30] High Court of Bombay at Goa while hearing an appeal against the acquittal of Tarun Tejpal in the rape case against him was shocked to see that the judgment of trial court contained a reference to the victim's husband, her email ID, the name of the mother of the prosecutrix. The court ordered that those and other particulars that might lead to identification of the victim to be redacted from the judgment.[31] Even

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[25] The Code of Criminal Procedure, 1973, s. 327(2).

[26] The Code of Criminal Procedure, 1973, s. 327 (3).

[27] *State of Punjab* v. *Gurmit Singh*, (1996) 2 SCC 384.

[28] *Id.*

[29] *Bhupinder Sharma* v. *State of Himachal Pradesh*, AIR 2003 SC 4684.

[30] Order dated June 30, 2021 in *Birbal Kumar Nishad* v. *The State of Chhattisgarh* (Special Leave Petition (Criminal) Diary No.7772/2021 before Supreme Court of India).

[31] Order dated May 27, 2021 in The State of Goa, through *CID CB* v. *Tarunjit Tejpal* (Criminal Appeal No.437 of 2021 before the High Court of Bombay at

when an appeal is to be filed by the victim it can be done by showing her name as 'X' or 'Y'. The real name can be filed in a sealed envelope to be filed with the appeal.[32]

B. Protection of Children from Sexual Offences Act, 2012 [hereinafter referred to as 'POCSO']

POCSO is a special Act that provides for establishment of Special Courts for trial of sexual offences against children. It is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected even during the criminal process and therefore duty is cast on police officers[33] and special court[34] to protect the identity of the child during investigation and trial. Further, all the cases are to be tried in camera[35] and not in open court. However, unlike Section 228A IPC, the obligation under POCSO to protect the identity of a child victim is not limited to penetrative sexual assault or rape but has an omnibus application to all sexual offences against the children.

C. Juvenile Justice (Care and Protection) Act, 2015 [hereinafter referred to as 'JJ Act']

Section 74 of the JJ Act criminalises the disclosure of identity of children. The protection against disclosure is available irrespective of the nature of offence to a child in conflict with law or a child in need of care and protection or a child victim or witness of a crime.

D. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 [hereinafter referred to as 'POSH Act']

Section 16 of the POSH Act prohibits the disclosure any information relating to the complaint of sexual harassment or its disposal. The prohibition applies to the contents of the complaint, the identity and

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Goa).

[32] *Court on its own motion* v. *Union of India*, LNINDORD 2019 Del 3124 (Delhi High Court).

[33] Protection of Children from Sexual Offences Act, 2012, s. 24(5).

[34] Protection of Children from Sexual Offences Act, 2012, s. 33(7).

[35] Protection of Children from Sexual Offences Act, 2012, s. 37.

addresses of the aggrieved woman, respondent and witnesses, any information relating to conciliation and inquiry proceedings, recommendations of the Internal Committee or the Local Committee, and the action taken by the employer or the District Officer. However, it is fundamentally different from protection under Section 228A IPC as POSH Act penalises only those persons who are entrusted with a duty to handle the complaint.[36]It is highly doubtful that any action can be taken against third parties like media houses.[37]

Is it Necessary to Protect the Identity of Victim?

'*A rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault—it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female.'* [38] In a patriarchal society, 'rape is a fate worse than death; there is no normal life possible for the raped woman'.[39]In the words of Apex Court, *'When a woman is ravished what is inflicted is not merely physical injury, but 'the deep sense of some deathless shame'.'*[40] The stigma caused by rape in fact actually drives some hapless victims to end their life. This is corroborated by the data collected by National Crimes Bureau [hereinafter referred to as 'NCRB'] on 'accidental deaths and suicides in India' [hereinafter referred to as 'ADSI']. The said data enumerates the causes of suicide, if available.[41] Amongst other causes, 'loss of

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[36] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, s. 17.

[37] Megha Mehta and Mukta Joshi, *A Crisis of Identity: Revisiting the Legal and Ethical Framework Governing Media Reportage of Secxual Violence*, 54 (29) EPW 56 (2021).

[38] *Supra* n. 27.

[39] Nivedita Menon, SEEING LIKE A FEMINIST, 111(Zubaan and Penguin Books India, 2012).

[40] *Rafiq* v. *State of U.P.*, (1980) 4 SCC 262.

[41] National Crime Records Bureau, Ministry of Home Affairs Government of India, *Accidental Deaths & Suicides in India (ADSI) available at* https://ncrb.gov.in/en/accidental-deaths-suicides-india-adsi (last visited October 24,2021).

social reputation'[42] and 'physical abuse [rape]' have also been mentioned. The number of people who committed suicide due to these causes from 2011-2019 are as follows:

Year	*No of Suicides due to fall in reputation*	*Number of suicides due to physical abuse [rape]*
2011[43]	1160	286
2012[44]	981	281
2013[45]	1466	270
2014[46]	490	74
2015[47]	1093	80
2016[48]	844	112
2017[49]	607	107

[42] Loss of social reputation can be due to various underlying reasons. It is being mentioned only to underscore that it is one of the reasons driving people to take their lives in India.

[43] National Crime Records Bureau, *TABLE – 2.10 Distribution of Suicides Categorised According to Causes – 2011 (State, UT & City-wise) available at* https://ncrb.gov.in/sites/default/files/adsi_reports_previous_year/table-2.10_2011.pdf (last visited October 24,2021).

[44] National Crime Records Bureau, *Table – 2.10 Distribution of suicides categorised according to causes – 2012 (State, UT & City-wise) available at* https://ncrb.gov.in /sites/default/files/adsi_reports_previous_year/table-2.10_2012_0.pdf (last visited October 24,2021).

[45] National Crime Records Bureau, *Table – 2.4 Incidence of suicides categorised cause wise – 2013 (All India) available at* https://ncrb.gov.in/sites/default /files/adsi_reports_previous_year/table-2.4_2013.pdf (last visited October 24,2021).

[46] National Crime Records Bureau, *Table 2.4 Distribution of Suicides by Causes – 2014 (All India) available at* https://ncrb.gov.in/sites/default/files/ adsi_reports_previous_year/table-2.4_2014.pdf (last visited October 24,2021).

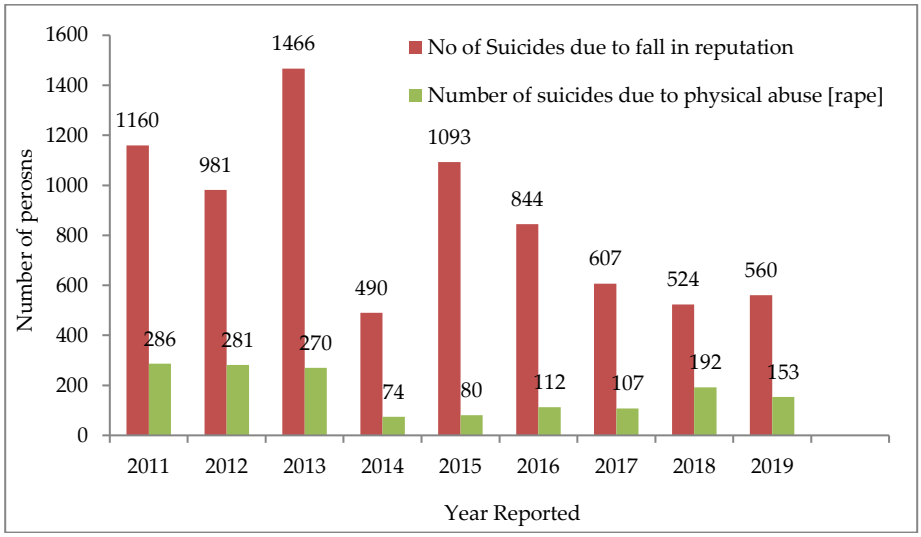
[47] National Crime Records Bureau, Table 2.4 Causes – wise Distribution of Suicides during 2015 (All India) *available at* https://ncrb.gov.in/sites /default/files/adsi_reports_previous_year/table-2.4.pdf (last visited October 24,2021).

[48] National Crime Records Bureau, Table 2.4 Causes – wise Distribution of Suicides during 2016 (All India) *available at* https://ncrb.gov.in/sites /default/files/adsi_reports_previous_year/table-2.4_0.pdf (last visited October 24,2021).

[49] National Crime Records Bureau, *Table 2.4 Causes – wise Distribution of Suicides*

Year	*No of Suicides due to fall in reputation*	*Number of suicides due to physical abuse [rape]*
2018[50]	524	192
2019[51]	560	153

Figure 1: Suicides in India: Due to fall in reputation and physical abuse [rape]



Rape is an '*assault on the individuality and inherent dignity of a woman*'[52] and violation of her fundamental right to life under Art. 21.[53] '*Rape destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will-power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt.*'[54] The case of *Ms. X* v. *State of Jharkhand*[55], serves an

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during 2018 (All India) *available at* https://ncrb.gov.in/sites/default /files/adsi_reports_previous_year/TABLE-2.4.pdf (last visited October 24,2021).

[50] National Crime Records Bureau, *Table 2.4 Causes – wise Distribution of Suicides during 2018 (All India) available at* https://ncrb.gov.in/sites/default /files/adsi_reports_previous_year/TABLE-2.4.pdf (last visited October 24,2021).

[51] National Crime Records Bureau,*Table 2.4 Causes – wise Distribution of Suicides during 2019 (All India), available at* https://ncrb.gov.in/sites/default /files/adsi_reports_previous_year/Table-2.4_2019_0.pdf (last visited October 24,2021).

[52] *Shyam Narain* v. *State (NCT of Delhi)*, (2013) 7 SCC 77.

[53] *Bodhisattwa Gautam* v. *Subhra Chakraborty*, (1996) 1 SCC 490.See also *The Chairman, Railway Board & Ors* v. *Mrs. Chandrima Das*, (1999) 6 SCC 667.

[54] *Bodhisattwa Gautam* v. *Subhra Chakraborty*, (1996) 1 SCC 490.

important reminder of the societal attitude towards rape victims. In this case the petitioner filed a writ seeking rehabilitation as no one was ready to give her an accommodation on rent. Her only fault was that she was a rape victim and after her identity was disclosed by the media. In such circumstances, it seems reasonable to have a law protecting the identity of rape victims. Such a law can ostensibly prevent subsequent 'social victimisation or ostracism of the victim'.[56]However, the claim seems superficial and hollow unless the act of social victimisation itself is criminalised or prohibited. Disclosure of identity is only a path that leads to victimisation. The actual victimisation that consists of hostile treatment in access to shops, houses, services and job is carried out by private individuals. But fundamental rights can be claimed only against the State. Also we don't have a general anti-discrimination law[57] that prohibits such discrimination by private actors. The Protection of Civil Rights Act, 1955 prescribes punishment for enforcing religious[58] and social disabilities[59] only on the on the ground of 'untouchability'. It will be interesting to see if the courts are ready to expand the scope of 'untouchability' to include within its purview the social ostracism of rape victims.

Further, the protection on the disclosure of identity does not create a 'veil of ignorance' about the victim in the judicial adjudication process. The courts have invented a prototype of an honest rape victim.[60] The non- conformity to the invented stereotypes has social and legal consequences like victim blaming and victim disbelief.[61] In the process, the courts search for corroborative evidence to support the testimony of victim, and shamelessly scrutinise the sexual history of the victim to

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[55] Judgement dated January 20, 2021 in *Ms. X* v. *State of Jharkhand* (Writ Petition (Civil) No.1352 OF 2019 before Hon'ble Supreme Court of India).

[56] *State of Punjab* v. *Ramdev Singh*, AIR 2004 SC 1290.

[57] Suhrith Parthasarathy, *The need for an anti-discrimination law* The Hindu (June 15, 2020) *available at* https://www.thehindu.com/opinion/lead/the-need-for-an-anti-discrimination-law/article31828372.ece (last visited October 24, 2021).

[58] The Protection of Civil Rights Act, 1955, s. 3.

[59] The Protection of Civil Rights Act, 1955, s. 4.

[60] *But see Aparna Bhat* v. *State of Madhya Pradesh*, LL 2021 SC 168.

[61] Mrinal Satish, DISCRETION, DISCRIMINATION AND THE RULE OF LAW: REFORMING RAPE SENTENCING IN INDIA 38-50 (Cambridge University Press, 2017).

search for traces of consent. Her risqué relationships outside marriage, 'not of a good character and was merely a concubine'[62] or 'habituation to sex'[63] have been taken as evidence of 'consent'. The Criminal Law (Amendment) Act, 1983 did not repeal Section 155 (4) of the Indian Evidence Act, 1872 which permitted the defense to make a roving inquiry into the sexual history of the rape victim. It was only in 2002 that amendment was made to delete past sexual history clause. This passive approach, however, did not make much impact. The courts continued to refer to the past sexual history of rape victim.[64] It was only upon the recommendations of Justice JS Verma Committee that a rape shield law in form of Section. 53A of Indian Evidence Act, 2013 was finally enacted. [65] It is then questionable that whether a direction to protect the identity of the victim was originally crafted to only make the rape trials appear facially benign? Was it a subterfuge to cloak the judicial misdemeanours behind anonymity?

It is noteworthy that prohibition to disclose the name operates even after the death of the victim. The personal victimisation and stigmatisation cease upon the death of the person. While Section 228A IPC permits the disclosure of name of deceased victim by next of her kin but it is subject to a regulatory control of the State. The law in its current format gives primacy to State over parents. The next of kin are required to give authorisation for the same only to the chairman or secretary of any recognised welfare institution. Unfortunately, IPC is bereft of any guidelines as to the nature of such organisation and the qualifications of the persons who are made the Chairman or Secretary of such organisation. As a matter of practice, neither the Central Government nor any State Government has notified any such social welfare institutions or organisations to which the next of kin should give the authorisation. This means that it is virtually impossible for the next of the kin of deceased victim to legally disclose her name. This problem was brought to the notice of Supreme Court of India in *Nipun*

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[62] *Pratap Misra* v. *State of Orissa*, AIR 1977 SC 1307.

[63] *Supra* n.10.

[64] Pratiksha Baxi, Public Secrets of Law: Rape Trials in India, 8-10 (OUP, 1st Edn, 2014).

[65] Justice J. S Verma Committee Report, *Report of the Committee on Amendments to Criminal Law* (January, 2013) 308-31.

Saxena v. *Union of India*[66]. The Court exercised its powers under Article 142 of the Constitution of India and directed that until the government lays down the guidelines under Section 228A 'application to authorise disclosure of identity should be made only to the Sessions Judge/magistrate concerned'. It was also urged before the Court that after the death of victim her name should be permitted to be disclosed so as to form a symbol of protest. However, the court rejected the argument and held, 'If a campaign has to be started to protect the rights of the victim and mobilise public opinion it can be done so without disclosing her identity.' Perhaps the Supreme Court was being too paternalistic in its approach. The distrust on next of kin by both the legislature and judiciary is uncalled for. By requiring the parents to file an application before Sessions Court/ Magistrate to disclose the name, Supreme Court has only saddled the lower judiciary, which already is battling a huge backlog, with an avoidable application. If the State could not, in the first place, protect the victim from sexual assault, it should not be entitled to usurp the authority to protect the 'identity' of victim after her death. The decision to disclose the identity should be better left to the kin of the victim. State should exercise such a power only in cases where the victim has no known kin.

Critical Analysis of Section 228A: From a Liberal and Feminist Perspective

Two of the most important critiques on the prohibition of disclosure of identity of rape victim come from are from a libertarian and feminist perspective. A liberal perspective based on Mill's exposition of 'liberty of thought and discussion',[67] argues in favour of liberty of expression which can be curtailed only if it causes harm to others.[68] Freedom of speech and expression is also a constitutionally guaranteed fundamental right in India under Article 19 1 (a) of Constitution of India. Freedom of speech and expression includes the freedom of

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[66] *Nipun Saxena* v. *Union of India*, (2019) 2 *SCC* 703.

[67] J.S. Mill, ON LIBERTY (Ticknor and Fields, 2nd Ed, 1863) 33-106.

[68] Stanford Encyclopaedia of Philosophy, *Freedom of Speech available at* https://plato.stanford.edu/entries/freedom-speech/ (last visited August 28,2021).

media to report court proceedings.[69] However, the freedom is not absolute but subject to reasonable restrictions on grounds of 'the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence'.[70]Therefore, freedom of media does not apply when proceedings are held in camera. This, however, does not mean that media is gagged from reporting the alleged incident of rape. What is prohibited by virtue of Section 228A IPC and 327 CrPC is, firstly, any information that can identify the victim, and, secondly, the kind of evidence that was given in the Court and the details of proceedings of the Court. The media can nevertheless report that such an incident occurred and that the hearing of the case was scheduled on a particular day. However, the Patna High Court, in the Bihar Shelter Home Rape case passed a blanket ban order on 23rd August, 2018 with regard to media reporting in that case.[71] The same was however set aside by the Supreme Court of India. It only restrained the electronic media from telecasting or broadcasting the images of the victims in morphed or blurred form as they could have led to the identification of the victims. Media was also prohibited to interview the victims. However, it was permitted to report on the subject matter to these terms and conditions relating to the protection of identity of victim.[72] It can, therefore, be concluded that the ban on disclosure of identity of rape victim does not in any way silence the media from reporting any rape incident in any particular manner. What is prohibited is sensationalism. This is also in line with the 'norms of journalistic conduct' drafted by Press Council of India which caution against identification of rape victims.[73] High Courts in India have also

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[69] *The Chief Election Commissioner of India* v. *M.R. Vijaybhaskar*, AIR 2021 SC 2238 (Supreme Court of India).

[70] Constitution of India, 1950, Art.19 (2).

[71] Based on the Letter of Social Activist *Mr. Saleem Madavoor Dated 29.07.2018* v. *State of Bihar* (Patna High Court CWJC No.15490 of 2018(3) dt.23-08-2018) *available at* http://patnahighcourt.gov.in/TEMP/9d19ca3b-ce6c-455b-8d41-825a70250eb0.pdf (last visited October 30, 2021).

[72] *Nivedita Jha* v. *State of Bihar*, 2018 SCC OnLine SC 1616.

[73] Press Council of India, *Norms of Journalistic Conduct* (Edition 2010), para 6 (ii), *available at* https://presscouncil.nic.in/OldWebsite/NORMS-2010.pdf (last

taken *suo motu* action against media houses when they in their temptation to garner higher TRPs have made public the names or/and the photograph of unfortunate rape victims. In the matter of making public the identity of eight year old girl child who was gangraped in Kathua, the Delhi High Court imposed a penalty of Rs 10,00,000 each on 23 media houses that had published the name or photograph of the victim.[74]

Another strand of criticism, curiously, comes from a feminist perspective. A feminist critique of law is rooted in questioning the objective neutrality of a legal proposition based on women's experience. While there many methods to do a feminist critique, Katherine T Bartlett in her seminal article advocates for asking the woman question, feminist practical reasoning, and consciousness-raising. [75] For this paper, I have preferred to ask women's question to critically analyse Section 228A. I ask what has been the impact of Section 228A on the lives of women. Is the protection against disclosure of identity of the victim promoting more women to come and report rape? What is the implication of this section on the existing patriarchal structure of Indian society? Whose interests are in effect protected in the name of privacy of women? Is the masculinist state trying to shield the perpetrators under the garb of privacy of the victim?

Rape, per se, is an offence against the bodily autonomy of a woman. But the patriarchal structure, which is built on purity of descent by controlling the sexuality of women, views rape as a stigma to family honour. So much so that the factum of rape is regarded as antithetical to the marriage prospects of the girl. In such circumstances a ban on disclosure of identity of rape victim would save the family honour. In the words of Supreme Court of India in *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat*[76], 'The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy'. It can therefore be argued that Section 228A

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visited August 28, 2021).

[74] *Court on its own motion* v. *Union of India*, LNINDORD 2019 Del 3124 (Delhi High Court).

[75] Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

[76] *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat*, AIR 1983 SC 753.

is only furthering the patriarchal agenda of protecting family honour. It also imbues the notion of shame associated with rape. Pratiksha Baxi notes particularly that bodily autonomy of all women has not been the chief concern of the 1983 Criminal Law Amendment, and Section 228A has, in effect, framed rape as shame.[77] Feminist thinkers have, however, attacked such framing of rape. Nivedita Menon argues that 'in the feminist view, the raped woman does not lose her honour, the rapist does.'[78] It is in the same light that Asha Devi echoes that it is the rapists who should be ashamed and not the victims.[79] Further, feminists have been critical about the public-private dichotomy and argued that privacy is a 'veneer for patriarchal domination and abuse of women.'[80] It seems there is some truth in the feminist arguments. Section 228A infantilises women and their families and robs them of agency.

Conclusion

The criminal justice system in India is not victim centric. Arguably, Section 228A IPC is for the protection of victim's interest and therefore a step in the right direction. The utility of such a protection is not disputed even by the critics. It has become even more relevant with the proliferation of internet. But the problem lies in the foundational defects that have impacted the practice. Section 228A IPC is not rooted in the victim's rights-based approach. The victim's decisional autonomy has been overridden by giving primacy to her community membership. Nowhere her choice to withhold or disclose her identity is asked at any stage of criminal justice administration. Further, the offence is cognizable. This implies that anyone can lodge the First Information Report ['FIR']. Victim's consent is not required. This opens the room for misuse of the provision for political vendetta and other reasons. Recently, a belated FIR has been filed after two years by an advocate in Delhi against thirty eight film celebrities for revealing the real name of

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[77] Pratiksha Baxi, *Rape, Retribution, State: On Whose Bodies?* 35 (14) EPW 1196 (2000).

[78] *Supra* n. 39., pp. 114-116.

[79] *Supra* n. 5.

[80] Justice D.Y Chandrachud in *Justice K.S. Puttuswamy* v. *Union of India*, (2017) 10 SCC 1.

the Hyderabad rape victim on their respective twitter handles[81]. Also, the offence u/s. 228A, IPC is non-compoundable. This means that even if the victim wants to enter a settlement, she cannot do that.

Therefore, it is proposed that while there should be an initial obligation to protect the disclosure of name of the victim during the stage of investigation, the same need not continue infinitum. The court should obtain an 'informed consent' from the victim at the commencement of trial or at the time of judgment if she wants to protect her identity indefinitely. Such an approach can prevent sensationalism by media and still uphold the decisional autonomy of the victim. In case the rape victim decides that her identity should not be made public then publication of the same should be criminalised. Another way of respecting the decisional autonomy of the victim can be making the cognizance of the offence subject to complaint by the victim or next of her kin on lines like Section 198A CrPC.

Further, in case the identity is disclosed, then criminalisation should not be the only strategy. Proper counseling and support must be provided to victim. An easy mechanism should be evolved to remove infringing information from the internet in consonance with the right to be forgotten[82]. It is ironic that Delhi High Court fined 23 media houses for disclosure of identity of a child rape victim in 2018 but a simple google search performed by me[83] with keywords 'kathua rape victim' even today makes her name public. There is an urgent need for an effective monitoring mechanism to ensure that infringing material is promptly taken down and not uploaded again.

Lastly, India needs to urgently come up an anti-discrimination law so that ostracism of the victim is also prohibited.

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[81] *Complaint filed against Tollywood & Bollywood actors for revealing rape-victim's identity in 'Disha case'*, The Times of India (Sep 7, 2021) *available at* https://timesofindia.indiatimes.com/entertainment/telugu/movies/news/case-filed-against-tollywood-bollywood-actors-for-revealing-rape-victims-identity-in-disha-case/articleshow/85976892.cms (last visited October 30, 2021).

[82] *Name Redacted* v. *The Registrar, Karnataka High Court*, Writ Petition No.62038 of 2016 (Karnataka High Court). Also see *Subhranshu Rout* v. *State of Odisha*, 2020 SCC OnLine Ori 878 (Odisha High Court).

[83] Last keyword search was done on 2:19 am, 28-08-2021.

Troubled Borders of Assam:
An Analysis in the Light of Constitutional Provisions and Legal Proceedings

Nirmali Bhattacharya[*]

Introduction

Granting statehood to the Indian states especially to the North Eastern States has brought with it innumerable and diverse problems for the state of Assam and during present time the most serious among all these is the interstate border dispute. Since independence India's North Eastern states has been subjected to violent ethnic conflict and secessionists movements in order to preserve their own identity. The present day North Eastern states are almost synonymous with what we termed as Assam during British colonial period. Changing of Assam's territory during British administration primarily focused on administrative convenience rather than historical and cultural continuity.[1] The close tie between hill tribes and the people of plains which existed before British colonial conquest ended with drawing of 'inner lines' along the foothill segregating hills and plains.[2] In post-independence India the agony and bitterness developed inside the minds of every community ultimately resulted in creation of new states. The largest district of Assam at the time independence has acquired remarkable transformation in terms of geography and demography. Since then, the state of Assam has been witnessing a series of conflict mostly in the line of ethnic assertion which centres around three issues-

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[*] Dr. Nirmali Bhattacharya is an Assistant Professor with the NERIM Law College, Assam and can be reached at sumi.bhattacharyya@gmail.com.

[1] Sanjib Baruah, INDIA AGAINST ITSELF: ASSAM AND POLITICS OF NATIONALITY 25, (Oxford University Press, 8thedn., 2013).

[2] Niru Hazarika, *Ethnic Autonomy: A Challenge to Indian Democracy,* in B.B. Kumar (ed.) PROBLEMS OF ETHNICITY IN THE NORTH-EAST INDIA 111, (Concept Publishing, 2007).

secessionist movement, problem of immigration and inter-state boarder disputes. Amongst all these, the present paper focuses on interstate border disputes in Assam. In a multi-ethnic community like Assam the feeling of being alienated by the dominant group of population often developed identity consciousness among the tribal population of North Eastern states and in order to resolved the issue states were reorganised as per their socio-cultural, linguistic and regional aspirations. Unfortunately, border clashes along the borders of Assam started with the reorganisation of states after independence.

The State of Assam has been passing through a series of violent interstate boarder conflict at some frequent intervals since independence resulting in untold sufferings of the people staying in border areas. The New Delhi-based Rights and Risks Analysis Group (RRAG) claimed that the inter-state border conflicts in the North-Eastern region had resulted in the death of at least 157 persons and 361 left injured since 1979 to July 2021. Moreover, the same report also stated that such conflicts has made 65,729 people displaced over a period of 42 years.[3] Observing the seriousness of the problem during present times the paper throws light upon inter -state border tussle with four neighbouring states of Assam-Nagaland, Mizoram, Arunachal Pradesh and Meghalaya. Keeping in view the unresolved border dispute even after seventieth decades of India's independence, the present paper also tries to focus constitutional provisions strengthening the demand for separate statehood as well as constitutional mechanism for resolving inter-state border dispute. Inclusion of statutory provisions by the constitution of India for administration and development of tribal ethnic groups of population has not been able to meet the aspiration of the people living in north eastern states of India. Formation of several boundary commissions as per the direction of Supreme Court failed to resolve the issue in an amicable manner. Considering the long standing problem of interstate border dispute in Assam an attempt has been made towards finding

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[3] Samir Karmakar, *Inter state Boundary Conflicts in Northeast killed 157 Since 1979, Rights Group Report Says* DECCAN HERALD (August 10, 2021) *available at* https://www.deccanherald.com/national/east-and-northeast/inter-state-boundary-conflicts-in-northeast-killed-157-since-1979-rights-group-report-says-1018287.html (last visited August 23, 2021).

out the reasons for interstate border dispute and various means adopted till now to resolve the issue.

Genesis of the Problem

The state of Assam has been witnessing violent conflict and aggression among various groups of population staying in North Eastern states of India due to inter-state border dispute along its border. The disputes although is continuing even today, but its root lies in the history of Assam especially during British colonial rules. Ethnic discontentment prevailing among these ethnic groups was observed only after independence. Prior to this it was not much seen during pre-colonial times and this can be known from the fact that they had considerable political, cultural and economic relations among themselves.[4] In most of the occasions hill tribes were dependent on plains for fulfilling their basic necessities in life. Commercial relationship existed between them shows their mutual understanding. Unfortunately, British policy always prevented the plain and hill tribes to come into close contact among themselves[5]. British colonial rule tried to establish protected enclaves for hill tribes so that they could pursue their own customary practices. Facilitating the next move for separation, excluded, and partially excluded areas were created by the government of India Act, 1935 and hill tribes were excluded from the operation of laws applicable to rest of British India.[6] Before that these excluded areas were known as backward tracts under 1874 Schedule District Act and Government of India Act of 1919.[7]

British policy of segregation between hill tribes and plains bears a remarkable impact upon the numerous linguistic, ethnic and regional movements during post-independence period in the state of Assam. On the other hand, post independence India experienced separatist

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4 *Supra* n. 1, pp. 28-31.

5 *Supra* n. 2, pp. 110-124.

6 Breehivorna Talukdar, *Troubled Northeast: In Search for Unity Amongst Diversity with Special Reference to Assam*, in A. Sarmah & Konwar (eds.) FRONTIER STATES: ESSAYS ON DEMOCRACY, SOCIETY AND SECURITY IN NORTH EAST INDIA 63, (DVS Publishers,1st ed., 2015).

7 Sanjib Baruah, DURABLE DISORDER: UNDERSTANDING THE POLITICS OF NORTHEAST INDIA 188, (Oxford University Press India, 2nd ed., 2007).

tendencies and agitations over local languages which was resolved only through reorganisation of the states based on ethno-linguistic demands whose boundaries were demarcated during British rule without giving due consideration towards linguistic divisions. Although the primary basis of state reorganisation was language but ethnic as well as economic considerations also played a vital role in the context of state reorganisation.[8] Moreover, State Reorganisation Commission (SRC) was set up in December 1953 with the objective of considering the question as regards reorganisation of states of Indian Union. Although it recommended formation of states by putting more emphasis on language and culture, factors like preservation and strengthening of the unity and security of India as well as financial, economic and administrative were also given due consideration by SRC. But SRC was unwilling to adopt linguistic principle to North East as it was uncertain about the stability of the region as a result of any step taken in lieu of it.[9]

In the subsequent years, several voices were raised opposing move for possible merger with Assam as well as demand for hill state. Assam had undergone rapid changes mostly in terms of its geographical boundary immediately after independence. The desperate will of tribal population for separate hill state was their desire for the establishment of separate tribal identity as they had a fear that they would be denied getting the full scope for the development of their language and culture. Broad perspective of national plans made and executed during that time ignored the factors associated with tribal integration and no due consideration was put into the issues regarding their historical and cultural background. Moreover, they expressed their dissatisfaction over sixth schedule of the constitution too as according to them it failed to safeguard their basic interest.[10] The feeling of alienation among hill tribes and passing of Assam's language bill in

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[8] Kunda K. Dilip, THE STATE AND THE BODO MOVEMENT IN ASSAM 4-5, (A.P.H. Publishing Corporation, New Delhi,1st ed, 2010).

[9] Subir Bhaumik, TROUBLED PERIPHERY: CRISIS OF INDIA'S NORTH EAST 15, (Sage publication New Delhi ,2nd ed, 2015).

[10] Nitendra Nath Das, *Reorganisation of Assam After Independence,* in B. Datta Ray & S.P. Agrawal (eds.) REORGANISATION OF NORTH-EAST INDIA SINCE 1947 149, (Concept Publishing, 1996)

1960 further intensified their sub regional and ethno-cultural sentiments.[11] Ultimately as the demand for separate hill states became louder, within a period of 15 years of linguistic reorganisation of India, greater Assam was break up into several pieces.[12] Reorganisation of British Assam resulted in creation of predominant tribal states of Nagaland, Meghalaya, Mizoram and Arunachal Pradesh. Amongst these states Nagaland was the first North eastern states to be carved during post- independence period.

Constitutional Safeguards towards Tribal Population

Owing to India's Independence on August 15, 1947, the administrative jurisdiction of the excluded and partially excluded areas of hills of Assam was transferred to the Government of Assam which acted on behalf of government of India. Even after independence Indian government also tried to adopt the same policy of exclusion and alienation. Such attitude of the government was reflected through incorporation of various preferential constitutional provisions in favour of tribal population enabling them to grow according to their genius and tradition as observed by the first prime minster of Independent India, Pandit Jawaharlal Nehru.[13]

For the administration and development of areas inhabited by tribal ethnic groups living in North Eastern states of Assam, the constitution of India provides for some special provisions as laid down in sixth schedule. Under Article 244 of constitution of India deals with the administration of schedule and tribal areas and the VIth Schedule lays down special provisions for the protection of the interest and cultural identities of the hill tribes of North Eastern Region. Again, Article 244A empowers parliament to form an autonomous state comprising certain tribal areas in Assam and create local legislature or council of ministers for such states. It was added to the Constitution so as to meet

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[11] H.N. Das, *Ethnic Aspirations and Insurgency in the North –Eastern Region of India*, in B.B. Kumar (eds.) PROBLEMS OF ETHNICITY IN THE NORTH EAST INDIA 83 (Concept Publishing Company,2007)

[12] *Supra* n. 8, p.16.

[13] N. Changkakoti, *Ethnic problems and inter-state border problems in North-east and Solutions*, in B.B. Kumar (eds.) PROBLEMS OF ETHNICITY IN THE NORTH EAST INDIA 155, (Concept Publishing Company, 2007)

the demands of the hill tribes in Assam for a separate state. Under Article 15 clause (4) of the Constitution of India state is empowered to make special provisions for the advancement of any socially and educationally backward classes of the citizens or for the schedule castes and Scheduled Tribes. This was inserted by the Constitution (1st Amendment) Act, 1951. Moreover, the general directive given under Article 46 provides the state to promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.[14] North Eastern States, thus, was recognised for maintaining their distinctiveness through various provisions within the Constitution of India even after the independence.

State Formation and Inter-State Border Dispute

Unfortunately, all the efforts made towards giving preferential treatment to tribal population had proven to be a futile exercise. Despite such preferential treatment tribal population of undivided colonial Assam plagued by various secessionist movements asserting separate sovereign state to preserve their own identity.

As a result of fragmentation of British colonial Assam, inter-state border dispute of Assam especially with its four neighbouring states Arunachal Pradesh, Nagaland, Meghalaya, and Mizoram has made the region unstable since independence. Inter-state border dispute has become one of the burning issues of the state disrupting the peace and cohesion among the people of North Eastern region. Since 1960 Assam has been experiencing border disputes which are recurring at some regular intervals.

A. Assam -Nagaland

Nagas were the first hill tribe demanding a separate political identity mobilised under Naga hostiles Naga National Council (NNC) and Nagaland was the first state carved out from undivided Greater Assam. In the year 1957 Government of India passed the Naga Hills-Tuensang Area Act under which new administrative unit in the state

[14] *Id*. p. 156.

of Assam was formed known as Naga Hills Tuensang Area. In 1962, Government of India passed State of Nagaland Act and with it Nagaland was constituted as the sixteen state of the Indian Union. Constitution Thirteenth Amendment Act was passed, and Nagaland gained full-fledged statehood.[15]

Among all the border disputes the lengthiest and most active was that of Assam and Nagaland.[16] The dispute persisted in Assam and Nagaland border can be traced back even before independence of India. In the year 1947 the nine points agreement between Naga National Council (NNC) demanded bringing back all the forests transferred to Sibsagar and Nagaon into Naga Hill District.[17] This was followed by sixteen point memorandum between government of India and the leaders of Naga People's Convention (NPC) in 1960 and the claims made by Naga leaders to certain reserve forest within Assam was refused by the government of India. Their claim was refused by Government of India on the basis of British government's notification dated November 25, 1925 defining boundaries of Naga Hill District as well as Article 3 and 4 of the Constitution of India prescribing procedure for the transfer of areas from one state to another.[18] Accordingly, in 1962, the Constitution (Thirteenth Amendment) Act was passed, aiming to establish a separate state of Nagaland and the border of the new state were defined under State of Nagaland Act of 1962 which included three districts to be called the Kohima district, Mokokchung district and Tuensang district.[19] Moreover, the Act was enacted defining its border as per 1925 notification.[20]

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[15] *Supra* n.13, p.162.

[16] Puspita Das, *Interstate Border Disputes in the Northeast*, Monohar Parrikar Institute for Defence Studies and Analysis (June 12, 2008) *available at* https://www.idsa.in/idsastrategiccomments/InterstateBorderDisputesintheNortheast_PDas_120608 (last visited August 11, 2021).

[17] Naga Akbar, Hydari Accord (nine point agreement, point no. 6) *available at* https://peacemaker.un.org/india-nine-point-agreement (last visited August 16, 2021)

[18] *Supra* n.13, pp. 163- 164.

[19] Udayan Misra, *Assam Nagaland Border Violence*, 49 ECONOMIC AND POLITICAL WEEKLY 16 (2014).

[20] Puspita Das, *Interstate Border Disputes in the Northeast*, Monohar Parrikar Institute for Defence Studies and Analysis (Jul. 29, 2021) *available at*

After gaining statehood their voices became louder and simmering tensions between these two states ultimately resulted in eruption of inter-state border violence in the form of kidnappings, abductions, encroachment of lands, armed clashes and even killings of innocent inhabitants residing in Assamese villages. The first case of inter-state border violence between the two states was witnessed just after the birth of new state of Nagaland in 1965 at Kakodanga Reserved Forest area.[21] In 1971, the government of India in order to find out an amicable settlement of the issue appointed K.V.K. Sundaram, the then chairman of the Law Commission as Adviser in the Ministry of Home Affairs to ascertain the facts regarding Assam Nagaland boundary in consultation with the chief minister of both the states and to give suggestions on it. He had submitted his report in 1978 where he had rejected most of the claims made by Nagaland. This report although accepted by Assam government but it was rejected by Nagaland government.[22]

The first major inter-state border violence took place in 1979 where about fifty Assamese villages were burnt down and over a hundred were killed. Observing the severity of the violence, the state governments of both the states entered into an agreement for maintaining status quo and employment of a neutral force for controlling the disputed areas. Again, in 1985 clash between Assam police and their Nagaland counterpart took place in Merapani area. Subsequently, as before, the government of both the states took the initiative to maintain peace and tranquillity of the area known as Disturbed Area Belt (DAB). Moreover, union government set up Shastri Commission after Merapani incident.[23] But it too could not been able to give a fruitful solution towards inter-state border violence due to rejection by Nagaland.[24]

The never ending dispute between the two states was further witnessed during August 12-14, 2014 when a clash was triggered due

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https://www.idsa.in/issuebrief/disputes-in-northeast-india-pdas-290721 (last visited August 17, 2021).

[21] *Supra* n. 19, p. 16.

[22] *Supra* n. 13, p. 163.

[23] *Supra* n. 19, p. 17.

[24] *Supra* n. 20, p. 4.

to a land dispute which carried out by Naga villagers backed by non-state militant groups. The violence left 17 people dead, over 200 houses burnt and about 10,000 people displaced.[25] Thus, the non-acceptance of notified boundary by Nagas eventually led towards unabated encroachment of Nagas into Assam's land thereby making the border area volatile and sensitive even today.

B. Assam- Mizoram

In 1890, Mizo Hills were brought under the administrative control of British and the territory was divided into North and South parts. The northern part was annexed with Assam and southern part with that of Bengal. But subsequently, both the parts were united into a district of Assam.[26] During British period the inhabitant of Mizoram were commonly called Lushai.

After India became independent Mizo District Council was set up in 1952. In 1955 craftsmanship was abolished.[27] Before that in April 1954 Lushai Hill district of Assam was changed to Mizo Hill district.[28] When the district was engulfed by famine 'mautam' during 1959-61, a voluntary organisation known as Mizo National Famine Front was formed to shoulder the responsibility for collecting and distributing foodstuff received from the government among the victims of famine. In 1961, they changed to Mizo National Font and emerged with the objective of attaining independence and sovereignty for the Mizo Hills. Soon after that in 1966 the organisation attacked the government treasury and other establishment in the district which was put an end with the help of security forces.[29] It became a union territory on January 21, 1972. The state of Mizoram became a full-fledged state on February 20, 1987 following the historic memorandum of settlement between Government of India and Mizo National Front in 1986.[30]

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[25] *Supra* n. 19, p. 15.

[26] S.K. Agnihotri, *Constitutional Development in North-East India Since 1947*, in B.B. Datta Ray & S.P. Agrawal (eds.) REORGANISATION OF NORTH-EAST INDIA SINCE 1947 67, (Concept Publishing, 1996).

[27] *Id*.

[28] *Supra* n. 13, p. 169.

[29] *Supra* n. 26.

[30] *Supra* n. 13, p. 169.

The inter-state border dispute along Assam-Mizoram border has resulted from the fact that both the governments are accepting two different notifications as regards demarcation of boundary along Assam Mizoram border. The 1875 demarcation which was derived from 1873 Bengal Eastern Frontier Regulation (BEFR) Act, 1873 has been considered by Mizoram for boundary fixation.[31] This 1875 notification differentiated Lushai Hills from the plains of Cachar in Assam's Barak Valley. In 1933 the new boundary demarcation conducted by British colonial government led to separation of Lushai Hills, Cachar and former princely state of Manipur. The government of Assam follows this 1933 demarcation. And the Mizos do not accept this demarcation.[32] Again, Mizoram after becoming a union territory, its territory was defined by North Eastern Areas (Reorganisation) Act, 1971 and s. 6 of the said Act stated that the Union Territory of Mizoram comprised of Mizo District in the existing Assam.[33] Its boundary was notified under Notification No. 2106 AP dated March 9, 1933.[34]

Assam Mizoram border although relatively calm initially, conflict along the border had taken its momentum since 1994 and has turned violent during present time. The first major incidence of border violence along Assam Mizoram border flared up in 1994. It although broke out again a decade later in 2006 and again in 2018, the frequency of interstate border violence between Assam and Mizoram increasing in recent times. Both the states had experienced major blow of violence in 2020 and more recently in 2021.[35] In one of the worst outbursts along the interstate border of both the states at least five personnel of Assam Police were killed and at least 50 personnel

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[31] Dr. Jogendran Nath Sarma, *Assam–Mizoram Border Demarcation,* The Assam Tribune 6, (Guwahati, August 4, 2021) 6.

[32] Utpal Parasar, *Assam Mizoram Border Dispute has Origin in British Era*, Hindustan Times (July 27, 2021) *available at* https://www.hindustantimes.com/india-news/assammizoram-border-dispute-has-origin-in-british-era-notifications-101627385890004.html (last visited August 16, 2021).

[33] The North Eastern Areas (Reorganisation) Act, 1971, s. 6.

[34] Government of Assam, Border Protection and Development *available at* https://bpdd.assam.gov.in/portlets/border-dispute (last visited August 12,2021).

[35] *Supra* n. 20, p.2.

were injured in firing and stone pelting by Mizo miscreants on July 26, 2021.[36]

C. Assam-Arunachal Pradesh

The state of Arunachal Pradesh was first created as a union territory on January 20, 1972 with the promulgation of North–Eastern Areas (Reorganisation) Act, 1971 and on February 20, 1987 it was granted full statehood along with Mizoram.[37]

The border dispute between the two states bears its root in Bordoloi Committee Report. The committee was entrusted with the task of preparing a report on future pattern of administration of North East Frontier Tracts and it was instructed to submit its report before August 25, 1950. The committee had recommended transferring certain plain areas of the North East Frontier Tract to Assam on the basis of availing the advantages of franchise and regular administration. Subsequently, the report was accepted by the Minority Sub Committee of the constituent Assembly and got presidential assent. Accordingly, it was formally notified on February 23, 1951. The boundary so notified is the present-day boundary between Assam and Arunachal.[38] The border dispute between the two states which is continuing even today is the fallout of this step taken almost seventy years back.

The first major border dispute between Assam and Arunachal flared up on July 5, 2002 during an eviction drive conducted by Assam Government. Border clash erupted again in January 29, 2014 where 11 people were killed by miscreants inside the Behali reserve forest in Sonitpur district in Assam. Moreover, most recently in July 2021 Forest department and police officials of Assam conducted eviction drive along Assam Arunachal border claiming the areas as belonged to Assam and this further intensified the situation along the border of these two states.

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[36] Staff Reporter, *5 Assam Police Men Killed in Mizoram Border Clashes*, (Guwahati, July 27, 2021).

[37] *Supra* n. 13, p. 167.

[38] Dr. Ratna Tayeng, *Boundary disputes between Arunachal Pradesh and Assam,* in H. Vokendro & M. Borgohain (edn.) CONTEMPORARY ISSUES AND INSIGHTS OF THE ANTHROPOLOGY OF NORTH EAST INDIA 95, (Kalpaz Publication, 2020).

D. Assam - Meghalaya

The formation of All Party Hills Leaders Conference (APHLC) in 1960 and passing of Assam Language Act strengthened the demand of hill states. Tribal inhabitants considered the passing of Assam Language Act as an enhancement of the domination of Assamese people over them. And it added fuel to hill state movement. Following 22nd amendment to the Constitution in 1969, the state of Meghalaya comprising the United Khasi-Jaintia Hills districts, and the Garo Hill district was created as an autonomous state within the state of Assam. Subsequently, in February 1972 the state of Meghalaya curved out from Assam and became a full-fledged state.[39]

Meghalaya after getting statehood the differences of opinions between both the governments regarding interstate boundary ultimately led resolving the issue through formation of a committee. A meeting held on May 26, 1983 between the Chief Ministers of Assam and Meghalaya came up with the decision of formation of a Joint Official Committee to identify the areas of differences on the Assam-Meghalaya boundary and they were to submit its report within a period of two months. The commission met four times and finalised its report. But differences persisted between the two governments regarding two sectors and the matter was then referred to a committee headed by Mr. Justice Y.V. Chandrachud, former Chief Justice of India. The committee submitted its report on July 27, 1987 where all the claims made by the government of Meghalaya were rejected.[40]

The border dispute between both the governments stems from the recommendations made by Bordoloi committee in April 1951 when the same recommendations followed by 1969 Reorganisation Act. As per the recommendations of Bordoloi committee Blocks I and II of Jaintia Hills were transferred to the Mikir Hill (KarbiAnglong) District of Assam and areas in Garo Hills to Goalpara District of Assam. The neighbouring areas in RiBhoi District were also transferred to the Kamrup District of Assam.[41] Major clash broke out in Assam–Meghalaya border in January 2011 which had rendered about 30,000

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[39] *Supra* n. 8, p. 12.

[40] *Supra* n. 13, pp. 164-166.

[41] *Supra* n. 20, p. 6.

displaced, torching several villages in three villages killing of about nine people of which five people died on Assam side and four in Meghalaya[42] Both the states have a dispute over 12 points along its border.[43]

Inter-State Border Dispute and Constitutional Provisions

The colonial rulers divided the country into various provinces based on administrative convenience rather than geographic, historical, or linguistic grounds and once India became independent the whole geographic scenario had changed drastically. Due to socio-cultural, linguistic, and regional diversities Indian states wanted to reorganise their boundaries to preserve their own identity in a diverse society and in 1920, Indian National Congress had made a promise to reorganise states after independence.

In this context it can be mentioned here that Constituent Assembly in India went through controversies over the use of the terms 'union' and 'federal' and ultimately as suggested by Drafting Committee Chairman Dr. B.R. Ambedkar, the term 'union' was incorporated in the Indian Constitution. The Constitution drafting committee had used the term 'union' because states as constituent units have no right to secede from the union which is permanent and indestructible. The Constitutional makers to tie up the whole Nation with a single thread has made the country as Union of States and Dr. B.R. Ambedkar while defending his statement stated:

> '…the federation is a Union because it is indestructible. Though the country and the people may be divided into different States for convenience of administration, the country is one integrated whole, it's a single people, living under a single imperium derived from a single source.'[44]

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[42] Sushanta Talukdar, *Fresh Violence on Assam Meghalaya Border*, The Hindu (Guwahati, January 10, 2011) *available at* https://www.thehindu.com/news/national/other-states/Fresh-violence-on-Assam-Meghalaya-border/article15513310.ece (last visited August 20, 2021).

[43] *Supra* n. 41.

[44] Raju, K.H. Cheluva, *Dr. B.R. Ambedkar and Making of the Constitution: A Case Study of Indian Federalism*. 52 THE INDIAN JOURNAL OF POLITICAL SCIENCE 156

Thus, all moves taken by Constitutional makers were to preserve the unity and integrity of India. India became an indestructible union of destructible states. The Constitutional makers had adopted a compassionate step by accepting a dynamic and progressive pattern of Indian society to meet the geographic and economic unification of India. And the same has been facilitated by incorporation of Article 3 to the Constitution of India. Article 3 to the Constitution of India provides for formation of new states by altering the areas, boundaries, or names of the existing states.[45]

Article 3 in its proviso further lies down that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President. It thereby requires Presidential recommendations for the Bill to be introduced. And Article 74(1) of the Constitution of India further makes the provision that President while exercising his function shall act in accordance with the aid and advice of Council of Ministers. This ultimately implies the will of the central government in this respect. It has been observed in case of all the North eastern states that states were been carved out from undivided Assam on the ground of geographical, racial, socio-cultural, linguistic and every other aspect relating to preservation of their identity. The union government, therefore, must adopt cautious steps by laying down certain juristic criterion rather than making it divisible on the basis of racial and linguistic criterion.[46]

The secessionist movements initiated by various armed groups in the region no doubt ended with fulfilling their statehood demand, but the bloodshed along the borders of Assam has threatened the unity and integrity of India. With it the basic objective as envisaged by the Constitutional makers to make the country as one integrated whole as well as to accept the evolving nature of Indian states turned out to be an opposing force against each other.

(1991) *available at* www.jstor.org/stable/41855548 (last visited August 29, 2021).

[45] Sidharth Sharma, *Creation of New States: Need for Constitutional Parameters*, 38 ECONOMIC AND POLITICAL WEEKLY 3973 (2003) *available at* www.jstor.org/stable/4414041 (last visited Aug 28, 2021).

[46] *Id*., p. 3974.

Article 1(2) of Indian Constitution envisages that the states and the territories thereof specified in the First Schedule and under Article 2 Parliament has been vested with the power with the admission and establishment of new states. Article 4(2) stipulates that no law made in pursuant to Article 2 and 3 shall be deemed to be in amendment of the Constitution for the purposes of article 368. Article 3 although necessitates recommendation of President for the introduction of Bill, Article 255 on the contrary stipulates that no provision of such Act shall be invalid by only reason that some recommendations or previous sanction from the president was not given as required by the Constitution. It clearly depicts the unitary form of government in India.[47]

Considering the diversity among the masses in these multi linguistic landscape, the framers of the Constitution of India apart from incorporating provision for creating new boundaries within the Indian Union, had also embodied the provision for settlement of inter-state disputes. Article 131 of the Constitution of India stipulates the original jurisdiction of the Supreme Court. Exclusive jurisdiction confers on the Supreme Court of India in exclusion of any other court. Original jurisdiction can be exercised in case of any dispute between either the Central Government and one or more constituent State or States or between two or more of such constituent States, between the Government of India and any State or States on one side and one or more other states on the other and between two or more states. Moreover, the dispute must involve a question of law or fact upon which the extent of a legal right depends.[48]

Pursuant to the recommendations made by Sarkaria Commission inter-state council was established under Article 263 of the Constitution of India.[49] It lays down under Article 263 a provision for establishment of an Inter State Council if any time it appears to the President that the public interests would be served by the

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[47] *Supra* n. 45, p. 3974.

[48] Constitution of India, 1950, Art. 131.

[49] Interstate Council Secretariat, Ministry of Home Affairs *available at* https://www.mha.gov.in/division_of_mha/centre-state-division/inter-state-council-secretariat (last visited August 10, 2021).

establishment of a Inter State Council charged with the duty of inquiring into and advising upon disputes which may have arisen between States.[50] Inter State Council is, thus, a reflection of India's federal structure where sovereignty is divided between federation and its units. But noticing the long standing border dispute especially in north eastern states it can be said that mere existence of the Council is not enough. To preserve the unity and integrity of India the amicable solution of Inter-state border dispute is one of the most daunting challenges before India and this further necessitates a wider role and power for the council.[51]

Settlement of Dispute through Judicial Intervention

Considering the seriousness of the problem relating to inter-state border dispute in the state of Assam, an analysis regarding judicial intervention of the matter is very much important. The reports, recommendations submitted by various commissions; survey conducted along the border as well as recommendations made by various study teams failed to solve the issue due to unwillingness on the part of states to accept those recommendations. The setting up of polling stations so as to mitigate the danger of violent conflict too has proven to be a futile exercise. Supreme Court having the original and exclusive jurisdiction under Article 131 of the Constitution of India can exercise its jurisdiction while addressing the disputes which arise between two states themselves. Accordingly, the government of Assam had taken resort to judiciary on several occasions.

In the year 1988, following Merapani violence of 1985 between Assam police and its Nagaland counterparts, Assam government moved to Supreme Court under Article 131 of the Constitution.[52] The civil suit was filed before the Hon'ble Supreme Court of India for identification of boundary with Nagaland as well as resolving of border disputes between the two states. Moreover, the contentions put forwarded by

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[50] Constitution of India, 1950, Art. 263.

[51] J. ROY, (1990). *Sarkaria Commission on Centre-State Administrative Relations in Respect of Public Order Duties,* 51 THE INDIAN JOURNAL OF POLITICAL SCIENCE 52-53, (1990) *available at* http://www.jstor.org/stable/41855468 (last visited August 29, 2021).

[52] *Supra* n. 19, p. 17.

the government of Assam also included declaring Assam as the rightful owner of the land encroached by Nagaland, directing the state of Nagaland to hand over peaceful possession of those areas and granting permanent injunction restraining the State of Nagaland from encroaching the areas within the Constitutional boundary of Assam.[53]

In 1995, the same suit was withdrawn by Assam Government to renew it in 1998. However, in the meantime J.K. Pilai Commission was established by Central Government in 1997 to resolve the issue. But Commission's report was rejected by Assam Government.[54] The Supreme Court while addressing 1988 petition filed by Assam government ordered to constitute a Local Boundary Commission to identify the boundaries of Assam, Nagaland and Arunachal in September 2004. The court was of the view that long pending issue of boundary dispute would best be determined by a Commission appointed by the Court under the Supreme Court Rules rather than by a boundary commission. But due to Nagaland government's denial on many points it failed to resolve the boundary dispute.[55]

Again, in 2006, the Hon'ble Supreme Court vide its judgment and order dated 25.9.2006 has appointed a Local Commission for identification of boundaries of the States of Assam-Nagaland and Assam-Arunachal Pradesh. The Supreme Court in August 2010 while hearing the petition filed by Assam government directed to explore the possibility of resolving the issue through meditation along with the continuation of the Local Boundary Commission. Accordingly, for this purpose two Co-mediators were appointed. Several meetings of the mediators regarding boundary issues between Assam and Nagaland are being held subsequently.[56]

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[53] Government of Assam, Border Protection and Development, *Border Dispute* (Mar 2021) *available at* https://bpdd.assam.gov.in/portlets/border-dispute (last visited August 25, 2021).

[54] *Supra* n. 19, p. 4.

[55] *SC for a Court Commission to Determine Boundaries of Assam*, Outlook (Delhi, September 13, 2004) *available at* https://www.outlookindia.com/newswire/story/sc-for-a-court-commission-to-determine-boundaries-of-assam/249012 (last visited August 23, 2021).

[56] Government of Assam, Ministry of Home Affairs, *Border Dispute in NER*

Despite taken all possible steps by Supreme Court of India, border issue has not been solved between Assam and Nagaland in an amicable way as both the states are putting allegations and counter allegations of encroachment against each other. The Original Civil Suit No. 2/1988filed by Assam government is still under consideration.[57]

Most recently on 31 July, 2021 the government of Assam and Nagaland signed an agreement to defuse the standoff between police forces in two locations along the interstate border. Both the states had decided to use unmanned aerial vehicles and satellite imagery to monitor the status quo to be maintained across the disputed boundary.[58]

The escalating tensions between the state of Assam and Mizoram as regards interstate boundary ultimately resulted in violent clash along Assam Mizoram border where six police officers were killed, and many were injured. Following this incident, the Assam government had decided to move the Supreme Court to resolve the inter-state boundary dispute with Mizoram amicably.[59]

The first major steps towards solving inter-state border dispute along Assam Arunachal border was taken by the government of Assam by filing Original Suit No. 1/89 in Supreme Court of India. In September 2006, while hearing two petitions of the Assam Government, the Supreme Court had appointed a Local Commission for identification of boundaries between the two states.[60] However, the case is still pending. In the year 1997, a Member of the Legislative Assembly of

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(L.S.US.Q.NO.5632 FOR 30.04.2013) *available at* https://www.mha.gov.in/MHA1/Par2017/pdfs/par2013-pdfs/ls-300413/5632.pdf (last visited Aug 19, 2021).

[57] Government of Assam, Ministry of Home Affairs, *Border Dispute between Assam and Nagaland*, (L.S. US. Q.N0. FOR 9.02.2021) *available at* https://www.mha.gov.in/MHA1/Par2017/pdfs/par2021-pdfs/LS-09022021/1339.pdf (last visited August 19, 2021).

[58] R. Dutta Choudhury, *Assam, Nagaland Ink Pact for Border Peace*, The Assam Tribune (Guwahati, August 1, 2021).

[59] Hemanta Kumar Nath, *Assam to Move Supreme Court in 10-15 Days for Resolution of Border Dispute with Mizoram: CM Sarma,* India Today (Guwahati, August1, 2021) available at https://www.indiatoday.in/india/story/assam-mizoram-border-dispute-clash-supreme-court-cm-himanta-biswa-sarma-1835468-2021-08-01, (last visited August 22, 2021).

[60] *Supra* n. 57.

Arunachal Pradesh submitted a Public Interest Litigation (PIL) regarding the eviction drives.[61] The three member boundary commission appointed by Supreme Court on Assam Arunachal Pradesh border dispute in its 2014 report recommended transferring seventy to eighty per cent of the disputed land to Arunachal.[62] At present both the states have agreed to find out an out of court settlement based on mutual trust and confidence.[63]

In 2019 a social activist THS Bonney had filed a petition before Supreme Court seeking direction to the Centre for constituting a time-bound commission to permanently resolve the boundary dispute between Meghalaya and Assam. But the writ petition was dismissed by the Supreme Court. The Apex Court instead asked Bonney to send his representation to the Centre in connection with his plea.[64] Recently in August, 2021 Chief Ministers of both the states decided to set up committee to resolve the interstate border dispute between the two states in a phased manner.[65]

While trying to find out the ways for amicable settlement towards the issue, Constitutional expert Mr. Dwivedi was of the view that approaching the central government and asking them to resolve the

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[61] Jason Wahlang, *Internal Border Conflicts of the North East Region : Special Focus on Assam and its Bordering States*, 286Centre for Land Warfare Studies ISSUE BRIEF 6 (2021) available at https://www.claws.in/static/IB-286_Internal-Border-Conflicts-of-the-North-East-Region-Special-Focus-on-Assam-and-its-Bordering-States.pdf (last visited Aug.12, 2021).

[62] Sumir Karmakar, *Inter state boundary conflict in North East killed 157 since 1979: Rights Group Reports Says*. Deccan Herald (August 10, 2021) *available at* https://www.deccanherald.com/national/east-and-northeast/inter-state-boundary-conflicts-in-northeast-killed-157-since-1979-rights-group-report-says-1018287.html (last visited August 21, 2021).

[63] *Assam Meghalaya Decide to Set Up Panels to Resolve Border Disputes*, The Assam Tribune (Guwahati, August 6, 2021) *available at* https://assamtribune.com/guwahati/assam-meghalaya-decide-to-set-up-panels-to-resolve-border-disputes-1112533?infinitescroll=1 (last visited August 22, 2021).

[64] *SC Dismisses Petition on Meghalaya-Assam Boundary Dispute*, The North East Today (New Delhi, April 22, 2019) *available at* https://thenortheasttoday.com/states/assam/sc-dismisses-petition-on-meghalaya-assam-boundary-dispute/cid2532610.htm (last visited August 14, 2021).

[65] Staff Correspondents, *Assam Meghalaya to Set up Committees for to resolve inter-state border disputes*, The Assam Tribune (Guwahati, August 6, 2021).

problem through legislation could be an option which could be availed by the states. Further, though he stated about moving to Supreme Court under Article 131of the Constitution at the same time he said that litigation takes time. Holding the same view, Debojit Borkakati, Advocate –on- Record at Supreme Court stated that states should move to apex court if they desire but legal recourse would take time.[66]

Conclusion

The state of Assam is plagued by innumerable and varied problems since independence and inter-state border violence with four of its neighbouring states Nagaland, Mizoram, Meghalaya and Arunachal Pradesh has emerged once these states have been granted separate statehood. The long standing problem of inter-state border dispute has tremendously impacted upon the peace and cohesion among the people of North Eastern Region of India. The geographical boundaries, which were created for ascertaining the linguistic and regional aspiration of the people of North Eastern States by way of grating statehood to them ultimately lead to violent clashes making the valley unrest at all the time. The conflict of opinion as regards demarcation of boundaries along the borders of Assam has made the issue unresolved even today. The solution to this long standing dispute could not be found either in the realm of Constitution or on the ground of ascertaining the claims made by the states considering historical grounds. Even the recommendations made by boundary commissions as directed by the Supreme Court failed to solve the decades old problem as states do not show their willingness to comply with these recommendations. Border tension has gone up to the extent of armed hostility even by police forces. Therefore, measures must be taken for maintaining peace and tranquillity along the borders. In this respect the central government need to give a serious thought on the issue and come up with some permanent solution in cooperation with the state governments. There is an urgent need for settling disputes through dialogues as Constitutional makers always wanted to make the

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[66] *Assam Mizoram can approach Supreme Court, Centre Says Legal Experts*, The Hindu (New Delhi, July 7, 2021) *available at* https://www.thehindu.com/news/national/assam-mizoram-can-approach-supreme-court-centre-say-legal-experts/article35571790.ece (last visited August 17, 2021).

country as one integrated whole and any kind of hostile behaviour by one state against another would defeat the quest for national unity and territorial integrity of India. Supreme Court of India having original jurisdiction over the matters relating to interstate border dispute must be trusted and relied upon. Moreover, the Inter-State council must play pro-active role towards finding out the ways for settlement of disputes. A concerted effort initiated at all levels only can make India connect through a single thread by promoting peace, unity and harmony as projected by our Constitutional makers.

China's Stand on Responsibility to Protect and its Responses: An Analysis

Vasavadutta Mishra & K. Ratnabali [*]

Introduction

The ambiguity and controversies over the practice of humanitarian intervention pioneered the advent of one of the most recognised principles of modern international law i.e., the Responsibility to Protect (hereinafter referred to as R2P). The R2P principle was introduced for the very first time via the Report of International Commission on Intervention and State Sovereignty (hereinafter referred to as ICISS) published in 2001. The ICISS was established as an autonomous and impartial commission in September 2000 by the Government of Canada to engage with the issues as to the principle of sovereignty, intervention, and protection of human rights. The proposed Principle got universal recognition in 2005 at United Nations (hereinafter referred to as the UN) World Summit when the member states endorsed R2P against war crimes, crimes against humanity, ethnic cleansing and genocide.[1] Again, the principle of R2P received overwhelming support at the UN General Assembly Debate in July 2009 after the then Secretary General of UN Ban-Ki-Moon presented a Report on implementation of R2P few days before the said Debate.[2] Since then R2P has not been made a formal agenda of General Assembly up till now at UN General Assembly Plenary Meeting[3] on

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[*] Vasavadutta Mishra, is a Ph.D. Research Scholar with the Faculty of Law, University of Delhi. Prof. K. Ratnabali is a Professor with Law Centre-I, Faulty of Law, University of Delhi and can be reached at ratnakratna@gmail.com.

[1] Para 138 and 139 of World Summit Outcome Document 2005.

[2] Adoption of UN General Assembly Resolution 63/308 acknowledging Secretary General's Report on R2P.

[3] Held on 17th and 18th May 2021 at 75th Session of General Assembly.

the R2P (2021) wherein majority of the states once again committed to the principle of R2P and discussed points relating to the implementation of the principle.[4] However, China objected to the implementation of R2P along with few other states expressing their disagreement to the same.[5] The recognition of R2P has also influenced the discourse over humanitarian intervention even though many have argued that both the principles are different.[6]

After receiving such international recognition, R2P is not sans controversy in relation to its validity as an international norm. Since many States have refused to accept their responsibility under R2P, even after agreeing on it at 2005 summit, therefore, many scholars have claimed that the principle is still in the process of evolution. Even though the States evade their responsibility under R2P, the UNSC resolutions have invoked the responsibility of States based on the Principle of R2P. For instance, in the Resolutions 2502[7], 2499[8], 2463[9], 2459[10], 2457[11], 2449[12], 2296[13], etc., the UNSC has invoked the responsibility of the state under R2P.[14] Moreover, the Presidential

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4 Adopted UN General Assembly Resolution 75/277 on the R2P and the Prevention of Genocide, War Crimes, Ethnic Cleansing and Crimes against Humanity' 2021.

5 China again expressed its concern over the varying definition of the R2P and the elements of the principle; Report of Global Centre for the R2P 'Summary of 2021 UN General Assembly Plenary Meeting on the R2P' (June 2021).

6 For instance, authors like P.H. Winfield and Farrokh Jhabvala while defining humanitarian intervention observed that it involves more of a right of a state to employ military measures for civilian protection. Whereas R2P is considered as a responsibility to protect civilians by employing military as well as non-military measures; Manoj Kumar Sinha, 'Is Humanitarian Intervention Permissible in International Law' 40 *JILI* 66 (2000); P.N. Premsy, 'Legitimacy of Humanitarian Intervention under International Law' 27 CULR 386 (2003)

7 Adopted on 19th Dec. 2019 on Democratic Republic of the Congo.

8 Adopted on 15th Nov. 2019 on Central African Republic.

9 Adopted on 29th Mar. 2019 on Democratic Republic of the Congo.

10 Adopted on 15th Mar. 2019 on South Sudan.

11 Adopted on 27th Feb. 2019 on Silencing the guns in Africa.

12 Adopted on 13th Dec. 2018 on Syria.

13 Adopted on 29th Jun. 2016 on Sudan (Darfur).

14 More than 60 UNSC Resolutions have referred to R2P for invoking responsibility under the R2P.

Statements have time and again referred to R2P to recall the responsibility of a state towards its population. Though there are denial of responsibilities by states in the implementation of R2P, yet these denials, of itself, does not challenge the very principle of R2P.

The R2P is a norm of international law that emerged in the year 2001, as a better substitute to the practice of humanitarian intervention which existed earlier[15] in terms of protecting the civilian victims of grave human rights violations. However, consensus over the authority of UNSC to exercise its powers under the UN Charter to invoke R2P has given rise to many controversies as to the role of its member states. The role of permanent members of UNSC with exclusive veto power determines its functioning. China is one of such permanent members of UNSC and a rapidly growing economy. Thus, it is imperative to study China's stance on the global norm and practices followed by the international community.

The present paper discusses the current standpoint of China on R2P and how it shifted from strict interpretation to the liberal interpretation of R2P. It also gives a holistic picture of how and to what extent China has accepted R2P and further elaborates on differential treatment of the countries while implementing R2P.

Responsibility to Protect

Under R2P norm, sovereignty, perceived as something more than the state's prerogative, is interpreted to include state's obligation towards its population. According to R2P, sovereignty entails duty of a state to protect its population from grave human rights violations which is likely to disturb peace of the region. But where state fails or is unable to protect its population then, the responsibility shifts to the international community to take necessary measure for protection of

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[15] Few scholars gave an indirect hint while giving definition of humanitarian intervention that the new international norm of R2P has its genesis in the former customary practice of Humanitarian Intervention. For instance, Alan J. Kuperman observed that- '*humanitarian intervention is the use of diplomatic, economic, and military resources by one or more states or international organisations intended primarily to protect civilians who are endangered in another state.*';
Michael Goodhart (ed.), HUMAN RIGHTS: POLITICS & PRACTICE 335, (Oxford University Press, New York, 2009).

civilians of the concerned state. Thus, the responsibility of the international community emanates only from the failure or inability of a state to take actions in case of egregious violations of human rights of its civilians. Appalling humanitarian conditions within a state does not give right to another state to interfere within domestic affairs of the former unless responsibility shifts on international community to restore peace. This pre-condition for the application of the Principle of R2P has also impacted positively on the debate over legitimacy of humanitarian interventions. As stated in the ICISS Report, where responsibility shifts to international community, UNSC may take necessary measures under the UN Charter to address the situation. But it nowhere mentions in the Report that it is the sole prerogative of UNSC to interfere when needed, although international community may call for collective measures through UNSC to deal with the crisis.[16] Also, UNSC has been considered as a legitimate authority to take measures for protection of civilians in crisis. Further, the Report also maintains that the actions authorised by UNSC are justifiable. The reason behind giving such authority under ICISS Report to UNSC in matters of crisis is that it has obligation under UN Charter to maintain international peace and Security.[17]

The ICISS Report specifies circumstances for application ofR2P, such as severe abuse of human rights due to civil unrest or war within a state or grave violation caused by the state itself acting as an oppressor and persecutor against its own population. Moreover, the Report specifically lays down the grounds on which military intervention may take place; for example, mass killing, rape, expulsion, etc. resulting either from state's failure or intentional state's act. However, at 2005 World Summit only four grounds were recognised for operationalisation of R2P i.e., War crimes, ethnic Cleansing, Crimes against humanity and Genocide.[18]

In 2009, Secretary-General Ban-Ki-Moon's Report elaborated on three cornerstones of R2P, considered as three pillars for implementation of R2P. These three pillars are - firstly, the responsibility of a state

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[16] Agreed at World Summit 2005.

[17] Article 24 of the UN Charter.

[18] ICISS Report, *Supra* n. 1.

towards its population; secondly, the responsibility of international community to help concerned state in discharging its duty under R2P and; thirdly, international community's responsibility to take effective and prompt measures for civilians security on failure of the concerned state.[19] The third pillar calls for taking peaceful measures by international community to address the crisis and when such measures prove to be insufficient, then resorting to enforcement measures in accordance with Chapter VII of the UN Charter. Further, Special Advisor to the then Secretary General also pointed out four main ingredients for operationalisation of R2P namely, Capacity Building & Rebuilding of the concerned state; Evaluation and Warning of crisis in advance; determined and prompt action reaction to the crisis; and lastly, cooperation with the regional and sub-regional organisation to resolve the conflict.[20] These ingredients suggested by the Special Advisor Edward C. Luck can be said to be inspired from the elements of R2P mentioned in the ICISS Report. According to the said Report, R2P consists of three elements namely responsibility to Prevent, to Protect and finally to Rebuild.[21] The element of responsibility to prevent contains early warning and evaluation of crisis, addressing the root cause of conflict, peaceful negotiations to avoid conflict, etc. whereas responsibility to protect contains taking prompt and effective measures when preventive measures fail or prove to be insufficient. Lastly, responsibility to rebuild embodies obligations after the intervention has taken place to restore peaceful situation existed prior to the conflict by ensuring rehabilitation of civilians as well as reconstruction of the infrastructure of that state.[22]

China's stand on R2P

China, being one of the victims of colonial oppression, has always considered the principle of sovereignty as a non-negotiable and inviolable right of a state under international law. It has been a

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[19] Alex J. Bellamy, 'The Three Pillars of The Responsibility to Protect', SPECIAL ISSUE PENSAMIEN TO PROPIO 39-64, (January-June 2015, Vol. 20).

[20] Edward C. Luck, *The United Nations and The Responsibility to Protect*, SATNELY FOUNDATION POLICY ANALYSIS BRIEF (August 2008).

[21] ICISS Report 2001.

[22] *Ibid.*

constant supporter of the principle of sovereignty over any other principles of international law. Interestingly, the said principle has itself evolved over a period making it a more dynamic concept which now cannot be confined to its traditional doctrinaire limits. Previously, the traditional interpretation of sovereignty emphasised more on the non-interference as well as supremacy of the authority and territorial integrity of the state. Although the contemporary idea of sovereignty not only encompass the components of traditional idea but extends to state's obligation to be a responsible sovereign. This shift in the interpretation of the principle of sovereignty has affected the stance of many states, including China, towards it. Thus, in order to understand the present outlook of China towards the principle of sovereignty and humanitarian intervention in the form of R2P, it is imperative to analyse its past conduct as well as its foreign policy.

The foundation of foreign policy of China is said to be enshrined in the five principles embodied in the Panchsheel Treaty [23] entered into between China and India. The said treaty dealt with the five principles which shall govern the international relations between the two countries. Subsequently, the said principles have been considered as fundamental in governing the international relations and, therefore, later adopted by other countries as well as by the UN through Resolutions adopted by the General Assembly.[24] For the purpose of humanitarian intervention, out of five there were two main principles i.e. non-interference in the domestic affairs and respect of each other's sovereignty and territorial integrity. These two principles underpin in the Chinese foreign policy when it comes to the approach of China towards the idea of humanitarian intervention.

According to the Independent Foreign Policy of China regarding Peace,[25] it is necessary for the states to adhere to principle of non-intervention for preservation of world peace. It reiterates the principles contained in UN Charter as to peaceful settlements of disputes, non-use of force and abstention from interference under any pretext. Nowhere in the policy has intervention been professed as a *modus*

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[23] Five Principles of Peaceful Coexistence, signed on 29th April, (1954).

[24] General Assembly Resolution 2131 (XX) (21 December 1965).

[25] China's Independent Foreign Policy of Peace (19th Sept. 2003).

operandi for maintenance of international order and security. In fact, on the contrary, it sees intervention of any kind as a threat or disruption to international peace.[26] However, China has also expressed its commitment towards the policy of resolving international issues, such as barbaric international crimes and other matters through cooperation and assistance of the international community. Here, the term 'international crimes' can be interpreted to include the grounds of humanitarian intervention under R2P viz. genocide, war crimes, ethnic cleansing and crimes against humanity. But China has insisted, under the said policy, on collective measures rather than taking unilateral measures to curb and resolve international issues. So, in a way it can be said that the Chinese Foreign Policy of Peace supports the idea of collective intervention and discourages any unilateral threat or use of force or other interventions. This stipulation as to collective action under the Chinese policy has helped it to evolve its stand on intervention as well as respond according to the need of the situation considering the pragmatic approach towards the issue.

Despite China's allegiance to the traditional principle of sovereignty, it acknowledged the significance of collective intervention to deal with humanitarian issues thereby impliedly accepting the fact that a state has no right to commit international crimes against its own population. China has also admitted that in exceptional, rare, and serious circumstances, the collective endeavour of the international community to address the issue is crucial. It has also been argued by some authors that China recognises that exceptionally grave situations require attention along with the action in the form of intervention by the international community. It shows that China believes in the protection of human rights as a valid cogent ground for intervention. This belief has been expressed by Chinese diplomats on different occasions as well.[27]

However, China believes that such collective endeavours for intervention in grave situations stated above, should adhere to the

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[26] *Ibid.*

[27] Statement given by Chinese Foreign Minister as to the necessity of collective action for securing peace in Africa at United Nations UNSC Summit Level Meeting held on 25th September 2007.

provisions of the UN Charter and with the consent of the state where intervention is to take place. Furthermore, China maintained that the international response should conform to the views of the affected countries by asserting the significance of the role of regional organisation.[28] Thus, it can be safely said that China backs certain essential elements of the Principle of R2P, as it acknowledged the coordinated efforts of regional as well as national and international entities in preserving peace. It has insisted on the moral obligation of these entities to ensure peace and tranquillity in the international community.

The involvement of China in the Peacekeeping Missions of UN also manifests that it subscribes to the idea of resolving humanitarian crisis with the help of international entity i.e., United Nations. It cannot be merely treated as rhetorical but a significant step on the part of China. China has been seen gradually increasing the number of its troops sent for UN Peacekeeping Missions to address the humanitarian emergencies. For instance, according to the UN Peacekeeping Mission Ranking as of 31st March 2021, China ranked 9thin contribution of troops for such mission, out-performing other four permanent members' of UNSC.[29] According to the same UN data of 2008, it ranked 23rd.[30] It shows that China's stand on the responsibility of international community towards protection of civilians of another state, has significantly transitioned over a period.

China has sent its security personnel under Peacekeeping missions irrespective of the fact that under some missions they are authorised to employ force for protection of civilians and in self defense. However, there is no uniform approach adopted by China towards peacekeeping missions for every humanitarian crisis. Thus, China's stance on intervention is complex because, on paper, it has always advocated for non-intervention and is believed to be a staunch supporter of

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[28] *Ibid.*

[29] Uniformed Personnel Contributing Countries by Ranking: Experts on Mission, Formed Police Units, Individual Police, Staff Officer, and Troops (31 March 2021). In the same Ranking of 2021, United States of America ranked 82nd, United Kingdom ranked 37th, Russia ranked 68th and France ranked 29th.

[30] Contributor Countries by Ranking to UN Peacekeeping Operations (monthly summary) As of: 31st Dec. 2008.

sovereignty as a sacrosanct principle of international law but in practice it has been observed to be earnestly involved in the United Nations humanitarian operations. Technically, such missions are said to interfere in the internal affairs of a country where crisis prevail. The thrust of Peacekeeping missions is substantially to safeguard human rights of civilians contributing in establishment of peace even though it takes place after obtaining the consent of the host state.

It is apparent from the practice adopted by China that it has put its responsibility under R2P into action by participating and sometimes playing proactive role in prevention of humanitarian crisis. But, notwithstanding such practice, it has many times used its veto power thereby obstructing the UNSC's Resolution as to any crucial matters involving grave human rights violations in a state.[31] This approach is intriguing as it represents that China does not support any intervention, including condemnation, even in cases of utmost exigency, particularly where the concerned state itself is the perpetrator of the crisis. But, despite use of its veto, China has on different occasions taken diplomatic measures stimulating formal discussions to reach amicable solutions without using any kind of violence. For instance, in the Darfur crisis, China acted as a diplomatic mediator in deployment of UN Peacekeeping forces in Sudan even though it had abstained from voting for UNSC Resolution regarding the expansion of mandates of UNMIS (United Nations Mission in Sudan)[32] and Resolution seeking disarmament of Janjaweed militia, accused of committing grave human rights violations, as well as imposing arms embargo on Sudan.[33] But these instances are not indicative of China's thorough commitment to R2P but only suggest that it has narrowly shifted from its previous stance of treating

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[31] For instance, China vetoed a draft resolution on Myanmar (S/2007/14) Even though the situation in Myanmar was considered to be one of the most dreadful humanitarian catastrophes of all time; China vetoed many Resolutions on Syria irrespective of the gravity of the crisis such as it vetoed draft Resolution (S/2011/612), (S/2012/77), (S/2012/538), (S/2014/348), (S/2016/1026), (S/2017/172), etc.

[32] UNSC Resolution 1706 (2006).

[33] Resolution 1556 (2004) Adopted by the UNSC at its 5015th meeting, on 30th July 2004.

sovereignty as an absolute principle to slight dilution of the principle to give effect to certain aspects of R2P in certain situations. Hence, China acknowledges some moral elements of R2P rather than the whole idea of it. It also recognises that the sovereignty is susceptible to widespread human rights violations taking place within a state and allows international community to act under R2P.

Apart from supporting moral attribute of R2P, China also along with other member states of the UN explicitly endorsed R2P in the event of genocide, war crimes, crimes against humanity and ethnic cleansing at the United Nations World Summit held in 2005.[34] Again in the same year, it formally reaffirmed this position in its Position Paper on UN Reform wherein it acknowledged the responsibility of international community in cases of grave humanitarian crisis.[35] Furthermore, in the year 2006, it voted for the UNSC Resolution wherein the Council reaffirmed its support for R2P.[36] However, according to the UNSC Report, China was initially reluctant to approve this Resolution but later on agreed to approve the Draft Resolution provided the language of the Resolution should be the same as used in the Outcome Document of 2005.[37] It can be said that these instances illustrate the significant transition in the position of China towards R2P which also helped in the growth of R2P as an international norm.

Notwithstanding its reaffirmation of the R2P, China has time and again shown its apprehensions towards the interpretation as well as implementation of the same. According to the UNSC Debates on Protection of Civilians, China had expressed its concern over misapplication of the norm of R2P. For instance, in the case of Northern Uganda, China insisted on giving due regard to the sovereignty of the state. Before this, in July 2005, China along with few other states opposed appointment of UN Special Envoy for fact finding operation in a crisis in Zimbabwe, arguing that it is a domestic

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[34] High Level Plenary Meeting of General Assembly resulting in adoption of General Assembly Resolution on 16th Sept. 2005; *Supra* n. 1.

[35] Position Paper of the People's Republic of China on the UN Reforms dated 7 June 2005

[36] UNSC Resolution 1674 adopted on April 28, 2006.

[37] UNSC Report: Update Report No.1 dated 8 March 2006 on Draft Resolution relating to Protection of Civilian in armed conflict.

matter of the state even though crisis affected around 2.4 million civilians.[38] Later on, in July 2008, China along with Russia vetoed a draft Resolution imposing arms embargo on Zimbabwe maintaining its previous stance on situation in the Zimbabwe.[39] Further, during Darfur Crisis in 2006, China persuaded to incorporate the requirement of consent of government in the UNSC Resolution 1706,[40] which called for transformation of AMIS (African Union Mission in Sudan) to UN Peacekeeping operation and which paved way for deployment of UNAMID (UN-African Union Hybrid Mission in Darfur) after few months.[41] Also, it persuaded Sudan to agree to the Resolution 1706, through bilateral dialogue. However, prior to adoption of Resolution 1706, China reiterated its confirmation of R2P by giving vote in favour of Resolution 1674[42] which reaffirmed R2P for protection of civilians in conflict situation. However, only after one month of passing Resolution 1674, China expressed its viewpoint, at a UNSC Meeting on R2P by stating that R2P under 2005 Summit Document is different from the basic notion of R2P, thereby referring to it as a complex concept.[43] Again in December 2006, China maintained that the notion of R2P should neither be interpreted beyond the limits of Outcome Document of 2005 nor be implemented by misinterpreting or misusing the concept.[44]

In 2007, China's apprehension towards R2P was observed to be increased as it asserted that the Council should avoid implementation of R2P owing to varying interpretations of the same by the states.[45] It also reiterated its stance on misapplication of the Principle and insisted

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[38] UNSC Report, Cross Cutting Report No. 2 on Protectionof Civilians (October 14, 2008).

[39] *Ibid.*

[40] Adopted on August 31, 2006.

[41] Since Sudan did not agree with Resolution 1706, it continued to oppose the deployment of UNAMID and thwart the proper deployment of UNAMID.

[42] Adopted on 28 April 2006.

[43] Record of UN UNSC 5476th Meeting on 28 June 2006 as to Debate on Protection of Civilians.

[44] Record of UN UNSC 5577th Meeting on 4 December 2006 as to Debate on Protection of Civilians.

[45] Record of UN UNSC 5703rd Meeting on 22 June 2007 as to Open Debate on Protection of Civilians.

on the discussion over it in the General Assembly in order to gain more clarity and consensus on implementation of R2P.[46] At the same time, many other states agreed on invoking R2P for safeguarding the civilians. Chinese delegate made statement reasserting the principle of sovereignty as well as territorial integrity and observed that UN should not interfere without the consent of the host state even in case when such interference is most needed. China also consistently insisted that any discussions over interpretation of R2P should take place in General Assembly and UNSC should not exploit the principle as a primary forum.[47]

When referring to the debates in UNSC on Protection of Civilians, China can be seen to be sceptical of the interpretation of R2P especially by the UNSC. But at the same time, it has repeatedly acknowledged the responsibility of a state under the Principle of R2P along with embracing the notion of R2P as specified under World Summit Outcome Document of 2005. Further, it has also emphasised the role of UN Bodies other than UNSC such as General Assembly, ECOSOC, Human Rights Council, UNDP, World Bank in protection of the civilian in conflict situation. Moreover, it highlighted the significant role which NGOs and other international and regional organisations can play in securing peace.[48] It has given prominence to the avoidance and alleviation of the crisis with the help of such organisations. China maintained that the UNSC Resolution 1674, which reaffirms the language of R2P used in the outcome Document of 2005, provides a legal structure for protection of civilians and the UNSC should act under that framework.[49]

It has been observed that China continues to lay more stress upon prevention and peace rebuilding as the two most important elements of R2P, as compared to the element of protection during crisis. China

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[46] Record of UN UNSC 5703th Meeting on 22 June 2007 as to Open Debate on Protection of Civilians.

[47] Record of UN UNSC 5781st Meeting on 20 November 2007 as to Open Debate on Protection of Civilians; Record of UN UNSC 5898th Meeting on 27 May 2008 as to Open Debate on Protection of Civilians.

[48] Record of UN UNSC 5898th Meeting on 27 May 2008 as to Open Debate on Protection of Civilians.

[49] *Ibid.*

pointed out that prevention plays a major role in the matters of civilian security as it entails advance action before the conditions of civilian deteriorates leading to crisis.[50]In January 2009, China abstained from participating in UNSC meetings regarding renewal of mandates of UN Missions such as UNOCI (UN Mission in Côte d'Ivoire), UNAMA (UN Assistance Mission in Afghanistan), UNAMI (UN Assistance Mission for Iraq), etc. Further, in case of Sri Lankan crisis caused by a militant group named LTTE (Liberation Tigers of Tamil Eelam), China affirmed that it is entirely domestic affair of the state and that the UNSC should not intervene. China has been very cautious in matters of civilian security.[51] It has argued that the crisis should be resolved through peaceful ways with the help of regional and international organisations rather than only through the UNSC resolutions as UNSC should not be seen as a sole forum to resolve crisis for civilian security.

As an advocate of peaceful resolution of conflicts, China has been unwilling to refer any conflict for investigation to any international agency or to take recourse of sanctions in general. China also did not attend any meetings of UNSC's Informal Expert Group on Protection of Civilians, as it might lead to making such group equivalent to the Working Groups of Council, which are formal in nature.[52] China and Russia amongst the other permanent members of the UNSC are more cautious about the protection regime in general. China's scepticism towards protection is due to its reluctance to the growth of R2P through the precedence based on Resolutions of UNSC.[53] China argued that measures taken after the eruption of crisis is not at all pragmatic from the point of view of civilian security as it would not be as effective in halting the already ongoing massacre.[54] It insisted that prevention as well as potent reconciliation is the key to civilian

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[50] UNSC Report (Cross Cutting Report No. 4: Protection of Civilians in Armed Conflict (30th Oct. 2009).

[51] *Ibid*.

[52] UNSC Report (Cross Cutting Report No. 3: Protection of Civilians in Armed Conflict (29th Oct. 2010).

[53] UNSC Report (Monthly Forecast: Protection of Women and Children in Situation of Armed Conflict) (February 2011).

[54] Record of UN UNSC 5577th Meeting on 4 December 2006 as to Debate on Protection of Civilians.

security as it occasions conditions conducive for civilians.[55] Moreover, it believes that since prevention leads to civilian security which ultimately leads to their protection in the future by avoiding any kind of conflict, international community should make more efforts to boost the preventive measures which also consists peace building measures.[56] Thus, it can be said that China's vehement support of preventive measures to resolve crisis with the help of regional and international organisations or bodies has, in a way, put R2P in action.

Conclusion

The unanimous adoption of R2P at the UN world Summit in 2005 gave hope for the reformation of humanitarian condition worldwide. Since the principle subscribe to the idea of modern sovereignty by acknowledging the primary responsibility of the concerned state to resolve the humanitarian crisis within its territory, many states approved the doctrine with the mindset that it would not interfere with their sovereign authority. The policy of non-interference with the sovereign authority of a state under R2P is a corollary to the aspect of giving prime responsibility to the concerned state to resolve the crisis under R2P. However, it is not absolute but depends upon the response of the concerned state to the crisis. In case of failure or inability of the state to respond, the other two aspects of R2P comes into play, viz. the responsibility to assist the host state to restore peace and responsibility of the international community to take up peaceful measures or otherwise to protect the security of the civilians of the host state in grave situation. In view of the above, there is dilemma as to whether states have accepted the R2P norm in its totality or is confined only to the single aspect of giving prime responsibility to the host. For instance, China, as member of the UNSC, endorsed the principle at 2005 summit but failed to implement the essence of the principle.

China along with the other four permanent members of UNSC, seen as guardian of peace by virtue of UN Charter, are responsible for the maintenance of international peace and security. But as a survivor of

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[55] *Supra* n. 54.

[56] Record of UN UNSC 5781st Meeting on 20 November 2007 as to Open Debate on Protection of Civilians.

colonialism, China has remained sceptical of the international norms advocated by its former colonist states. It has constantly advocated for the territorial integrity and principle of sovereignty under international law. Thus, when it comes to China's foreign policy, it is apparent that the policy is tilted more towards the non-intervention narrative and territorial integrity rather than the other way around.

As far as the humanitarian crisis in other countries is concerned, there is no uniformity in the response of China, although it has consistently advocated for non-intervention and prevention of crisis before it culminates into a case for humanitarian intervention. China has time and again reiterated its commitment to R2P, which is strictly limited to the grounds upheld in the World Summit i.e., crimes against humanity, genocide, war crimes and ethnic cleansing. But even in cases where the said grounds were evident and reported by the international organisations, China has been reluctant to take any significant steps. For instance, in case of Myanmar crisis, which according to Human Right Watch Report involved ethnic cleansing and genocide, China was not only reluctant to take any significant steps to resolve the crisis, but it also vetoed a UNSC Resolution addressing the humanitarian crisis in Myanmar. However, in case of African Countries, China had participated and encouraged resolution of crisis through intervention. Further, in case of Syrian crisis, China vetoed many Resolutions of UNSC which resulted in the escalation of crisis for several years as well as grave human rights violations to massive population. China had advocated for peaceful resolution of heart wrenching cases of humanitarian crisis like Myanmar and Syria even though it fulfilled the prescribed criteria for intervention and when the peaceful methods have been futile. It is very confusing as to why China has been adopting different approaches for different regions. Some scholars have argued that since China wants to economically establish itself in African region, therefore, it showed more interest there. Further, in cases of human rights violations in the mainland China and its autonomous region, China has been adopting its strict policy of non-interference in its internal matters even though there have been reports of many violations of human rights and restrictions on fundamental freedoms of the citizens there. However, in case of Uyghurs Muslims Concentration Camps, China allowed the entry of diplomats and UN representatives for inspection of the

situation. But many had not only accused China of controlling the visit of those envoys but also pre-planned the inspection according to its strict policy for hiding the true picture of the condition of detainees in the camps.[57]

China has been seen making constructive statement (as opposed to its previous stand) in relation to respect for human rights and significance of its protection but in practice it has not been that active as it claims on paper. However, it has come far from what it used to be when it was a staunch supporter of traditional idea of sovereignty. China has also made its due effort for the peaceful resolution of the crisis through good offices, but it had on several occasions failed to understand the seriousness of the crisis on case to case basis leading to serious hardships to many. Further, China will also send a meaningful message to other states by addressing serious human rights violations in Tibet Autonomous Region, Hong-Kong, Xinjiang (towards the Uyghurs).

The respect for R2P and its proper implementation covering all three aspects or pillars of R2P will go a long way in not only in the protection of gross violence of human rights within a state but also prevention of such violence, which will enhance the maintenance of international peace and security. Consensus among the states, more particularly the permanent members of UNSC, on the rational application of R2P, side-lining individual member's vested interests, at least in those circumstances where war crimes, crimes against humanity, ethnic cleansing or genocide are reported with credible facts, is the need of the hour.

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[57] Human Rights Watch, World Report 2020, 'China: Events of 2019' *available at* https://www.hrw.org/world-report/2020/country-chapters/china-and-tibet.

Manual Scavenging in India:
A Blot on Human Dignity

Ajay Kumar[*]

Introduction

India is a country with democratic ideals of equality and justice, but it is unfortunate that a sizable portion of citizens, whose rights are recognised under the Indian Constitution, are forced to engage in the obnoxious practice of manual scavenging. Manual scavenging is the act of removing night soil from the dry latrines manually and the cleaning of sewages and septic tanks by human beings. Manual scavenging is more of a social practice than an avocation having roots in the infamous caste system of India.[1] This practice is one of the extreme forms of indignation that results in discrimination and social stigmatisation of the persons performing the act of manual scavenging and violates their basic human rights. The State's failure to end this practice and allow its continuation is an intolerable human rights violation that reflects from the very fact that manual scavenging is continuing in the society despite legal prohibition and manual scavengers are dying inside manholes.

In India, caste is still one of the determining factors for division of work, and manual scavenging is a prime example. Most of the manual scavenger's hail from the scheduled castes termed as Dalits.[2] They face dehumanising treatment from the upper caste and their fellow *Dalit*

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[*] Ajay Kumar is an Assistant Professor with the School of Law, UPES and can be reached at ajay.learner@ymail.com.

[1] Indira Khurana & Toolika Ozha, *Burden of Inheritance: Can We Stop Manual Scavenging,* Water Aid India, 2 (Oct. 2009) *available at* https://www.ircwash.org/sites/default/files/Khurana-2009-Burden.pdf (last visited April 3, 2021).

[2] Rahul Pandita, *The Struggle to Stay out of Pits,* The Magazine, (Sept. 2017) *available at https://openthemagazine.com/society/manual-scavenging-the-struggle-to-stay-out-of-pits/* (last visited March 29, 2021).

castes, thereby giving them the status of *Dalits among Dalits*.[3] Manual scavengers face untouchability, something that has always presented a haunting experience for them. Untouchability is still prevalent in different parts of the country and *Dalit* children face discrimination at schools.[4]

The roots of the practice can be traced back to the caste system of India. Historically, the Hindu religious scriptures sanctioned manual scavenging by assigning this job to the so-called untouchable castes. The traces of this practice can be found in *Narada Samhita* that mentions the disposal of human excreta as one of the fifteen duties assigned to the slaves, and *Vajasaneyi Samhita* refers to *chandalas* as slaves who engaged in the removal of human excrement.[5] During the Mughal period, the *purdah* system led women in purdah to defecate in enclosed toilets that required manual cleaning by manual scavengers.[6] During the British period, with the advent of municipalities, the public toilet system was introduced, and these public toilets, again, required manual cleaning of human faeces.[7]

After the independence, the law took cognizance of the issue in as late as 1993 and the Parliament passed legislation that sought to prohibit the practice of manual scavenging with penal sanctions.[8] Again, in 2013, a new legislation was enacted which reinstated the State's obligation

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[3] Smita Narula, *Equal by Law Unequal by Caste: The 'Untouchable' Condition in Critical Race Perspective* 26 WISCONSIN INTERNATIONAL LAW JOURNAL 279 (2008).

[4] Shikha Silliman Bhattacharjee, *Cleaning Human Waste: Manual Scavenging, Caste and Discrimination in India*, Human Rights Watch, 20, (August 2014) *available at https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/27/india_0814.pdf* (last visited March 23, 2021). Also See Jan Sahas Social Development Society, *Inclusion and Exclusion of Dalit in Health and Education*, Jan Sahas - UNICEF, (Mar. 2009) *available at* http://www.dalits.nl/pdf/ExclusionAndInclusionOfDalitCommunity.pdf (last visited March 26, 2021).

[5] Gita Ramaswamy, INDIA STINKING: MANUAL SCAVENGERS IN ANDHRA PRADESH AND THEIR WORK 38 (Navayana Publishers, 2011).

[6] Swagata, *Manual Scavenging in India: A National Scourge*, Terra Green, 24 (Jan. 2019) *available at* http://terragreen.teriin.org/terragreen/TGJan19/TG_CoverStory/files/downloads/TG%20January_2019_Cover_Sory_LS.pdf (last visited April 23, 2021).

[7] *Id.*

[8] The Employment of Manual Scavengers and Construction of Dry Latrine (Prohibition) Act, 1993.

towards eradicating this menial practice and aimed at liberation and rehabilitation of manual scavengers.[9]

Presently, the question posed is why this inhuman practice is persisting in the country despite legal prohibition. What are the reasons and factors that lead to the continuation of this practice where human beings continue to remove the human excreta manually or enter the sewers to clean the same? Despite the advancement in science and technology, why do certain sections of society engage in this practice at the cost of violation of their human rights and human dignity? Whether the law prohibiting manual scavenging is insufficient, or the problem lies elsewhere? Another critical question is – whether the problem is under-represented, or have we chosen to close our eyes and have failed to recognise the deplorable plight of this segment of society?

Despite the Constitutional guarantee to protect the rights of citizens, the situation of the manual scavengers has not been improved as they are continuing in this inhuman job and, what is more, they are dying because of inhaling toxic gases present in the sewers. Data from the past few years shows that 376 deaths of manual scavengers have taken place at work while cleaning septic tanks and sewers in 2015-2019.[10] Such deaths raise doubt over the efforts and indeed the will of the State to eradicate the practice of manual scavenging.

Although the Manual Scavengers Act of 2013, that replaced the old Manual Scavengers Act of 1993, introduced more stringent provisions, yet manual scavenging is persisting in society with impunity. Liberation and proper rehabilitation of the manual scavengers are still a distant dream after several years of the commencement of the Manual Scavengers Act of 2013.

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[9] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013.

[10] Response to an Unstarred Question (Question bearing no. 1607) given by Minister of State for Social Justice and Empowerment Mr. Ramdas Athawale in Lok Sabha in 2019, *available at* https://swachhindia.ndtv.com/manual-scavenging-376-die-in-5-years-only-half-of-the-families-given-compensation-minister-to-lok-sabha-41680/ (last visited Feb 16, 2021).

Factors Contributing towards Continuation of Manual Scavenging

The continuation of manual scavenging is the result of certain socio-economic factors forcing manual scavengers to continue in this brutal occupation.

Caste biases against the castes traditionally engaged in manual scavenging force them to continue to engage in this practice. The stigma of impurity attached to this work is one reason why the historically recognised manual scavenger castes are forced to do the degrading job of removing faeces manually.[11] The castes engaged in manual scavenging are placed at the lowest rung in the caste hierarchy. Its members consider themselves obliged to perform this work due to the traditional and customary obligations sanctified by religious sanctions.[12] The stigma of untouchability attached to manual scavenging hinders their employment in other alternative professions or self-employment, with the resultant outcome is the re-engagement in the act.

Poverty and illiteracy prevalent among the scavengers are other factors that force them to engage in manual scavenging. Due to poverty, manual scavengers find it challenging to engage in alternative occupations. The deep-seated discrimination against persons involved in manual scavenging makes it difficult for them to get alternative occupations under the rehabilitative schemes initiated by the Government.[13] A study conducted by *Dr. Pamela Singla, Professor at the Department of Social Work at the University of Delhi,* endorsed the view that scavengers are engaged in this activity owing to financial reasons, to fend for their families. Due to economic reasons, manual scavengers are involved in this inhuman task. Twelve percent of the scavengers in

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[11] *Supra* n. 1, p. 3.

[12] T. M. Dak, *Impact of Scheme of Training and Rehabilitation on Socio Economic Improvement of Manual Scavengers in Rajasthan,* Institute of Social Development, 1 (2006-2007) *available at* https://niti.gov.in/planningcommission.gov.in/docs/reports/sereport/ser/ser_istr.pdf (last visited April 15, 2021).

[13] Stephanie Barbour & Smita Narula, *India's Hidden Apartheid: Caste Discrimination against India's Untouchables*, Human Rights Watch 14 (Feb. 2007) *available at* https://www.hrw.org/sites/default/files/reports/india0207webwcover_0.pdf (last visited March 15, 2021).

Delhi said they could not quit their profession as there were no alternative means of employment available to them because of their illiteracy.[14] Lack of awareness among the scavengers about Government welfare schemes is also one of the reasons for their continued engagement in this occupation.[15] On one hand, there is progress in human development, and on other hand, a segment of society is forced to fend itself by continuing in this inhuman practice.[16]

Despite the mandate of law prohibiting manual scavenging to demolish or convert the dry latrines into water-flush latrines, the existence of dry latrines throughout the country leads to the continuation of manual scavenging. So long as there are dry latrines, there will be a need to remove the human soil manually. The law on manual scavenging prohibits the construction and maintenance of dry toilets, yet the harsh reality is that dry latrines are in existence in different parts of the country. The preamble to the Manual Scavengers Act of 2013 recognised the existence of the insanitary latrines as one of the reasons that the practice of manual scavenging is persisting in society. The National Human Rights Commission in its report brought out on the surface the fact of the existence of dry latrines in the country despite the legal mandate to demolish the same.[17] Later the Census of India, 2011 confirmed that 7.94 lacs insanitary latrines required manual cleaning.

Further, the Government is the greatest violator of the law as its instrumentalities, like municipalities and hospitals, employ manual scavengers to clean the dry latrines and sewages.[18] Although at many places, the dry latrines have been discarded and replaced by new toilets,

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[14] Pamela Singla, *The Ex-Scavengers of Delhi: Into Alternative Sources of Livelihood – Exploring Unexplored Terrain,* in D. Soen, M. Shechory & Sarah Ben David (eds.), MINORITY GROUPS: COERCION, DISCRIMINATION, EXCLUSION, DEVIANCE AND THE QUEST FOR EQUALITY 11 (Nova Science Publishers Inc., 2012).

[15] Kuldeep Singh, *Scavengers and Their Awareness about National Scheme for Liberation and Rehabilitation (NSLRS)- A Case of Haryana,* 13 (2) JOURNAL OF ADVANCES AND SCHOLARLY RESEARCHES IN ALLIED EDUCATION, 152 (July 2017).

[16] Abhishek Gupta, *Manual Scavenging: A Case of Denied Rights,* Summer Issue ILI LAW REVIEW 38 (2016).

[17] National Human Rights Commission Report 2004, *Report on Prevention of Atrocities on Scheduled Castes,* (NHRC, 2004, 85).

[18] Varun, K. Aery, *Born into Bondage: Enforcing Human Rights of India's Manual Scavengers*, 2 (4) INDONESIAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 733 (2015).

the new toilets disposing the human excreta to a septic tank still require manual cleaning by scavengers, thereby keeping alive the need for manual scavengers.[19] Unless the dry latrines are converted into water-borne toilets, the abolition of manual scavenging cannot be achieved in its entirety. The use of technology is necessary for the cleaning of the septic tanks and sewage. The existence of dry latrines in private homes is a big reason for the continuation of the practice. The private household owners having dry toilets are reluctant to convert their dry latrines by contributing financially or taking loans to convert dry latrines into water flush latrines unless adequate pressure is exerted.[20]

The lack of political will on the part of the State to eradicate this practice is another reason for continuing the practice of manual scavenging.[21] The law made it mandatory for the State to abolish the practice of manual scavenging by punishing the employers employing manual scavengers and those constructing dry latrines. However, the sad reality is that the State itself is involved in violating the law by allowing the employment of manual scavengers by its instrumentalities like governmental hospitals and municipalities.[22] Such employment of scavengers by State agencies itself is an indication of the lack of political will on part of the State to eradicate manual scavenging. Although the practice was outlawed in 1993, not even a single conviction had been ordered under the Manual Scavengers Act of 1993.[23]

More ironic is that the State governments deny the existence of the manual scavengers in their respective States but take funds for the liberation and rehabilitation of the manual scavengers.[24] The law aims to liberate and rehabilitate manual scavengers, but, the manual scavengers are not even aware of rehabilitation schemes. The unawareness among the manual scavengers about the Government rehabilitative schemes is also a reason for the continuation of the practice. The entrenched caste-based discrimination, existence of dry latrines, poverty, illiteracy, unawareness among the scavengers about

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[19] *Supra* n. 1.
[20] *Supra* n. 17, p. 56.
[21] *Supra* n. 13, p. 86.
[22] *Supra* n. 13, p. 83.
[23] *Supra* n. 1, p. 13.
[24] *Id.*, p. 2.

rehabilitative schemes, and State's apathy in implementing the Act are the main reasons for the perpetuation of this inhuman practice.

Problems of Manual Scavengers

Manual scavengers face varied problems while engaging in the occupation of manual scavenging. They face acute poverty as they earn meagre wages that are either in the form of cash or kind. They get paltry sums of money, food, and clothes in return.[25] Therefore, poverty becomes the cause as well as the effect of manual scavenging. The manual scavengers face various health risks. The routine exposure to human waste without the protection of masks, gloves, shoes, etc., exposes manual scavengers to various respiratory and gastrointestinal diseases. Data shows that most of the manual scavengers suffer from anaemia, diarrhoea, tuberculosis, vomiting, jaundice, and trachoma.[26] They suffer from health ailments like skin infections, gastrointestinal illnesses, reduced vision and hearing due to the toxic fumes inhaled during cleaning septic tanks and maintenance holes.[27]

Manual scavengers who enter the manhole without protection die due to inhaling toxic gases present in the sewers and septic tanks.[28] Every year, hundreds of scavengers die by inhaling poisonous gases or drowning in excrement.[29] The ridiculous problem other than health issues that manual scavengers face is the problem of untouchability. The manual scavengers are considered untouchable due to their caste and the work they do. Their exposure to human faeces makes them avoided by others, and they become victims of untouchability.[30] The stigma of untouchability attached to their caste and nature of work hinders their upward mobility into other alternative jobs. Reportedly, they find it difficult to get alternative employment due to the stigma attached to their caste and work. Children of scavenger's face discrimination in

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[25] *Supra* n. 1, p. 7.
[26] *Supra* n. 13, p. 13.
[27] *Id.*, p. 9.
[28] *Supra* n. 10.
[29] *Supra* n. 13, p. 84.
[30] *Supra* n. 4.

schools;[31] they are made to do odd jobs in the school, leading to dropping out of these children from schools.[32]

Manual scavenging affects scavenger women on an altogether different level. Reportedly, most of the manual scavengers in India are women.[33] Women, who constitute 80% of the manual scavenger workforce, face considerable discrimination, deprivation, and exclusion.[34] Their families force the women to engage in the work of manual scavenging. Women majorly engage in cleaning human excrement from the dry latrines, whereas their male counterparts take cleaning sewers and septic tanks. Those manual scavengers who have been liberated from manual scavenging by providing alternative vocations under the rehabilitative schemes still permit, rather encourage, and coerce the women members of their families to continue indulging in this menial occupation for increasing the family income.[35] The male scavengers benefit from rehabilitative schemes, although women constitute the principal workforce for manual scavenging. Women scavengers face health problems like heavy menstruation, miscarriage, severe anaemia, and irregular heartbeat.[36] Women scavengers face acute inequality in this occupation that poses a challenge to Indian State's initiative to achieve gender equality, a sustainable development goal under Agenda 2030. Further, as manual scavenging affects the health of a significantly large number of people, it poses a significant challenge for the State to achieve the sustainable development goal of good health and well-being. Manual scavenging, thus, posing a significant challenge before

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[31] *See* International Dalit Solidarity Network & Rastriya Garima Abhiyan, *The Inhuman Caste and Sanitation Based Practice of Manual Scavenging,* International Dalit Solidarity Network & Rastriya Garima Abhiyan, *available at* https://idsn.org/wp-content/uploads/2017/10/Submission-Caste-and-Gender-Based-Sanitation-Practice-of-Manual-Scavenging-in-India.pdf (last visited Jan. 23, 2021).

[32] *Supra* n. 3, p. 283.

[33] Zachery Burt, Kara Nelson & Isha Ray, *Towards Gender Equality through Sanitation Access,* UN Women 17 (2016) *available at* http://munimpact.org/wp-content/uploads/2018/03/Towards-gender-equality through-sanitation.pdf (last visited March 21, 2021).

[34] *Supra* n. 31.

[35] *Supra* n. 17, p. 56.

[36] *Supra* n. 13, p. 84.

the State in achieving the sustainable development goals of sanitation, no poverty, good health and well-being, and gender inequality.

Governmental Committees/Commissions for Manual Scavengers

Given the nature of the problem, manual scavenging had attracted the Government's attention that resulted in the appointment of various committees and commissions to investigate the issues of manual scavengers. These committees and commission made multiple recommendations regarding improving the living conditions/standard of living of manual scavengers, increasing their income level, protecting work, liberation, and rehabilitation.

Barve committee was appointed under the leadership of V. N. Barve by the then State of Bombay in 1949. This committee was called the Scavengers' Living Condition Enquiry Committee. The task assigned to this committee was to assess the living conditions of the manual scavengers, recommend ways through which the living conditions and standard could be improved, and recommend fixing minimum wages. The focus of the committee was on the assessment of the living conditions of manual scavengers and not on their liberation and rehabilitation. After studying the living conditions of the manual scavengers, this committee submitted its report to the Government in 1952, making recommendations to the Government regarding raising the standard of living of the manual scavengers.[37]

The Government appointed the first backward classes commission headed by *Kaka Kalelkar* in 1953. This commission relooked into the living conditions of the manual scavengers and, in its report submitted in 1955, highlighted the miserable conditions in which the manual scavengers were forced to live. The commission also recommended that manual scavengers not be ghettoised and be provided with quarters in different localities. It highlighted the outdated methods employed by the manual scavengers for the removal of human faeces from the insanitary latrines. The committee's recommendation emphasised the need to introduce new technological tools and methods of sanitation to

[37] *See,* Barve Committee Report 1949, *Report of the Scavengers Living Condition Enquiry Committee* (1949).

clean the human waste to eradicate the practice of removing human excrement by the human on their head.[38]

Under the leadership of *Professor N. R. Malkani, Malkani Committee* was appointed in 1957 to look into the issues of manual scavengers. This committee, named Scavenging Conditions Inquiry Committee, was to prepare a scheme to end the practice of manual scavenging. The committee submitted its report in 1960 and recommended eliminating carrying human excreta on the head and improving the manual scavengers' social status and living conditions.[39]

Under the leadership of Professor N. R. Malkani, a committee[40] was appointed to analyse the abolition of the customary right of a manual scavenger to clean human excreta. In its report submitted in 1966 the committee noticed that in non-municipal areas, latrines were cleaned as hereditary right as against a scavenger by an understanding and agreement. The committee recommended the amendment of Municipalities Acts to confer the obligation of cleaning the private household latrines on the municipalities and that women should not be engaged in the scavenging task.

Pandya Committee was a sub-committee appointed by the National Labour Commission in 1968. The committee was assigned the work to assess the working conditions of the manual scavengers and sweepers. This committee recommended that comprehensive legislation be enacted to regulate the work, service, and living conditions of the manual scavengers.[41]

A review of these committees and commissions depicts that the emphasis of the initial committees/commissions mentioned above was to improve the living conditions of the manual scavengers rather than the abolition of the practice of manual scavenging. The later committees

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[38] *See,* Kaka Kalelkar Commission Report 1955, *Report of India Backward Classes Commission* (1955). *Also see* B. N. Srivastava, MANUAL SCAVENGING IN INDIA: A DISGRACE TO THE COUNTRY 36 (Concept Publishing Company, 1997).

[39] *See,* Malkani Committee Report 1961, *Report of Scavenging Condition Inquiry Committee* (Ministry of Home Affairs, 1961).

[40] *See,* Malkani Committee Report 1966, *Report of Committee on Customary Rights* (Ministry of Home Affairs, 1966).

[41] *See,* Pandya Committee Report 1969, *Report of the Committee on Condition of Sweepers and Scavengers* (National Commission of Labour, 1969).

focused on the eradication of the practice and made recommendations for the abolition of the practice.

Legal Regime –National and International

International Legal Regime

At the International level, the Universal Declaration of Human Rights recognises human beings' right to be considered equal in dignity and rights.[42] It acknowledges that every human being is entitled to have an adequate standard of living, which is necessary for oneself and his family's health and well-being.[43] The Convention on Rights of Child obliges the States that State parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral, and social development.[44]

The International Covenant on Economic, Social, and Cultural Rights, which is part of the International Bill on Human Rights, obligates the State parties to recognise the right to work. It 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. The State parties are obligated to take proper steps for the full realisation of this right. For that purpose, the State shall take measures for imparting technical and vocational guidance and initiate training programs, policies, and techniques to achieve steady economic, social and cultural development.

Further, the covenant recognises the rights of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing.[45] Despite the recognition of human rights at the international level, manual scavenging results in violation of all these rights as manual scavengers are forced to indulge in this work due to their economic circumstances and caste. They are unable to choose the work of their choice. Though the rehabilitative schemes require imparting of technical and vocation training, yet such training is negligible. The rehabilitative plans do not have the desired reach. Per

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[42] The Universal Declaration of Human Rights, Art. 1.

[43] *Id.*, Art. 25(1).

[44] The Convention on Rights of the Child, 1989, Art. 27.

[45] The International Covenant on Social, Economic and Cultural Rights, Art. 11.

capita income of the manual scavengers is significantly less as they earn paltry sums that directly affect their right to food, clothing, and housing. India is an active member of the United Nations and is a State party to International Covenant on Economic, Social, and Cultural Rights (ICESCR). Hence, there is an obligation on the Indian State to respect and protect the right to an adequate standard of living for every citizen.

Under the Discrimination (Employment and Occupation) Convention, 1958, ratified by India in 1960, the social origin is one of the grounds of discrimination in employment and occupation.[46] Manual scavengers are discriminated against because of their caste. Therefore, they lack equal employment opportunities, and the stigma of impurity attached to manual scavenging forces them to do this degrading job. Members of Dalit castes like Valmiki, Mehtar, and Bhangi are preferred for the appointment of a manual scavenger. Their caste status also affects their possibility of getting alternative employment.

Despite the recognition of human rights at the international level, manual scavengers' rights get violated due to this inhuman practice of manual scavenging. Its continued practice directly jeopardises the commitment of the State to ensure human rights to all its citizens and raises doubts over the will of the Indian State to eradicate this practice.

National Legal Regime

The legal regime at the national level aims to protect the rights recognised under Part III (Fundamental Rights) of the Indian Constitution[47] The directions to the State enshrined in Part IV (Directive Principles of State Policy) are fundamental in good governance. Manual scavengers are entitled to all the rights under Part III that include the right to equality[48], right against untouchability[49], right to freedom of

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[46] Discrimination (Employment and Occupation) Convention, 1958, Art. 1- Discrimination under the convention includes any distinction, exclusion, or preference based on, inter alia, 'social origin'. Discrimination because of one's caste falls under discrimination based on social origin.

[47] The Constitution of India, 1950.

[48] *Id.*, Art. 14

[49] *Id.*, Art. 17.

occupation[50], right to life with dignity[51], right against exploitation[52]. The right to Constitutional remedies is also available in case of violation of the rights recognised by part III.[53] In case of violation of these rights, the writ can be filed directly in Supreme Court under Article 32 and in High Court under Article 226 of the Constitution.

The Directive Principles of State Policy gives direction to the State that the State takes measures for promoting the welfare of the people by securing a just social order ensuring social, economic, and political justice.[54] It directs the State to minimise the inequalities in income and make an endeavour for eliminating inequalities of status, facilities, and opportunities for all the people living in different parts of the country and engaged in different avocations.[55] The State shall direct its policy towards securing that the citizen men and women equally have the right to an adequate means of livelihood.[56] The State shall, in particular, direct its policy towards ensuring the ownership and control of the material resources of the community are so distributed as best to subserve the common good.[57] Therefore, manual scavengers are entitled to all the protection conferred under the Indian Constitution.

Legislative Framework

The legislative framework includes various legislation enacted by the central legislature for the protection of the rights of the manual scavengers.

The Protection of Civil Rights Act, 1955

The Untouchability (Offences) Act aims to abolish untouchability. It punishes preaching untouchability and enforcement of any disability arising due to untouchability. However, the harsh reality is that manual

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[50] *Id.*, Art. 19.
[51] *Id.*, Art. 21.
[52] *Id.*, Art. 23.
[53] *Id.*, Art. 32.
[54] *Id.*, Art. 38(1).
[55] *Id.*
[56] *Id.*, Art. 39(a).
[57] *Id.*, Art. 39(b).

scavengers are still considered untouchable due to their membership in a particular caste group and their work.[58]

The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989

The Parliament took another legislative action in 1989 by enacting the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. This enactment defines explicitly certain acts as an 'atrocity' and makes provision for speedy trial of cases against SC/ST through special courts and stricter punishments against the perpetrator. By amending the Act in 2015, employing, permitting, or making any SC/ST to do manual scavenging was brought within the purview of 'atrocity' and made an offence punishable with a minimum of six months imprisonment and maximum of five years and with a fine.[59]

National Commission for Safai Karamcharis Act, 1993

The Parliament of India passed the National Commission for Safai Karamcharis Act, 1993. This Act established the National Commission for Safai Karamcharis (NCSK). The main task of this commission is to study, evaluate and monitor the implementation of various rehabilitative schemes introduced by the Government and address the issues of the manual scavengers. The Manual Scavengers Act of 2013 has conferred the statutory responsibility to monitor the Act's implementation on the NCSK.[60]

The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 (EMSCDLA)

The Parliament enacted the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, to eradicate the practice of manual scavenging. Employing manual scavengers and constructing dry latrines were made criminal offences under this law. The Act defined 'manual scavenger' in a restrictive manner by including

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[58] Ghanshayam Shah, Harsh Mandar, Sukhdeo Thorat, Satish Deshpande & Amita Bhaviskar (eds.) UNTOUCHABILITY IN RURAL INDIA 124 (Sage Publications, 2006).

[59] The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, inserted S. 3 (j) vide s. 4.

[60] *Supra* n. 9, s. 31.

a person employed in or engaged in manually carrying human waste and excluding the sewage cleaners from the purview of the Act.[61]

Section 3 of the Act empowered the State Government to specify, by notification, the areas in which a person shall neither employ nor engage another person for manual scavenging.[62] No notification was to be issued in those areas where adequate facilities for the use of water-seal latrines were not available.[63] Such requirements provided a good excuse for the Government to escape its duty to eradicate manual scavenging by taking excuse of the non-existence of adequate facilities for the use of water-seal latrines etc. Under section 4 of the Act, the State Government had the discretion to exempt any area from the Act's purview that was objectionable.[64] It was left at the discretion of the state Government to decide as to which area Act shall apply.

Section 5 of the Act conferred the power on the state Government to appoint a District Magistrate or Sub-Divisional Magistrate as the *Executive Authority* to ensure the proper implementation of the provision of the Act.[65] The duty of the Executive Authority was to rehabilitate and promote the welfare of the manual scavengers in its area.[66] Section 6 provided empowered the State Government to initiate schemes regarding converting the insanitary latrines into sanitary (water-seal) toilets, constructing or maintaining new water-seal latrines, and rehabilitating the employed person's manual scavengers.

Section 14 of the Act made the failure to comply with or contravention of the Act's provisions punishable and provided punishment up to one-year imprisonment or with a fine up to Rupees two thousand or with both. For continued violation, an additional penalty of up to one hundred Rupees could have been imposed on such a person for each day of such violation.[67] Every offence under this Act was a cognizable offence.[68] Section 17 of the Act dealt with the court's jurisdiction to try

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[61] *Supra* n. 8, s. 2(j).
[62] *Id.*, s. 3(1).
[63] *Id.*, s. 3(2).
[64] *Id.*, s. 4.
[65] *Id.*, s. 5(1).
[66] *Id.*, s. 5(2).
[67] *Id.*, s. 14.
[68] *Id.*, s. 16.

any offence under the Act and conferred the authority to try the cases on a Metropolitan Magistrate or a Judicial Magistrate first class.[69] Further, every prosecution for the commission of any offence was to be initiated only with the previous sanction of the Executive Authority constituted under the Act.[70] Without the previous sanction of the Executive Authority, neither the complaint could have been filed nor could the prosecution have been initiated.

Further, this provision prohibited the court from taking cognizance of any such offence unless the complaint was made by a person generally or specially authorised on this behalf by the Executive Authority.[71] Though employment of manual scavengers was made an offence, the Act took away the locus standi to file a complaint from the affected person. The Act made it mandatory for the court to take cognizance only in those cases where a person made the complaint generally or specially authorised by the Executive Authority. Who is generally or specially authorised by the Executive Authority was not made clear in the Act. In an era where the *locus standi* rule is liberalised by the courts, taking away the right to file a complaint from the affected person against the violation of his human rights was itself a sheer violation of the human rights of the affected person.[72]

Therefore, the Act of 1993 made the employment of manual scavengers and the construction of dry latrines a criminal offence. Still, the Act's provisions revealed the legislature's half-heartedness to eradicate manual scavenging once and for all. Some provisions of the enactment provided ample chances for excuses to be offered for not eradicating this practice and thus showed the lack of political will on the State. Where manual scavenging directly affects the human dignity of the person engaged in the practice, the undue procedural requirements endorsed the non-sincerity of the State to end the practice of manual scavenging.

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[69] *Id.*, s. 17(1).

[70] *Id.*, s. 17(2).

[71] *Id.*, s. 17(3).

[72] *Supra* n. 38, Art. 8 provides that 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law'.

Moreover, the Central Government took four years to notify the Act, and the State governments took three more years to adopt the Act.[73] By 2009, only nineteen States had adopted the Act.[74] No single conviction had taken place under the Act. The State had extended its deadline to eradicate this inhuman practice for the fifth time by March 2010.[75] The dry latrines still existed in the country, and the municipalities, panchayats continued to employ manual scavengers.

The Prohibition on Employment as Manual Scavengers and their Rehabilitation Act, 2013

The Act of 1993 was full of lacunae and was not adequately implemented, therefore, the obnoxious and shameful practice of manual scavenging continued to persist. The Government itself realised this fact, and, thus, finding the Act of 1993 inadequate, the Parliament of India came up with a new law to deal with manual scavenging.[76] The idea of the prohibition on the employment of manual scavengers and their rehabilitation is the central theme of the Act of 2013. The Act's preamble recognises that due to the deep-rooted caste-based discrimination and the existence of the insanitary latrines, the dehumanising practice of manual scavenging is persisting in different parts of this country.[77] While recognising the fact that manual scavenging is associated with the weaker section of the society and the entrenched caste-based discrimination enforced this practice, this law views manual scavenging as violative of human dignity.[78]

The new legislation introduced changes that were not there in the Act of 1993. First, the Act broadened the definition of manual scavenger to include manual removal or disposal of human excreta from dry latrines and manual cleaning of sewages and septic tanks without protective

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[73] *Supra* n. 5.

[74] *Supra* n. 1, p. 83.

[75] Darshan Desai, *Inhuman Bondage: 1.3 Million Manual Scavengers Exist in India despite Ban* (Jul. 27, 2009) *available at* http://twocircles.net/2009jul27/inhuman_bondage_1_3_million_manual_scavengers_exist_india_despite_ban.html (last visited March 27, 2021).

[76] *Supra* n. 9.

[77] *Id.,* Preamble.

[78] *Supra* n. 16, p. 54.

gears and manual cleaning of human waste from the railway tracks.[79] Sadly, this Act excludes manual cleaning of latrines in railway bogies or of septic tanks or sewers with the use of protective gear from the purview of the definition of manual scavenging.

Secondly, this Act makes occupiers of insanitary latrine responsible for converting the same in a water flush latrine at their own cost. If the dry toilets are transformed into water flush latrines, by the local authority, the cost of such conversion is to be recovered from such occupier.[80] The Act casts the duty of surveying insanitary latrines in their respective jurisdiction on the local authority i.e., municipality, panchayat, cantonment board, or the railway authority. These authorities are also responsible for constructing sanitary community latrines in their respective jurisdictions. Putting the responsibility on the local authority to build sanitary toilets is a change introduced in the Act and was not there under the Act of 1993. The Act casts the duty of implementing the provisions of this Act on the District Magistrate of the area and the local authority.[81]

The Act makes the offences under the Act cognizable and non-bailable[82], and the court can try the same in a summary manner.[83] In case of a violation under the Act is committed by a company, the Act fixes responsibility for the same on both the persons responsible for the company's business at the time of the commission of the offence and the company. The Act provides for enhanced punishment in comparison to the Act of 1993. The Act of 1993 provided imprisonment up to one year and a fine of up to Rupees two thousand. The Act of 2013 provides imprisonment for up to one year and a fine of up to Rupees fifty thousand for the construction of an insanitary latrine and for employing a person as a manual scavenger. In case of subsequent contravention, the imprisonment may extend up to two years and fine up to Rupees two lacs.[84]

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[79] *Supra* n. 9, s. 2(g).
[80] *Id.*, ss. 5(2) & 5(3).
[81] *Id.*, s. 17.
[82] *Id.*, s. 22.
[83] *Id.*, s. 21.
[84] *Id.*, s. 8.

The Act differentiates between manual cleaning of insanitary latrine from hazardous cleaning of a septic tank/sewage by providing enhanced punishment of imprisonment up to two years or fine up to Rupees two lacs or with both and for any subsequent infringement is punishable with imprisonment up to five years or fine up to Rupees five lacs or both.[85] However, the Act limits taking cognizance of an offence by the court, where the person affected does not make the complaint of such offence within three months of the alleged commission of the offence.[86] Importantly, this Act has done away with the requirement of prior sanction of the Executive Authority and the condition of making a complaint by a person generally or specially authorised by the Executive Authority as required under the Act of 1993. Now the affected person can directly file the complaint regarding the commission of an offence.

This Act requires the Constitution of the vigilance committees and monitoring committees at the district, state, and central levels.[87] The Act makes it obligatory for the local authority to carry on surveys within its jurisdiction for dual purposes, one, for identifying insanitary latrines and second, for identifying the manual scavengers in its area. As the Act's focus is to rehabilitate manual scavengers, it provides for initial one-time cash assistance, scholarship for the children of manual scavengers, allotment of plots, and monetary aid for the construction of the house.[88]

Further, it also makes provision for imparting training in a livelihood skill to the manual scavenger himself or a family member of such manual scavenger and a monthly stipend up to Rupees three thousand during such training. Most importantly, the Act provides subsidised and concessional loan facilities to manual scavengers for taking up alternative avocations.[89] The duty to rehabilitate every manual scavenger is cast on the District Magistrate of the area.[90]

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[85] *Id.*, s. 9.
[86] *Id.*, s. 10.
[87] *Id.*, ss. 24 & 26.
[88] *Id.*, s. 13 (1).
[89] *Id.*
[90] *Id.*, s. 13 (2).

Thus, the Manual Scavengers Act of 2013 introduced essential changes, yet it also suffers from certain lacunae. Excluding the manual scavengers cleaning the railway bogies, septic tanks with the help of protective gear are problematic and run counter to eradicate this practice from society. Negligible convictions have occurred under the Act although manual scavengers are being employed and deaths are taking while cleaning the maintenance holes.

Governmental/Administrative Schemes for Liberation and Rehabilitation of Manual Scavengers

The Government of India launched various schemes for the conversion of dry latrines into water-seal latrines, liberation, and rehabilitation of manual scavengers.

In 1989, the Government initiated the National Scheme[91] intending to liberate and rehabilitate the manual scavengers and their dependents. The scheme failed due to the gaps between liberation and rehabilitation. According to the CAG report submitted in 2003, the scheme failed after ten years of implementation despite the allocation of Rupees 600 Crores, which remained non-utilised or under-utilised. The report further highlighted that there was no evidence of rehabilitation of the manual scavengers who were liberated from manual scavenging.[92]

To liberate and rehabilitate the manual scavengers, the Government launched Self – Employment Scheme for Rehabilitation of Manual Scavengers (SRMS) in 2007.[93] The scheme aims at rehabilitating the manual scavengers identified under the Manual Scavengers Act, 2013. In tune with the mechanism provided under the Act of 2013, this scheme provides for one-time cash assistance, vocational training in livelihood skills to the manual scavengers, including a monthly stipend, and subsidised loans for taking up alternative occupations.

The Government of India launched an integrated Low-Cost Sanitation Scheme to convert dry latrines into low-cost water flush latrines and, therefore, liberate manual scavengers from the clutches of the menial

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[91] National Scheme for Liberation and Rehabilitation of the Manual Scavengers and their Dependents (NSLRSD).

[92] Report of Comptroller and Auditor General, 2003 *cited in Safai Karamchari Andolan v. Union of India,* (2014) 4 SCALE 165.

[93] The Self – Employment Scheme for Rehabilitation of Manual Scavengers (2007).

practice. Total Sanitation Campaign initiated in 1999 was renamed in 2012 as the Nirmal Bharat Abhiyan (NBA) by the then UPA Government with a target to ensure 100 percent sanitation in rural and urban areas. After coming into power in 2014, the NDA Government replaced NBA with Swatch Bharat Abhiyan (SBA). The main objectives of the SBA are to eliminate the practice of open defecation by providing sanitary latrines, abolition of manual scavenging by employing modern and scientific solid waste management, and effect change in the attitude of society regarding healthy sanitation practices.

Despite initiating so many schemes, the liberation and rehabilitation of the manual scavengers have not happened satisfactorily. The schemes' names kept on changing, but manual scavenging is continuing to haunt a large segment of society. The schemes introduced to rehabilitate suffer from various deficiencies, e.g. under-utilisation and misutilisation of funds, low stipend for training, inadequate training period, and shortage of training institutions.[94] The schemes do not have the desired reach, and there is a misuse of funds as those who are not engaged in manual scavenging receive the benefits of these schemes.[95] A survey conducted by Rashtriya Garima Abhiyan in three states of India in 2010-11 shows that the SRMS has not benefitted the needy manual scavengers. There has been a siphoning of the funds. Seventy-six percent of those who received the benefits under SRMS were not involved in the practice of manual scavenging.[96] This scheme was not launched in twenty-five Districts stating that there were no manual scavengers in these Districts, but the survey conducted by Rashtriya Garima Abhiyan reflected that manual scavenging was rampant in those Districts. Ninety-eight percent of the persons engaged in manual scavenging were women, yet men received fifty-one percent of the scheme's benefits.[97]

One of the lacunas in the implementation of the schemes pointed out by the NHRC is that the rehabilitated scavengers are not given proper training and pushed into alternative employment without improving their skill base. The ultimate result is that these manual scavengers find

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[94] *Supra* n. 13, p. 85.

[95] *Supra* n. 33, p. 19.

[96] *Id.*

[97] *Id.*

themselves involved again in scavenging due to a lack of alternative vocations.[98] The NHRC, in its report, pointed out that the Ministries obliged to eradicate manual scavenging do not work in a coordinating manner in implementing the schemes and policies that are important for this program.[99]

Besides Governmental schemes, certain private social organisations have also made efforts to emancipate manual scavengers. Sulabh International Organisation, founded in 1970, has been vocal about manual scavenging and continuously contributed towards unshackling the fetters of manual scavenging from the manual scavengers by providing a cost-effective sanitation system.[100]

Judicial Response to Manual Scavenging

The Judiciary in India has also noticed the deplorable situation and the plight of manual scavengers in India in the *Safai Karamchari Andolan Case*[101] (2014) and the *Delhi Jal Board Case*[102] (2011). The courts have repeatedly reminded the State about its duty under law to eradicate the menace of manual scavenging. Still, the practice is continuing despite legal prohibitions and such reminders by the judiciary. The Apex Court in *Safai Karamchari Andolan Case* observed that for eradicating manual scavenging, the rehabilitation process must include that the entering of sewer tank without protective gears even in emergent situations is made a crime. It directed that a mandatory compensation of Rupees ten lacs must be given to the deceased's family. The railways, which is one of the greatest violators of the law, must take a time-bound strategy to stop manual scavenging on its tracks.[103] In *Delhi Jal Board Case*, the Supreme Court criticised the Government for failing its duty in eradicating this obnoxious practice and for being insensitive towards the safety of the manual scavengers. The Delhi High Court in *M/S Metro Waste Handling v. Delhi Jal Board* (2018), deciding a writ petition,

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[98] *Supra* n. 17, p. 54.

[99] *Supra* n. 17, p. 92.

[100] Dr. Aprajita Baruah, *The Prohibition of Manual Scavengers and Their Rehabilitation Act, 2013: A Review*, 1(3) SPACE AND CULTURE 12 (2013).

[101] *Safai Karamchari Andolan v. Union of India*, 2014 (4) SCALE 165.

[102] *Delhi Jal Board v. National Campaign for Dignity & Rights of Sewerage & Allied Workers*, (2011) 8 SCC 568.

[103] *Supra* n. 17, p. 48.

observed that the Government of NCT though might have failed in its duty to make a proper survey of the existence of manual scavengers under the Act of 2013 yet the existence of manual scavengers in Delhi is undeniable and that manual scavenging is persisting in Delhi despite the law to abolish the practice.[104]

The Delhi High Court observed that:

> 'Unseen and forgotten for generations, our society has marginalised manual scavengers to its darkest corners. They are trapped in an eternal caste embrace, with no voice in the society or in any meaningful participation; their children are doomed to the same stereotypical roles assigned to them. The promise of equality, dignity, and egalitarianism has eluded them all together in the march and progress witnessed by the rest of our citizens'.[105]

In *National Institute of Rock Mechanics v. Assistant Commissioner and Executive Magistrate & Ors.*,[106] Karnataka High court held that as the offences under the Act are cognizable, the police are duty-bound to register an FIR. The court held that even the State commission for Safai Karamchari can take up the matter and get the FIR registered under the Act.

In April 2021, the High Court of Orissa expressed its shock over the persistence of manual scavenging in the country and deaths taking place due to the same. The High court registered a *suo motu* public interest litigation under the title 'Deaths of Sanitation Workers' about the death of two manual scavengers each in Bhubaneswar and Cuttack and directed the state Government to disburse Rupees 10 lacs each to the families of the deceased.[107]

Thus, the Indian judiciary has considered manual scavenging and the deplorable plight of manual scavengers in the country and has called

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[104] *M/S Metrro Waste Handling v. Delhi Jal Board,* 2018 SCC Online Del 9319, p. 10.

[105] *Id.,* p. 11.

[106] *National Institute of Rock Mechanics* v. *Assistant Commissioner and Executive Magistrate & Ors.* (Decided on July 17, 2017) *available at* https://indiankanoon.org/doc/97742405/ (last visited Feb. 9, 2021).

[107] Meera Emmanuel, *Manual Scavenging Shocks Judicial Conscience, as it should the Society's Conscience,* Bar and Bench, (Apr. 21, 2021) *available at https://www.barandbench.com/news/litigation/manual-scavenging-orissa-high-court-registers-suo-motu-case* (last visited Aug. 28, 2021).

for the eradication of this heinous practice. It has reprimanded the State for failing in its duty to eradicate the same.

Conclusion and Suggestions

In the concluding remarks, it is submitted that the State has shown its apathy by not implementing the law in its letter and spirit. Non-implementation of the law, under-implementation of the rehabilitation schemes, misuse of the funds allocated for rehabilitation of the liberated manual scavengers, denial on the part of the States regarding the existence of manual scavengers in their respective territories reflect upon the apathy and lack of political will on the part of the State to eradicate this practice. Presence of dry latrines across the country, absence of surveys for identification of manual scavengers points at the State's failure to emancipate the manual scavengers.

Caste, poverty, illiteracy, lack of alternative occupations, dry latrines, liberation, proper rehabilitation of manual scavengers, and non-employment of modern sanitation technology and apparatus have kept this obnoxious practice alive in society. Once an untouchable always an untouchable notion is attached to the castes engaged in manual scavenging, and the stigma attached to the nature of work hinders the manual scavengers in taking alternative jobs. Due to poverty, caste, and lack of alternative avocations, the scavengers again engage themselves in manual scavenging. Manual scavengers are stuck in this vicious circle of caste, poverty, and manual scavenging.

Besides that, manual scavenging coupled with caste has affected the psyche of the manual scavengers. Many of the manual scavengers consider this work as their privilege. Such attitude of the manual scavengers needs to be countered by bringing a change in their attitude to eradicate the practice of manual scavenging. Exempting manual scavenging using protective gear is problematic, and such exemption is highly unwanted. Such kind of exemption runs counter to the idea of eradication of this practice.

Further, we are failing as a society in eradicating the problem of manual scavenging due to the entrenched caste discrimination and our outlook towards manual scavengers. Awareness among the masses about manual scavenging and the problem faced by manual scavengers is

necessary. Members of society must stop employing scavengers and convert their dry latrines into water flush latrines.

Strict implementation of the law is the need of the hour. Though the law provides more stringent punishment, it has not been a deterrent as public and private entities continuously employ manual scavengers. Railways must end this practice on their tracks and stations in a time-bound manner. A more focused approach is required for the identification of manual scavengers, their liberation, and rehabilitation. The Government Ministries like Social Justice and Empowerment Ministry, Poverty Alleviation Ministry, Urban Development Ministry, Rural Development Ministry, Woman and Child Development Ministry, Labour Ministry, Railways Ministry must coordinate with each other for proper implementation of the Act and the rehabilitative schemes. Any efforts to liberate manual scavengers will fail if there is no appropriate rehabilitation of the manual scavengers. Emphasis is required to be given to the issues of women scavengers as they are more vulnerable in this occupation. Use of advanced sanitation technology needs to be made for the cleaning of swages and septic tanks.

It is not the lack of funds but the lack of will on part of the State that this practice continues to haunt the manual scavengers. Many NGOs and organisations like Safai Karamchari Andolan, Human Rights Watch, National Dalit Solidarity Network, and Rashtriya Garima Abhiyan are doing commendable work towards manual scavengers' emancipation yet a lot more is still to be done to liberate manual scavengers. For that, the State and the civil society must join hand in hand, and concerted efforts are required at all quarters to abolish this inhuman practice.

Common Heritage of Humankind v. Province of Humankind:
From the Perspective of Privatisation of Outer Space Operations

Akanksha Marwah[**]

Introduction

With the development of civilisation, quest to build societies began and so did the endeavor to acquire territories and claim sovereignty over them. With survival of the fittest entered powerplay in how countries deal with each other and in the matters relevant for the entire world community. The fights started from land and were stretched to the sea. And in no time, the nations which considered themselves masters of their own destiny, thought outer space to be an extended front. To prevent outer space from being turned into a battleground for developed nations, the United Nations stepped in. This later led to the recognition of outer space as a 'province of humankind.'[1] The United Nations Office for Outer Space Affairs (hereinafter referred to as 'UNOOSA') established the United Nations Committee on the Peaceful Uses of Outer Space (hereinafter referred to as 'UN COPUOS') in 1958 to ensure that the activities undertaken in the outer space are only for scientific and research purposes and for the betterment of human society.

[**] Akanksha Marwah is an Assistant Professor (Law) with Delhi Metropolitan Education, Noida (Affiliated to GGSIPU, New Delhi) and can be reached at: akanksha1593@gmail.com.

[1] UN, 1967. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, London, Moscow and Washington, D.C.: General Assembly Resolution 2222 (XXI), Art. 1.

Thereafter, many principles were devised to generally guide the outer space activities, and, based upon these principles, other treaties and conventions were signed. It was established through these documents that the outer space and its exploration shall be done for the benefit of entire humankind for there lies 'common interest' of all.

With the beginning of the working of UN COPUOS, the next significant development that took place was the adoption of Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space[2]. Though not binding, they put forth the collective conscience of the world community to accept the outer space to be an area of 'common interest of all humankind in the progress of the exploration and use of outer space for peaceful purposes' and, further, laid down the principles that the outer space can be used only 'for the benefit of and in the interests of all humankind', with 'equal access for all States; no sovereignty; compliance with international law; and special international status for astronauts as 'envoys of mankind'.'[3]

The aforementioned principles also find a mention in the five major treaties governing space law.[4] The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (hereinafter referred to as 'the Outer Space Treaty')[5], being the cornerstone of the outer space law, also called its *Magna Carta*, recognises the principle of common interest of humankind, and calls the outer space a 'province of humankind'. The principle also mandates that the outer space shall be explored for the benefit of all the countries 'irrespective of their economic or scientific development'.[6]

Furthermore, it maintains that there shall not be made any national appropriation by the parties to the treaties.[7] No State can claim sovereignty over the areas in the outer space[8] and that they shall also

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2 G.A. Res. 1962, 18 U.N. GAOR Supp. (No. 15) at 15, U.N. Doc. A.5515 (1963).

3 *Id*., Arts. 1, 2, 3, 4, 9.

4 See Space Law Treaties and Principles (unoosa.org) (last visited Jan. 24, 2021).

5 *Supra* n. 2.

6 *Id.*

7 *Supra* n. 2, Art. 2.

8 *Id.*

bear an international responsibility for the activities undertaken by their governmental or non-governmental organisations.[9]

Other than the Outer Space Treaty, the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (hereinafter referred to as 'Moon Agreement')[10] not only upholds these principles but also goes a step beyond and calls exploration of Moon and other Celestial bodies 'common heritage of humankind'.[11] Although there shall be freedom to explore, there shall be limitations governing the operations to ensure that the activities are conducted in conformity with the international law so as to maintain international peace and security.

The principles of 'province of humankind' and 'common heritage of humankind', though they appear to be similar, they, in essence, have different applications. Because of this, there have been conflicting interpretations and varied degrees of acceptance by different nations. This paper shall, in the first place, discuss the meaning and different interpretations of these two principles. It shall then be analyzed if the present developments with increasing privatisation of outer space activities pose any challenge to the interpretation of these principles.

The idea has been to put forth the views in support of providing a sustainable outer space environment for all the nations, particularly the less developed ones, so that their present and future generations can also be benefitted from the outer space affairs. The suggestions shall pertain to addressing the potential claims that might be created in the outer space, *viz*., space tourism, property rights, etc. vis-à-vis obligations of nations like launch permits, licensing and supervision, debris management, assignment of radio frequencies, national security and resolution of disputes.

Principle of Province of Humankind and Common Heritage of Humankind

The concept of 'common heritage of humankind' and 'province of humankind' came up from the ideas of *res nullius and res communis.* The

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[9] *Supra* n. 2, Art. 6.

[10] UN, 1979. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, New York: General Assembly Resolution 34/68.

[11] *Id*., Art. 11.

former refers to a territory that belongs to none but can still be appropriated by the first comer. It is relied upon to assert sovereignty over an uninhabited territory. This, however, has been side-lined by being prohibited under the Outer Space Treaty and other principles, treaties, and conventions by expressly eliminating national appropriation. The concept of *res communis*, on the other hand, maintains that such territories may not be appropriated by anyone but still their usage belongs to everyone.[12]

The principle of province of humankind, with reference to the outer space, implies that the outer space, as territory, shall belong to the entire humankind. No nation, however advanced, scientifically or technology or financially, can take over and claim its rights over that territory. The allowance to explore that area is subject to the condition that there shall be peace and security maintained during the activities undertaken in the outer space and that there shall be no militarisation of it. The principle has been stated in the Outer Space Treaty[13] and the Moon Agreement[14] as well.

The principle of common heritage of humankind, however, has only been placed in the Moon Agreement[15] and has invited quite a few criticisms since the agreement was finally opened to ratification after its at length discussion for over a decade. It refers to the 'common management of areas outside national jurisdiction with an equitable sharing in the benefits derived from those resources, despite the level of participation in the exploitation activities'[16]. Arvid Pardo, the Ambassador from Malta, gave five elements to characterise anything as a common heritage.[17] Firstly, there should not be any kind of appropriation of that subject matter, whether public, or private, national or corporate. They shall be open to access for everyone, thus, depicting absence of any sovereignty and ownership. Secondly, the management

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[12] Bradley Larschan & Bonnie C. Brennan, *Common Heritage of Mankind Principle in International Law*, 21 COLUM. J. TRANSNAT'L L. 305 (1983).

[13] *Supra* n. 2, Art. 2, 4, 8.

[14] *Supra* n. 11, Art. 3, 4, 6.

[15] *Id.*, Art. 11.

[16] *Id.*, Art. 7.

[17] Christopher C. Joyner, *Legal Implications of the Concept of the Common Heritage of Mankind*, 35(1) THE INTERNATIONAL AND COMPARATIVELY LAW QUARTERLY 190-199 (1986).

of the subject matter shall be shared with everyone as representatives of humankind. Thirdly, the natural resources exploited from these common areas shall lead to economic benefits of everyone internationally. Fourthly, the exploitation shall be for peaceful purposes exclusively. And lastly, conduct in the common areas shall be for scientific purposes and that there should be no threat to the ecology.

Three takeaways from these elements, first, that the area under consideration for being 'common heritage' cannot be subjected to any appropriation by nations; secondly, all countries must have a share in the management of the regions including an active sharing in the benefits reaped from the exploitation of the aforesaid area's resources; and lastly, that the area must be dedicated to exclusively peaceful purposes, [18] pose significant problems in the adoption of moon agreement by the developed nations. It is the common management and sharing of benefits that makes common heritage different from province of humankind principle.

Difficulties in Application of Principles

Many States have confused the principle of 'common heritage of humankind' appearing in Moon treaty with the 'province of humankind' in the Outer Space Treaty, mostly the developing nations. Developed countries treat them differently to enable them to operate conveniently in the outer space. After the adoption of the Outer Space Treaty by majority of the space-faring nations, the threat hovered upon the developing and less developed nations that they would lose their rights and opportunities for the exploration of the outer space or be left behind, and therefore, they strived for a treaty which would create a stricter imposition upon the developed nations to use the outer space and share benefits internationally.

Developed nations did not want 'common heritage of humankind' principle to be actualised, but despite their criticism, the less-developed nations succeeded in bringing it into the legal form through Article 11 of the Moon Agreement. The outer space has been called the 'province of humankind' and the Moon Agreement has called moon and other celestial bodies, except earth, and their resources 'common heritage of

[18] Goedhuis, *Some Recent Trends in the Interpretation and the Implementation of the Rules of International Space Law*, 19 COLUM. J. TRANSNAT'T L. 213, 218-19 (1981).

humankind' which means that no single generation or country can claim its rights over the resources and use them for its advantage solely.

'Common heritage of humankind' principle finds its mention only in the Moon Agreement, which is considered practically dead since it has not been signed by majority of space faring nations.[19] If this is strictly construed, there could be some severe implications upon how the space faring nations want to behave in the outer space. Thus, unfortunately, 'Common Heritage of Humankind' has failed to attain legal status since it exists only in the Moon Agreement and many states, especially the developed have not signed or ratified it and it applies not to outer space *per se*.

The question often revolves around whether the outer space and its resources are 'common heritage of humankind' or only that the outer space is 'province of humankind'. Further, many space law advocates call outer space being 'common heritage of mankind' a myth and an erroneous assertion.[20] Many nations have often accepted the outer space to be a common heritage and that it should be explored only for peaceful purposes but unfortunately, it is claimed only to be in respect of the non-militarisation of outer space and prohibition on arm race in there.[21] Nevertheless, promotion of international cooperation for benefit and enhancement of quality of life is always sought on the grounds of space being a common heritage of all. Since 'common heritage of humankind' concept emerged as measure taken by the developing nations under the fear that they may be precluded from benefiting the regions like outer space, seabed, *etc.*, which required technology and huge expenditures for their explorations, the idea was only to prevent their *de facto* control in these jurisdictions and protect their interests.[22]

The developed countries, on the other hand, treat the two principles differently, to enable them to operate in the outer space. According to them, the Outer Space Treaty only designates the outer space to be a province which is accessible to all but, to their advantage, says nothing

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[19] Virgiliu Pop, IS OUTER SPACE PROPER THE 'COMMON HERITAGE OF MANKIND? Eleven International Publishing, 67th International Astronomical Congress (IAC), Guadalajara, Mexico, 26-30 September 2016.

[20] *Id.*

[21] *Id.*

[22] *Id*.

about the resources and their exploitation, or their international management and sharing of benefits which are essentially the ingredients of 'Common Heritage of Humankind' principle.

The interpretation helps in a way which does not expect them to share benefits with those nations which are less developed and have not spent anything on scientific or technological developments or not sponsored any funding for the projects. This might appear to be fair, since the developed countries are reaping the benefits for the investments they have made, and they would not want to share it with the countries who have not made any effort.

But the issue that comes here is while determining the implication of the provision where the Outer Space Treaty itself says activities shall be carried out by countries in the benefit and interests of all countries 'irrespective of the scientific or economic development of the country'. If the outer space is seen only as a 'province', it would mean giving 'first come, first in rights' would benefit the developed nations.

While the province of humankind does not talk about sharing of benefits, the common heritage principle insists upon it. According to clause 5 of Article 11 of the Moon Agreement, 'States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible.' And further, Article 2(7)(d) calls for an 'equitable sharing' of the benefits derived from natural resources. This makes Moon Agreement contentious since it amends the legal status of the moon from province to heritage, the most important reason which lead to its failure for being complied by many nations.

This remains the difficulty in the acceptance of this principle by the developed nations since it would mean that must share their benefits and surrender a part of their vital sovereign powers. However, it is an emerging principle of space law which needs to be given adequate attention. In the light of its potential for benefitting the entire humankind which its 'sharing by all' approach, it can be adopted by the world community soon. Because of this, there arises a need to understand the impact of privatisation and commercialisation of outer space in this light.

Privatisation in Outer Space

The era to which the present generation stands facing has been designated as '*NewSpace*', where the outer space activities have been opened to the private sector, which were otherwise conventionally undertaken by the government or governmental agencies. NewSpace, also referred to as 'commercial' or 'entrepreneurial space' or 'astropreneurship', has been defined as 'people, businesses and organisations working to open the space frontier to human settlement through economic development'. Commercial space activity is referred to as, 'one in which a private entity puts its own capital at risk and provides goods or services mostly to other private subjects or consumers rather than to the government.'[23]

Privatisation allows the government to focus on key public essential services and financial management for designated areas. It brings in huge investments and technical know-how and lets the government save a lot of money for those essential functions. Due to such benefits, the involvement of private sector in outer space activities expedited quickly in 1990s[24]. Commercial operations performed by private enterprises in outer space have proved to be of great advantage to the humankind, especially, in the field of telecommunication and remote sensing and they continue to provide support to agriculture, education, medical aid, navigation, public safety, technology, disaster management, health and hygiene and now, space tourism.

Regarding privatisation, first concern is if private actors can engage themselves in the operations in outer space, and secondly, if they possess any rights in the properties created therein during their operations.

As far as appropriation is concerned, there has been a difference of opinion in this regard. A few countries interpret the Article 2 of the Outer Space Treaty as prohibiting national as well as private appropriation by virtue of extension of restrictions to nations and the entities operating from their surface. Another set of interpretation

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[23] Dr. Dionysia-Theodora Avgerinopoulou, Katerina Stolis, *Current Trends and Challenges in International Space Law*, *available at:* https://essc.ameos.net/wp-content/uploads/2021/09/53rd_Athens17_Avgerinopoulou_Current_Trends_and_Challenges_in_Space_Law.pdf (last visited Jan. 24, 2021).

[24] *Id.*

maintains that Article 2 prohibits only national and not private appropriation of the outer space territory.

Further, the Article 6 of the Outer Space Treaty envisages imposition of international responsibility upon the nations for governmental and non-governmental entities under their authorisation and supervision. This provision is further mentioned in the Article 14 of the Moon Agreement. Furthermore, Article 11 clause 3 states that there shall not be any appropriation by any nation, international intergovernmental or non-governmental organisation, national organisation or non-governmental entity or of nay natural person. This clause is distinctive from Article 2 of the Outer Space Treaty which only anticipated nations appropriating outer space resources.

Irrespective of differences of opinions, the private players continue to spurt in the outer space industry. A combined reading of Articles 2, 8 and 9 of the Outer Space Treaty provides that space objects launched by States have a right to occupy the locations and States continue to have authority over the facilities and all personnel sent in the outer space. Also, the personnel sent to outer space by nations can conduct their activities without any interference from anyone.

Challenges to Privatisation in Outer Space

The operations performed in outer space are subjected to the provisions of Outer Space Treaty and the Convention on International Liability for Damage Caused by Space Objects (Liability Convention)[25] for incurring the liabilities in case of any hazard. But not all the nations have signed these treaties. The problems may arise if the international organisations operating in outer space have States that have not signed the treaties or if a State operating independently has not signed any of those treaties. In such cases, delegation of responsibilities to private actors poses an issue regarding determination of the law that shall be binding on such entities, especially, in the cases of absence of national laws, for instance, in Indian scenario. The United States of America, for example, has enacted the Spurring Private Aerospace Competitiveness and

[25] UN, 1972. Convention on International Liability for Damage Caused by Space Objects, London, Moscow and Washington D.C.: General Assembly Resolution 2777 (XXVI)

Entrepreneurship (SPACE) Act, 2015[26] to regulate the engagement of private sector in the commercial space exploration and exploitation of space resources even though it underwent a debate as to whether it violates the no-sovereignty principle of the Outer Space Treaty.[27]

Furthermore, the Liability Convention and the Convention on Registration of Objects Launched into Outer Space[28] (Registration Conventions) would need amendments to clearly specify the 'Launching State' and the liabilities in case of accidents and registrations of space objects respectively. Half work for this has already been done since the Outer Space Treaty and the Liability Convention imposes the international responsibility upon the State Party to bear the liability for any accidental happening because of the space object launched from its territory. Also, provision for launches from the sea and the outer space itself needs to be made.

If the outer space is a province of humankind and everyone is entitled to its benefits, it can be called a 'social good'. The nature of development that must be undertaken in that territory can be nothing but sustainable, ensuring the benefits reach everyone. Inclusion of the private actors in the space sector poses certain difficulties here. They shall not be interested in sharing their benefits with everyone. The private companies entering the outer space for exploration and indulging in commercial activities there would expect some securities and benefits. First and foremost, they must be able to see potential to make profits, and attractive return on their research and development. Most importantly, they require a stable legal environment to work in.[29] The technological and economical tussle between developed nationals and developing nations who outnumber the former, insist upon sharing of profits because of sharing of profits by virtue of Common Heritage for

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[26] US Congress, 2015. U.S. Commercial Space Launch Competitiveness Act: Spurring Private Aerospace Competitiveness and Entrepreneurship, Washington, D.C.: Public Law 114-90, 114th Congress.

[27] *Supra* n. 25.

[28] UN, 1972. Convention on Registration of Objects Launched into Outer Space, London, Moscow and Washington, D.C.: General Assembly Resolution 3235 (XXIX).

[29] Brian M. Hoffstadt, *Moving the Heavens: Lunar Mining and the Common Heritage of Mankind in the Moon Treaty*, 42 UCLA L. REVIEW 575 (1994).

Humankind principle. Until the meaning is defined, no private investor shall invest money in any lunar mission.

Another issue that sprouts is the appropriation by the private actors in the outer space. As soon as they start taking up their adventures in the outer space there would be a need for regulating their affairs. Pre-operational stages would include the licenses and permits, and the code of conduct defined for their ventures. This would require designing of the national laws in tandem with the international guidelines which would have to be updated in the present context. Post- operational stages would require them to work in the holistic manner to work like they are the trustees of entire human race, where outer space is the trust that has to be taken care of.

If they are allowed, would they be interested in being governed by international community and share their benefits for the rest of the community. Or would they try to exercise the principle of 'first in time, first in right'[30]. Within the ambit of the Outer Space Treaty, the State Parties have freedom to determine all aspects of their participation while exploring outer space, the activities they want to undertake and the organisational structure they want to have.[31] The Moon Agreement as well provides the scope for private actors in the exploration of moon and other celestial bodies. If the first come first served were to apply, developing countries, which are technologically less-advanced, might never be able to reap the benefits of the resources in outer space. This would give the developing countries *de facto* claims over the certain areas that they cover and the services that they offer.

The property rights, tangible and intangible, and their regulation needs consideration of the world community too. The issues that need to be addressed include the intellectual property rights on the inventions that are created in the outer space or on any celestial body, and on Earth with the help of the outer space programmes. Protection of intellectual property rights of the private sectors can give them great incentives to work in the outer space and invest there.

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[30] Carol R. Buxton, *Property in Outer Space: The Common Heritage of Mankind Principle vs. the First in Time, First in Right, Rule of Property*, 66(4) JOURNAL OF AIR LAW AND COMMERCE 689 (2004).

[31] *Supra* n. 2, Art. 2.

Endeavors like space tourism and commercial human rights also raise other concerns like tangible property rights, debris management and environmental protection. Also, it would require guidelines for space traffic control and management. [32] The news for persons selling properties on moon might appear to be lucrative, but at the same time, they may question the nature of outer space being common good and the province for entire humankind.[33] The unidentified debris already threatens the outer space and its environment and in the interest of humankind all the entities adventuring outer space have to avoid harmful contamination and adverse changes in the environment.[34]

Lastly, there are equal chances of space-faring nations for sending private astronauts to the outer space. If such plans are actualised, how the status of such astronauts shall be determined becomes an issue to be considered. The Outer Space Treaty regards Astronauts as 'Envoys of humankind'[35], since they conduct the activities which consequently will prove to be beneficial to entire humankind and in the interest of all States. This, in return, gives them a special status and protection in outer space. If, any disaster takes places, irrespective of their nationality they shall be returned to their State.[36]

But in the future of space law, which lies in the cradle of privatisation, this status might change. There might be different categories of astronauts in these affairs. For instance, Japan had sent a journalist from Tokyo Broadcasting Service (TBS) to the outer space using Soyuz and Mir of the USSR along with a section manager of National Space Development Agency of Japan (NASDA).[37] Similarly, in the times to come, with the burgeoning space tourism, the status of such tourists needs to be established. They might never play any role in the benefit of

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[32] Francis Lyall, Paul B. Larsen, SPACE LAW-A TREATISE (Ashgate Publishing Limited, England, 2009).

[33] Lunar Real Estate Agent Has 'Sold' 7.5% of Moon, Man Selling Lunar Property Claims He's Sold 7.5% of the Moon | Space (last visited Jan. 24, 2021).

[34] *Supra* n. 2, Art. 9.

[35] *Id*., Art. 5.

[36] *Id.*

[37] Yasuaki Hshimoto, *The Status of Astronauts Towards the Second Generation of Space Law, Space Future* - The Status of Astronauts Towards the Second Generation of Space Law (last visited Jan. 25, 2021).

human race and be present in the outer space for purely personal pleasure.

Conclusion and Suggestions

As a specialised field of public international law, outer space law must be allowed to transcend all the territorial barriers and so that the benefits derived from it are allowed to reach every human on this planet. All the stakeholders, irrespective of economic or scientific stability, in this arena must be carefully identified to let them participate in the upgrading of existing laws and formulation of new ones in the light of changing scenarios. The identification of all the 'stakeholders' in the outer space adventures can be the first turning point in this regard. They shall include nations who are 'well off' and who can support the less developed and developing nations.

Followed by this, there shall be a requirement for development of an updated space law. The new outer space law rules must be driven by four relevant factors, *viz*. technology, increased capabilities of launching satellites, increasing commercialised space activities, and the new legal challenges.[38] The increasing privatisation in space activities calls for a review of laws so that they can encourage nations across the world for securing their rights, arranging more funds, framing national laws for regulating licenses, permissions, incurring liabilities, decreasing environmental hazards and debris, and further for the protection of upcoming generation of private astronauts and space tourists, and protection of their own assets within the light of common heritage of humankind principle.

The common heritage of humankind has emerged as a philosophical notion which has the potential to crystallise into a legal norm.[39] It has positive values such as jointly acquiring, fostering, and increasing what has been inherited.[40] It just needs to be more well-defined and kept distinct with the values that have to be kept for the application to the contemporary outer space regime.

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[38] Tronchetti, F., FUNDAMENTALS OF SPACE LAW AND POLICY 19 (Springer, London, edn. 1, 2013).

[39] *Supra* n. 18.

[40] Adrian Bueckling, *The Strategy of Semantics and the Mankind Provisions of the Space Treaty*, 7 J. SPACE L. 15 (1979).

Further, establishment of an internationally regulated authority for administering outer space affairs seems to be an indubitably inevitable need of the hour in the context of increasing space intervention. Accordingly, it deserves mentions that establishing this authority should be based upon, and only after, assessing the needs of less developed and developing nations and the objectives of developed nations. It should keep economic and scientific considerations as par with the 'common heritage' principle to develop an equitable regime. Furthermore, a dispute redressal and settlement mechanism need to be established.

For less developed and developing nations, something in the essence of social security schemes can be placed on the table to allow them to enjoy the benefits of the outer space and its resources. Introduction for public interest service in commercial space activities can help in addressing the needs of such nations. The development of this shall be in the nature of the endeavor taken up by the developing countries when they managed to have slots reserved for them in Geostationary orbit for their domestic services.[41] Consultations can be made to allow the use of outer space in consonance with the public interests rather than national interests.

[41] *Supra* n. 31.

Balancing Hetero Male Norms under Indian Legal System through the Indian Constitution*

*Stuti Wahal***

Introduction

Indian legal system provides for special treatment to women and treats them as special category in order to bridge the gap of inequalities prevailing in the society amongst the binary accepted classes of persons.[1] It does so by providing, for example, special treatment to them through laws enacted invoking Article 15(3) of the Constitution.[2] Ensuring these rights are not violated are largely dependent upon the works of legislative draftsman ship, the way these categories are treated in relation to each other by the judges who pronounce the judgments and interprets the law and the way we behave with each other. The promise of the Indian Constitution and idealistic realisation of these depend on the ways laws and policies are made, what is their content, the way they are interpreted and how much they are being recognised by the guardians of the Constitution. Laws in whole i.e., language, norms behind those laws and interpretation must be reflective of the Grund norms i.e., Constitution of India and its ideals.

Norms which govern Indian Legal system are largely hetero in nature and is hetero sexual. There have been works of scholarship which

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* The paper is presented by the author as a requirement in the Phd course work, with different title but similar content.

** Stuti Wahal, Phd Scholar, Faculty of Law, University of Delhi.

[1] In the recent past only there is de-construction of these binary classes by recognising the third class based on sexual orientation namely the third gender or transgender. *See*, *National Legal Services Authority* v. *Union of India and Others*, Writ Petition No. 400 of 2012.

[2] Constitution of India, 1950, Art. 15.

supports this premise. For example, Prof. Ved Kumari[3] argues that Indian Penal Code distinguishes between man and woman for the purposes of the application of the substantive purposes of criminal law which otherwise is prima facie gender neutral. Dr. Usha Ramanathan in her article[4] argues that courts conceptually differentiate between reasonable man and reasonable woman and thereby attaches different expectations to a man and a woman. The court has erred in this gendered conception when it says that as holder of a right in the property, a reasonable woman should behave differently than a reasonable man would but her behaviour when she is an accused of a crime should conform to the expected reasonable man's perspective. In this later case, court expects male and paternal behaviour from the women, maybe because crime is the domain of a man more than a woman. Recently cases[5] have been pronounced by the courts which show the expectation of particular behaviour from an 'ideal' rape survivor. This approach is problematic as it attaches certain attributes to certain category of people or class of persons which is not natural but socially constructed. It is also problematic because of its inherent paternalistic nature which must be in conformation with the male ideals which will uphold superior position of one gender out of other genders in the society. It ignores sex to be treated itself as a gendered category thus not realising the equality principle in its true sense.[6]

This paper is attributed to see the prevalence of hetero-male normative approach of law under Indian Legal System and its effect on rights of women. Part-1 of the paper will analyse the definition of hetero-male normativity. Part-II will reflect upon the rights of women under the Constitution by trying to trace inclusivity or exclusivity of norms when we construct equality principle through it. Part-III tries to trace the hetero-male normativity under Indian Legal System. Part-IV

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[3] Ved Kumari, *Gender Analysis of Indian Penal Code,* in Amita Dhandha and Archana Parashar (eds.) ENGENDERING LAWS: ESSAYS IN HONOR OF LOTIKA SARKAR 139-161(EBC, 1999).

[4] *Id*., pp. 33-71, *See,* Usha Ramanathan, *Images: Reasonable Man, Reasonable Women and Reasonable Expectations*.

[5] Refer part III of this paper.

[6] Anna Gullickson, *The Significance of Sexed Bodies: An Analysis of Moira Gatens' A Critique of the Sex/Gender Distinction,* 12 UNDERGRADUATE REVIEW 44 (2000).

presents the concluding remarks and need to incorporate or not to incorporate the principle against usage of these norms in the Constitution and the way forward.

Meaning of Hetero-Male Normativity

Hetero-normativity is defined as a system of valuing hetero-sexuality as the natural and normative sexual orientation, thereby devaluing all other expressions of sexuality. It operates within a patriarchal framework where gender is viewed as a natural derivative of sex and males and females are depicted as appropriate and complementary sexual partners for the purpose of procreation. Therefore, sexual expressions are devalued, and sex and gender are defined in binary terms. If heterosexuality is seen as compulsory and naturally occurring discounts, then we learn how to practice it.[7] It is therefore difficult to separate the two terms i.e., gender and sex.

The assumptive heteronormative model is the 'Straight Mind' whereby reality and all social and psychic phenomena are interpreted through a heterosexual lens. Judith Butler terms this undetected dominance as the 'heterosexual matrix' and describes it as a 'grid of cultural intelligibility through which bodies, genders, and desires are naturalised'.[8] The confusion of heterosexuality as naturally occurring rather than institutionalised ignores the great variance in its practice across cultures and downplays its role in the distribution of labour and wealth in patriarchal societies. Hetero-male normativity is attributed to the male norm prevalent in the society and its institutions. These norms are governed in accordance with male standard and therefore law see and treat women the way men see and treat women[9]. The treatment of women as secondary sex is dependent on construction of men as primary first.

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[7] AD Page and J.R. Peacock, *Negotiating Identities in a Heteronormative Context*, 60 JOURNAL OF HOMOSEXUALITY 639-654 (2013).

[8] Peterson C, 2011, *The Lies That Bind Heteronormative Constructions of Family In Social Work Discourse*, Master's Thesis, Smith College, Northampton.

[9] Catharine A. MacKinnon, TOWARDS A FEMINIST THEORY OF THE STATE 89 (HUP, 1989).

In terms of family and marriage relationships, heteronormativity is related to heterosexuality and 'interprets itself as society'. It often goes undetected as a 'natural,' 'normal' and 'ideal' way to organise and perform social relationships. Hetero-norms in family institutions help in the organisation of families by differentiated gender roles. It enacts 'gender-based constraints and unequal power dynamics based on gender.[10] It is treated as dominant and pervasive belief that a viable family consists of a heterosexual mother and a father raising heterosexual children together. It is the uncritical adoption of heterosexuality as an established norm or standard.[11] Heteronormativity sustains the dominant norm of heterosexuality by rendering marginal any relational structure that falls outside of this 'norm'. Hetero norms render the diversity of human sexuality and identities invisible and hence does not recognise many identities.[12]

'Heteronormativity entails a convergence of at least three binary opposites: 'real' males and 'real' females versus gender 'deviants', 'natural' sexuality versus 'unnatural' sexuality, and 'genuine' families versus 'pseudo' families. Adult competencies associated with heterosexuality are distributed on the basis of gender.[13]

The main idea behind the notion of hetero-normativity is that heterosexuality is the norm and that a norm is something by which the individuals of the society must comply with not just to be accepted in the society but also to be not discriminated against. This kind of norms works in its skeletal mechanics i.e. one's biological endowments are used to put one in a sex category which then determines his/her behaviour within a system of norms of expected behavior.[14] Heterosexuality presupposes a binary sex system in which the sexes

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[10] *Supra* n. 9.

[11] J. Hudak, & S.V. Giammattei, Doing *Family: Decentering Heteronormativity in 'Marriage' and 'Family' Therapy*, in T. Nelson & H. Winawer (eds.) CRITICAL TOPICS IN FAMILY THERAPY: AFTA MONOGRAPH SERIES HIGHLIGHTS 105–115 (Springer, 2014).

[12] *Supra* n. 12.

[13] *Id.*

[14] Sneha Annavarapu, *Heteronormativity and Rape: Mapping the Construction of Gender and Sexuality in the Rape Legislations in India,* 8(2) INTERNATIONAL JOURNAL OF CRIMINAL JUSTICE SCIENCE 248-264 (2013).

are constructed as opposites and that heterosexuality and gender identity are the result of specific genitalia which is pre-discursive, natural and thus not susceptible to challenge.[15] Hetero male norms are those hetero norms which are decided by male standard in the society.

Problem and Effects of Hetero-male Norms on Constitutional Rights

When we look to the concept of hetero-male normativity under the legal system, we talk about norms which govern the law making and the interpretation of it. Constitution does not in its language take into consideration the presence or absence of norms while providing for rights. Hetero-male norms which attach a certain kind of expectation to all without seeing the intrinsic nature of the things are nowhere being mentioned to be taken care of under the Constitution when the effects of certain laws on individuals are seen. Rights in the nature of their being fundamental are provided by Part III of the Indian Constitution and must be respected by individuals in their relation to each other and must not be violated or infringed by any laws made by the legislature [16]. Laws may however discriminate between individuals as they may not consider the different experiences of the individuals by their being part of the society and may attach the same expectation to all different categories of individual by fitting everyone in one category without regarding their circumstances. Law may also not be considered with the effect it causes when it is made gender neutral in language. This may happen unintentionally due to the norms prevalent in the society itself. In that case, the plain language of the Constitution itself may not provide a remedy because only the laws in force must not violate the rights provided in part III of Indian Constitution. Such considerations are important to address when a society is patriarchal in nature as it is governed by the male standards and beliefs and the power remains in hands of few through the institutionalisation process.[17] Thereby it may be that individuals are

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[15] *Id.,* p. 252.

[16] Article 13 (1) of Indian Constitution provides that any law inconsistent with part III of the Constitution of India is void.

[17] *See generally*, Foucault M, (1985) THE USE OF PLEASURE. Translated by Robert Hurley. New York: Vintage Books.

discriminated by falling in the same category as others because of being governed by the same standard which is a male standard in a patriarchal society. When we talk about discrimination the very first bundle of rights which are provided by the Constitution i.e. Right to Equality are attracted.

The positioning of the very first right enumerated under the Constitution of equality, shows the importance attached to it by the framers, equality not only in terms of substantive sense but also in formal sense. Equality has attracted many meaning since the last seven decades. Formal equality[18] means equal laws should be applied to all in the same circumstances and like should be treated alike and not that unlike should be treated alike. At the same time importance is attached to its enforceability in its substantive form[19], means that identical treatment in unequal circumstances would amount to inequality thus necessitates reasonable classification. This reasonable classification must be based on some real and substantial distinction.[20] Equality is defined to be antithesis to arbitrariness[21], a reasonable classification is although permissible when there is a reasonable relation between the object to be achieved[22]. Equality right has also been a basis for claims of gender specific laws which focus on achieving justice and gender equality for different genders particularly women and transgender. Customary practices being part of personal laws have been prohibited by judicial pronouncements as they are gender discriminatory in nature[23] others are amended or created for improving the position of

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[18] *State of West Bengal* v. *Anwar Ali Sarkar*, AIR 1952 SC 75.

[19] *Kedar Nath* v. *State of West Bengal*, AIR 1953 SC 404.

[20] *R G Garg* v. *UOI* AIR 1981 SC 2138.

[21] *E.P.Royappa* v. *State of Tamil Nadu* AIR 1974 SC 555.

[22] Re- Special Courts Bill, AIR 1979 SC 478.

[23] *See*, For example, Muslim Women Protection of Rights on Marriage Act, 2019, which was passed subsequent to the decision of *Shayara Bano* v. *Union of India And Ors.* In this case it was observed by the court that the personal law regarding Talak-e-Biddat cannot be declared invalid and does not violate Article 14, 15 and 21 as it is limited to state action alone and Article 25 as it is matter of faith even though such practice is good in law and bad in theology. It also observed that falling in the realm of religious practices or 'personal law' it is not for a court to make a choice of something which it considers as forward looking or non-fundamentalist. But it further observed the necessity to invoke

women in society[24], while others still exist even though they are gender discriminatory in their effect even though framed in gender neutral language[25]. But not every time the same meaning is attached to the term equality for such a claim and equality as understood in the words of *Justice Bhagwati* cannot be *cribbed, cabined, and confined within traditional limits* and hence is a dynamic concept[26]. Classification is inevitable in human life and for the conditions of the society. However, protection of equality rights under the scheme of the Constitution is prerogative as well as made a duty of the State machinery only[27]. A set of duties being fundamental but non-enforceable in nature are provided in Part VI-A under the Constitution. With relation to woman, a duty to denounce any practice derogatory to the dignity of women is provided, however does not cast a duty not to discriminate.[28] Now we must understand how we connect between equality right and hetero-male norm.

The definition of hetero normativity as mentioned earlier is generally understood to denote hetero sexual norms. They are understood in relation to sex rather than the gender differences and beliefs attached to that sex. The Indian laws also consider the sex aspect when it talks about discrimination but not gender or the norms which are attached with regard to that gender, which is decided according to a male

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Article 142 to provide complete justice as this practice of talak-ul-biddat is not only arbitrary but also gender discriminatory. Hence court asked the government to investigate the matter thereby deciding upon the issue of regulating such practices in future.

[24] *See*, For example: The Hindu Succession (Amendment) Act, 2005, which provides legal rights and liabilities to daughters also in a Hindu Undivided Family. Against sexual harassment of women at workplace, the Parliament has enacted The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

[25] *See*, For example: non-consensual sex of husband with the wife above 18 years of age is still not being made culpable even though one of the criteria to decide the offence of rape being lack of consent as defined in s. 375 of the Indian Penal Code and therefore issue of marital rape is still absent in the scheme of Chapter VI or elsewhere in the same. Also, it does not address the issue of withdrawal of consent during the intercourse.

[26] *Supra* n. 22.

[27] All Articles in Constitution of India from Articles 14 to 18 uses the word 'State'.

[28] Constitution of India, 1950, Art. 51A (e).

perspective. Articles 14, 15 and 16 of Constitution, prohibit discrimination on the basis of 'sex' as one of the categories. It does not mention the word 'gender'. And gender is also construed to means sexual identity and orientation only.[29] The effects of gender stereotyping and of gendered norms as standard for all categories of person disregarding their capabilities, is recognised through judicial pronouncement to be part of equality rights under the Constitution. The Supreme Court in the case of *Lt. Col Nitisha* v. *Union of India*[30] has clarified this point by making a distinction between the concept of formal and substantive equality and relate it to systemic discrimination and indirect discrimination respectively. In this case 86 women Short Service Commission officers demanding equality in application of standards for grant of permanent commission.[31]

Systemic discrimination, court observed, is based on the concept that fairness, it demands consistency in treatment and the fact that some protected groups are disproportionately and adversely impacted by the operation of the concerned law or its practice, makes no difference.[32] While observing various case laws court said not much jurisprudence is evolved of substantive equality and is still at nascent stage[33]. Court took the model developed by Prof. Sandra Fredman to say that this kind of equality reflects *the redistributive dimension, recognition dimension, transformative dimension, and participative dimension* of equality.[34] In order to further move towards more substantive aspect of equality, Prof. Fredman focused on three things:

1. **Equality of results but** *'what results matter and what does equality mean in that context'* are key questions for the interpretation.

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[29] *Supra* n. 2, para 19.

[30] 2021 SCC Online SC 261.

[31] Dhananjay Mahapatra, *SC to put Laws, Decisions to Indirect Discrimination Test,* Times of India (March 26, 2021) *available at* https://timesofindia.indiatimes.com/india/sc-to-put-laws-decisions-to-indirect-discrimination-test/articleshow/81698545.cms (last visited June 2, 2021).

[32] *Supra* n. 31, para 55.

[33] *Id.,* para 59.

[34] *Id.,* para 56.

2. **Equality of opportunity which** aims to equalise the starting point rather than the result arguing that once the starting point is equalised, individuals should be judged on merit.
3. **Dignity** where it can be hierarchical where some can be regarded as more dignified than others. Therefore, the subjective interpretation in practice has been highly problematic.[35]

This conception eschews the uncritical adoption of laws and practices that appear neutral but in fact help to validate and perpetuate an unjust status quo.[36] It should redress stigma, stereotyping, humiliation and violence, should accommodate difference and aim to achieve structural change.[37] This concept entails structural inequalities in them.[38] This concept as the court said deals with the indirect discrimination[39] which is not a remote concept.[40] It is caused by facially neutral criteria by not taking into consideration the underlying of a provision, practice or a criterion.[41] Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.[42] *Justice Chandrachud* in this case observed five principles for identifying indirect discrimination under Indian laws which are as follows:

1. Discrimination can be a consequence of not just intent, but unconscious biases and existing structures that perpetuate an unjust status quo.
2. Indirect discrimination occurs when there is an effect of unfair treatment, irrespective of intent.
3. The evidence required can, but need not necessarily be, statistical or cross a particular quantitative threshold.
4. In addition to whether there is a disproportionate effect on a particular group, the Court must look at whether the law has an effect of reinforcing, perpetuating, or exacerbating disadvantage.

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[35] Sandra Fredman, *Substantive equality revisited,* 14 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 712-738(2016).

[36] *Supra* n. 3, para 57.

[37] *Id.*

[38] *Id.,* para 60.

[39] *Id.,* para 58.

[40] *Id.,* para 61.

[41] *Id.*

[42] *Id.,* para 59.

5. The test to assess a challenge based on indirect discrimination should check whether the measure is necessary for 'successful job performance' as well as whether less discriminatory alternatives exist[43].

Prior to abovementioned judgment, in the case of *Madhu* v. *Northern Railway*[44] Delhi High court through *Justice Ravindra Bhatt* had explained the meaning of indirect discrimination. In this case a former Government employee before his retirement removed name of his wife and his unmarried daughter from the medical card by stating that he had disowned his family and was living separately from them who were otherwise entitled to free medical facilities[45]. The Railways withdrew medical benefits from both of them on the basis that only those family members who were formally declared eligible by an employee could actually avail of the benefits.[46] *Justice Bhatt* observed that actual effect and effect on the citizen's life must be seen if one wishes to argue upon the validity of state action as opposite to the intension of the legislature behind the same.[47] He further observes that *seemingly innocent ground can in fact have discriminatory effects due to the structural inequalities that exist between classes.*[48] Therefore a rule or a practice that seems to be neutral or colour-blind may have a disproportionately adverse impact upon a set or group of people.[49]

Catherine Barnard[50] explained the concept of indirect discrimination. She says it is result oriented in three senses:

1. The treatment must be detrimental to an individual, but it also involves equality of results.

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[43] *Id.,* para 60 and 82.

[44] Civil Appeal No. 6400 of 2016.

[45] *Id.,* para 2.

[46] *Id.,* para 8.

[47] *Id.,* para 19.

[48] *Id.,* para 20.

[49] Gaurav Bhatia, *Indirect discrimination: Rules and Laws are Never Really 'Neutral'*, Hindustan Times (Feb 23, 2018) *available at* https://www.hindustantimes.com/opinion/indirect-discrimination-rules-and-laws-are-never-really-neutral/story-WI1R1pAmkgN4zHja9gUeeP.html (last visited June 6, 2021).

[50] Catherine Barnard and Bob Hepple, *Substantive Equality*, 59(3) CAMBRIDGE LAW JOURNAL 562-585 (2000).

2. The essential characteristic of indirect discrimination is that an apparently neutral practice or criterion has an unjustifiable adverse disparate impact upon the group to which the individual belongs.
3. If there is no exclusionary practice or criteria or if no significant disparate impact can be shown, or if there is an objective business or administrative justification for the practice, then there is no violation.[51] In this third sense she says that this discrimination is not redistributive and different situations are treated in the same way but with a significant disparate impact on the protected group.[52]

When we talk about equality, what is equal is also subjective and is decided by the facts and circumstances of the case. And who will decide what is equal is also subjective, as there is no one criteria. Hetero male norms work in two ways to violate equality rights. In one way it denies the capabilities of women to do something, in other way it treats men and women equal for all purposes and puts all in one category thereby ignoring the special needs, circumstances and extent of capabilities and capacities. To understand this clearly, let us see some of the laws mentioned under.

Reflection of Hetero-male Norms in Indian Legal System

Equality under different laws may include different things. For example, Dorothy E. Roberts[53] investigates various factors that would contribute to mean equality in criminal law. The inequality must investigate the definition of crime which reinforces prevailing relationship of power. It raised the issue of gender equality in sentencing offender by arguing women sentences based on family responsibilities may be paternalistic and may perpetuate female stereotypes. It analyses the gendered circumstances that leads to offending women particularly how women are blamed for their relationship with criminal men. It concludes on the note that there are 3 broad guidelines for feminist analysis of criminal law:

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[51] *Id*., p. 564.

[52] *Id.,* p. 570.

[53] Dorothy E. Roberts, *The Meaning of Gender Equality in Criminal Law*, 85 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 1 (1994- 1995).

i. It should centre on the political nature of both commission and definition of crime.
ii. It should reach beyond the appearance of preferential treatment to reveal deeper biases in law.
iii. It should account for the interplay of race and class along with gender, in the criminal law treatment of women. These guidelines would present feminist vision of the dominant male criminal justice system.

Some laws may inherently be based on hetero male norms while others may look to be based on hetero male norms when compared with other laws. Following examples can be looked to clarify this statement by looking to some provisions of Indian Penal Code.

Assault on Women and Sexual Offences under Indian Penal Code

i. Problem in the definition of rape- Rape as defined to include all acts mentioned under s. 375 of Indian Penal Code attaches primary importance to the penetration of penis amongst other circumstances included therein and such act must be done by man in the vagina, the urethra or anus of women [54]. This section describes insertion of any object in these body parts including penis which can be done by man as against woman only. So the primary focus is on penetration of penis upon which other circumstances are built upon and includes insertion of any object apart from penis in these abovementioned body parts of woman. If it also includes other things to be inserted then why it does not make a woman culpable if she inserts any object, not being penis hence law here deny the capabilities of woman to insert anything inside other woman's body part. The offence is male centric only because of general acceptability of the term 'rape' done by men upon women leaving apart any possibility of it being done by women upon women or women upon men. It may be because law either does not think women capable of doing so or considers it impossible for her to commit such an act and to always behave in non-violent manner towards other women. *Women are expected to*

[54] Indian Penal Code, 1860, s. 375(a).

conform to communal-based behaviours characterized by friendliness, unselfishness, and expressiveness, which are traits that inhibit criminality.[55] This happens when we consider gender from the perspective of sexual identity only, as happens under s.375. This also ignores chance of any other sexual orientation persons being capable of doing such acts apart from the males. The only possible reason could be that law treats women from a male's perspective to be an inferior creature and ignores presence of other sexual identities in totality for the purposes of committing sexual offences on to other genders in the society. There is also ignorance of male child in definition of rape[56] and hence prime assumption is that only women or girl child[57] can be raped. This abovementioned reason can further be justified if we look other provisions relating to assault on woman which is not sexual in nature but has the same implications upon the women i.e. it violates her in person and her right to dignity.

ii. Comparing other offences in IPC from 'rape' to look the hetero male norms behind them- **S. 354**[58] of Indian Penal Code talks about the use of assault or criminal force for outraging the modesty of woman and **s. 354 B**[59] talks about use of assault or criminal force for disrobing woman. If we compare both these sections we see that the former uses gender neutral language as it uses the word 'whoever' but later one makes only a man responsible for it. In both these sections the basic crime is assault or use of criminal force but the usage of it is for different purpose. This approach is again problematic as outraging of modesty can be seen as an inferior act of criminality than assault or criminal force, which can easily be committed by either women or men. In case of outraging

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[55] Luis M. Rivera & Bonita M. Veysey, *Criminal Justice System Involvement and Gender Stereotypes: Consequences and Implications for Women's Implicit and Explicit Criminal Identities*, 78 ALBANY LAW REVIEW 1109-1128 (2015).

[56] Flavia Anges, *Law, Ideology and Female Sexuality, Gender Neutrality in Rape Law*, ECONOMIC AND POLITICAL WEEKLY, 844-847 (March 2002).

[57] *Supra* n. 55, *See*, s. 376 AB, s. 376 DA and s. 376 DB.

[58] *Id*., *See*, s. 354 is headed as 'Assault or criminal force to women with intent to outrage her modesty'.

[59] *Id*., *See*, s. 354 B is headed as 'Assault or use of Criminal Force to women with intent to disrobe'.

the modesty, law provides lesser penalty so that if a woman commits it she does not remain in jail for a longer duration, where penalty provided is 1 – 5 years of imprisonment. But in case of s. 354 B where compulsion is to be made law thinks only man can compel anyone and not woman and she might not be strong enough for facing harsher punishments for the same, therefore punishment under this section is of longer duration i.e. from 3-7 yrs of imprisonment[60] as it is to be faced by man only. Here law does not consider the fact that both these offences are against women and effects the personal liberty and dignity of women and seems to classify her dignity under s. 354 to be of a lesser degree than under s. 354 B. Law tries to convey that only in some circumstances a woman's dignity can be violated by both men and women, but in other cases it can only be violated by men, ignoring the fact that dignity is a gender neutral concept. This shows the different norms and levels of protection to women under different circumstances hence discriminate amongst them even though belonging to the same category or class of population.

Courts' Pronouncements on Offence of Rape

In the language in which court interprets act of rape upon woman, there is a reflection that hetero- male norms are present. The position from Mathura's case till now may have brought in certain amendments for the betterment of position of woman in the society but they are not reflective in the language in which the judges of Indian Courts interpret the law. Some of the recent cases here enumerate the same.

i. ***Raja*** v. ***State of Karnataka***[61] Supreme Court says if a woman is outside, she should immediately hurry home 'in a distressed, humiliated and devastated state' or it will be 'unusual'.
ii. ***Mahmood Farooqui*** v. ***NCT Delhi*** (2017)[62], Delhi High Court observes that if woman knows the attacker they should bring up

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[60] *Id.*
[61] Criminal appeal No. 1767 of 2011, para 19.
[62] Criminal appeal No. 944/2016, para 48.

the assault with them the next day, because it will be 'surprising' if she doesn't.

iii. ***Rakesh B***. v. ***State of Karnataka***[63] , Karnataka High Court observes that a woman must not fall asleep immediately even if she is tired after rape, because 'that is not the way **our women** react'.

iv. ***State*** v. ***Tarun Tejpal*** (2021)[64] Sessions Court, Panaji suggests she should not smile in any photos the day after the crime of rape is committed upon her, because it will show she is 'not disturbed, reserved, terrified or traumatised'.

The Way Forward

Article 13[65] of Indian Constitution provides protection against those laws only which are 'in force' if they are in violation of any of the fundamental rights enumerated in its part three. These violations of part III including other legal rights can be remedied for which Courts' door can be knocked in accordance with law. But to deal with the issue of violation we must look whether it is outside the scope of meaning given to the fundamental rights or is included in it. As we have seen that the concept of equality rights has evolved with time and includes the criteria of indirect discrimination. Indirect discrimination as such is recognised by the courts and reason behind it is the norms and beliefs prevalent in an institution. Persons who fail to acknowledge the victimless status due to the indirect discrimination are perpetrators of discrimination and hence cannot be expected to reverse the victim's status if laws are to be made by these perpetrators. Also it is not a specific gender category or specific person who is responsible for this discrimination as this kind of indirect discrimination depends on the choice which we make in our daily lives.[66] Whether there is a need to enforce them, if yes how to enforce them, what is the alternative ways

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[63] Criminal Petition no. 2154 of 2019, para 3(c).

[64] Sharmeen Hakim, *Tarun Tejpal Acquittal Judgment Coloured by Prejudice and Patriarchy; Focuses on Victim Blaming: Goa Govt. in Appeal*, Live Law. in (June 2, 2021) *available at* https://www.livelaw.in/top-stories/goa-government-appeal-tarun-tejpal-bombay-high-court-tehelka-174986(last visited June 6, 2021).

[65] *Supra* n. 16.

[66] Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S LAW JOURNAL 77 (2000).

apart from enforcing through Constitutionalisation of it and who will decide whether a norm is hetero normative specifically being a male one are some questions which needs to be researched. Even if indirect discrimination is established, the outcome is usually compensation for an individual and not a duty to remove the offending practice or criterion.[67]

Regarding Constitutionalisation of this anti-discrimination principle to avoid hetero male norm to be used in Indian legal system we need to analyse the meaning of the term Constitutionalisation. This term means two things:

1. Directly to raise the legal value of some rules that are considered more important than others, thus forcing the legislator as well as the government to follow them, or
2. Indirectly to guide the interpretation of the law in the light of Constitutional requirements. Thus, the rise of sub-Constitutional norms to the Constitution is a reverse process in which sub-Constitutional law determines the scope of the Constitution. In that respect, Constitutionalisation is fundamentally a system of interpretation because it gives the means to see all the law in a Constitutional way[68]. The interpretation like this is dependent on the court rather than a mandatory one, as seen in the above-mentioned cases in this paper.

Hetero male norms violate right to equality under the Constitution and are hindrance to the welfare of the people. It is important to recognise them as a cause for discrimination in the scheme of the Constitution because it may hinder India in achieving Sustainable Developments Goals 2030 particularly ***Goal No. 5***[69] which talks about gender equality. ***Target 5.1*** talks about ending the discrimination against women and girls and specify that legal framework must be such which ensures fulfilling of this target. ***Target 5.5*** guides for full and effective participation and equal opportunities for leadership at all

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[67] *Supra* n. 51, p. 565.

[68] Mathieu Disant, *The Constitutionalisation of Law: General Considerations Based on the French Example*, 34 TULANE EUROPEAN & CIVIL LAW FORUM 79 (2019).

[69] *See generally*, Sustainable Development Goal No. 5 of 2030, *available at* https://sdgs.un.org/goals/goal5 (last visited June 6, 2021).

levels of decision-making in political, economic and public life. But this goal may not be fulfilled in totality if a gender continues facing discrimination, directly or indirectly. But ways of ensuring nondiscrimination and welfare of people for serving the purpose of justice in society is not only limited to shaping it in a form of fundamental right of not to be discriminated by these norms but also by way of informing the institutions of the national life which includes courts as well in considering these norms while interpreting the law. Courts must enforce the fundamental rights when they are violated but otherwise also. Enforcing this nondiscriminatory principle due to these kinds of norms as a right under Constitution is not without problems as what and whose criteria will be to decide that the norms are of nature of hetero male norms and what are the ways to ensure that institutions like court do not use them. Therefore, absence of hetero male norm is desirable but ways to ensure this still needs to be researched upon more. Theorists like Spender argued that men's ability to control language gives them great power indeed.[70] Therefore chance must be given to more women to control the language of law by giving them place in proportionate numbers as that of their counterparts in the legislature. This will take into account the experience of women as part of social structure while framing the laws. It may be achieved by recognising women's equal representation in law making under the Constitution. An attempt was made in the Indian Parliament and a bill was presented in Rajya Sabha on 17th December 2009 but it lapsed[71].

The way forward at present is only the acceptance of our responsibilities and duties towards each other in daily life activities by unlearning ourselves the gendered notion and ensuring that our future generations also follow the same. As law professionals we must learn

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[70] Saul, Jennifer and Esa Diaz-Leon, *Feminist Philosophy of Language*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (September 3, 2004) *available at* https://plato.stanford.edu/archives/fall2018/entries/feminism-language/ (last visited June 7, 2021).

[71] The Constitution One Hundred and Eighth Amendment Bill, 2008,(Rajya Sabha Secretariat, 2009) *available at* http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Personnel,%20PublicGrievances,%20Law%20and%20Justice/36th%20Report.htm (last visited June 2, 2021).

to use carefully even in our day to day lives the language, which is gender neutral, this is the first sign to unlearn what we have learned earlier being a part of the society as we do not only use language, it uses us and it provides the categories in which we think.[72]

[72] *Supra* n. 12.

'Standard of Proof' for Business Practices Having Anti-Competitive Effects: An Analysis

Shankar Singh[*]

Introduction

Fair trade and market competitiveness is the essence of an open and liberal economy. Any state claiming its economy as an open economy must have to ensure that there are no barriers to entry in the market and the market should be liberal, globalised and competitive enough so as to cater competition not from within the state but outside also. To ensure innovation, economic development and freedom of trade, the business practices having anti-competitive effects must be prevented. Since 1890 with the enforcement of the Sherman Act, 1890 in the United States of America, almost every country in the world has adopted legal principles and policies relating to market competition to prevent anti-competitive business practices.

India is not immune from the modern competition policy and law as it has not only repealed the redundant the Monopolies and Restrictive Trade Practices Act, 1969 but also adopted a market regulatory mechanism by which free trade and market competition is promoted and adverse practices can be prevented. With the enforcement of the Competition Act, 2002 the Indian competition regulator Competition Commission of India (CCI) is looking after the competition issues in the Indian Market with the constant effort to ensure free market, promote competitiveness and prohibit and punish those business practices having ill effects on competition in Indian market. It is the duty of the Indian competition regulator to inquire into the alleged contravention of the Act and to prohibit and eliminate such practices

[*] Dr. Shankar Singh is an Assistant Professor with Law Centre-I, Faculty of Law, University of Delhi and can be reached at shankaryadav123@gmail.com.

having anti-competitive effects.[1] It is also having the power to punish the enterprises where their activities are found in contravention of the Act. The broad objective of the Commission is to ensure freedom of trade, to protect consumers and to promote competition in Indian market.[2] The Commission is having wide powers to attain the objectives of the Act. In *SAIL case*[3] the Supreme Court ruled that, *'under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of the Act'.* The Commission is having the power to order for investigation into the alleged contravention, inquire into the case, regulate the market, and exercise the adjudicatory power (quasi-judicial) for determination, direction and orders in matters before it.

While determining issues before it, the Commission is to satisfy itself that there is contravention of the provisions of the Act based on proof produced before it. The Act provides certain factors which the Commission shall consider while determining the violation of the provision. To arrive at the conclusion, the competition regulator must have reason to believe on the basis of some substantive proof, oral, documentary or electronic record; direct or indirect and primary or secondary to ensure that the business entity has acted in breach of the provisions. The objective of the paper is to examine what evidence are considered by the competition regulator on which its decisions are based and if it is adhering to the principles of law of evidence. The paper examines the requirement of evidence, standard of proof as well as decided cases where the Commission has found the contravention of the Act.

Competition Policy in India

Effective market competition and fair trade among business enterprises, innovation of competing technology and products and consumer protection are the essence of the competition policy in India.

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1 The Competition Act, 2002 (Act 12 of 2003), s. 18.

2 *Id.*

3 *Competition Commission of India* v. *Steel Authority of India Ltd.*, (2010) 10 SCC 744.

India surpassed the pre 1991 system where the Government used to command and control the economy. After opening of the market in 1991 for more private participation and global competition in different sectors of the economy, India adopted the global policies for the protection and promotion of competitiveness among market players and fair trade with minimum interference of the government. The Government was also a market player in various business sectors as it was having its own corporations, it was felt that there should be an independent regulatory body which can not only regulate but having adjudicatory and investigative powers with the aim to restrict adverse effects on competition, to promote competitiveness and fair trade in India and to protect the consumers.[4] The Competition Commission of India as a regulatory body is the result of the competition policy. The Commission is to regulate and adjudicate based on substantive proof on competition issues concerning an enterprise except where presumption is authorised by the Act.

Anti-competitive Business Practices

Competition laws/ anti-trust laws around the world perceive certain business activities as anti-competitive in nature. These anti-competitive business practices may relate to agreements/ arrangements having adverse effects on competition or abuse of dominant position or combinations which may have anti-competitive effects. The Indian Competition Act, 2002 also prescribe and prohibit certain practices as anti-competitive. An anti-competitive agreement prohibited by the Act may be either at horizontal level *i.e.*, among the enterprises competing in market and also include cartels where the market competitors may have price determination related or quality related or quantity related understanding. Cartels prohibitions also include collusive rigging of bids and market allocation on the basis of territorial area, customers or type of goods.[5] The cartels or horizontal agreements are *per se* void as the only aspect which should be proved is an understanding/agreement or arrangement and if the understanding is proved then the court will presume anti-competitive effects of cartel and no substantive proof is required to prove adverse

[4] The Competition Act, 2002.

[5] *Id.,* s. 3(3).

effects on competition. There may also be vertical agreements between enterprises in upstream or downstream market level in the production chain. These vertical agreements may relate to the tying of one product with other, exclusive supply or distribution, maintenance of resale price and refusal to deal by enterprise having adverse effects on competition in relevant market.[6] These practices under vertical agreements are not *per se* void and the courts are not to presume adverse effects but to decide on the substantive proof as if the agreement is having adverse effects on competition in relevant market. With these agreements, there may be agreements or cooperation among enterprises for enhancing economic efficiencies in production or distribution etc. of product, provided the benefit of efficiencies in terms of innovation and technical development must be greater than the adverse effects on competition in market.[7]

Further, an abuse by an enterprise in dominant position has been prohibited by the Act. Unlike the Monopolies and Restrictive Trade Practices Act, 1969, the Competition law adopts the philosophy that 'dominance is not bad but its abuse is'. Dominant enterprise means the enterprise having a greater market share where it can have own business conditions and the competitors may not affect the business.[8] Such abuse may be either in exploitative or exclusionary manner which is detrimental to consumers, market players or interest of the market. These abuses includes predatory prices, discriminatory/ unfair conditions or prices, restrictions as to production and technological growth, refusal to market access, applying auxiliary conditions on other parties or to enter/protect other relevant market where it is not having dominance, by using the dominant position in one relevant market.[9] In case of excessive pricing by the dominant enterprise, there should be a reasonable relation between the price charged by the enterprise and the economic value of the product supplied. The value can be determined by finding out the difference between production cost and the retail price of the goods. The margin between the two will

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[6] *Id.,* s. 3(4).

[7] *Id.,* s. 3(3).

[8] *Id.,* s. 4.

[9] *Id.,* s. 4(2).

disclose if there is an excess within the ambit of abuse of dominant position.[10]

Where there is abuse of dominant position, it must be proved by substantive evidence that there is dominance in relevant geographical and product market; there is abuse of such dominant position and the abuse is having the appreciable adverse effects on competition in relevant market. The rule of reason applies in case of abuse of dominant position which means the courts are not to presume the adverse effects but, proof is required to show that the abusive practices by the dominant enterprise are having exclusionary or exploitative (adverse) effects on relevant market. Any enterprise having abuses but not in a dominant position cannot be said to be in contravention of the Act. Likewise, any practice of a dominant enterprise without any proof to have adverse effects on competition and market cannot be in violation of the Act.

Mergers, amalgamations, takeovers or control may also have anti-competitive effects and such combinations are prohibited as they may tend to concentration of market power.[11] Anti-competitive effects due to combinations of enterprises may be evaluated to analyse the combined relevant product market share of combining enterprises in the relevant geographic market. The concentration of dominant market share with an enterprise will create dominant position of such enterprise in relevant market and then there is possibility exploit the market condition in favour of dominant enterprise.

The Evidence Rule

Evidence can be stated as some reasonably convincing proof of a fact either oral, documentary, electronic or by other means in connection with the issue under investigation/inquiry which can inculpate or exculpate the act or omission of any person. The standard of proof must be unambiguous, reasonable and beyond any doubt to prove the

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[10] *United Brands Company and United Brands Continental BV* v. *Commission of the European Communities,* European Court Reports (1978) 207.

[11] The Competition Act, 2002, s. 6.

act or omission.[12] Evidence can be given of any fact, thing (state of thing) or any conditions[13] which must be connected and relevant to the issue[14] under investigation/inquiry. Evidence may be given of the subsistence or non-subsistence of fact in issue[15] or any relevant transaction and such evidence can be perceived as proved if the court believes it to be true or it is highly probable that it existed and no other conclusion can be drawn.[16] Proof may be oral or documentary and if the later than either primary or secondary.[17] It may also be in electronic record or optical/ magnetic media[18] or physical, exculpatory/inculpatory, financial analysis or scientific reports etc. There must be proof beyond reasonable doubt and be proved by the person who allege the existence of a fact.[19]

The Competition Act, 2002 provides that in case of any contravention of its provisions, penalty may be imposed by the Commission on such business concern but after inquiry. The penalty may be imposed when the Commission concludes and is satisfied that there exists a prima facie proof beyond doubt that the business concern has contravened the Act. The standard of proof must be such which evidence in reasonable manner the anti-competitive business practices to the contravention of the Act. When the Commission receives information as to the contravention of the Act and after forming a prima facie opinion that there is violation, it refers the matter for investigation to the Director General. During investigation, the DG collects the proof to the acts/conduct/practices/agreements of the parties based on which he

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[12] *Re. Winship,* 397 U.S. 358 (1970), the US Supreme Court held that proof beyond a reasonable doubt, which is required by the 'Due Process Clause' in criminal trials, is among the essentials of due process and fair treatment required during the adjudicatory stage. In *Colorado* v. *New Mexico,* 467 U.S. 310 (1984), the US Supreme Court stated that proof is to be judged by a clear and convincing evidence standard.

[13] The Indian Evidence Act, 1872, s. 3.

[14] *Id.,* s. 3.

[15] *Id.,* s. 5.

[16] *Id.,* s. 3.

[17] *Id.,* ss. 59, 61-63.

[18] *Id.,* s. 65B.

[19] *Id.,* s. 101. Burden of proof is based on Latin maxim *'semper necessitas probandi incumbit ei qui agit'* and *'onus probandi incumbit ei qui dicit, non ei qui negat'*.

recommends action to be taken or not on the concerned party based on the findings.[20] If inculpatory evidence is shown, the Commission then inquiries into the contravention and may pronounce penalty. The Competition Commission of India is having inquisitorial and adjudicatory powers and no adverse action shall be taken by it without any satisfactory, clear, sufficient, and reasonable proof to the contravention of the Act.

The orders of the Competition Commission reflect the standard of proof required to conclude the contravention of the Act. In *Grasim Industries Viscose Fibre case*[21] the information was relating to vertical restraint and abuse of dominant position by Grasim Industries. During investigation it was found that Grasim is the sole producer of viscose staple fibre in India and having more than 85% market share in Indian market (after considering the imports of fibre). The econometric data and sales record collected by the Director General about the relevant market and supply of viscose staple fibre to spinning mills shows dominant position of Grasim Industries in relevant market in India. Again, the documentary evidence imposing supplementary conditions, obligations and charging discriminatory prices was perceived as evidence of abuse of dominant position by Grasim to the contravention of the Act.

In *Maruti Suzuki Discount Control Policy case,*[22] the information was related to the 'Discount Control Policy' (resale price maintenance) by Maruti Suzuki India Ltd. (MSIL) as it restricted the Dealers not to give discounts more than as directed by MSIL. During investigation, the DG found that MSIL had 51.22% market share in relevant market. Investigations were also made regarding the contents of agreements between dealers and Maruti. Electronic record like e-mails between the parties were analysed and it was evident from such documentary and electronic evidence that MSIL restricted the Dealers from giving discounts more than what was authorised by it which clearly shows

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[20] The Competition Act, 2002, s. 26.

[21] *Re. Informant (Confidential)* v. *Grasim Industries Limited,* Competition Commission of India, Case no. 51/54/56 of 2017, Order dated August 06, 2021.

[22] *Re: Alleged anti-competitive conduct by Maruti Suzuki India Limited in implementing Discount Control Policy vis-à-vis dealers,* Competition Commission of India, Case no. 01 of 2019, Order dated August 23, 2021.

imposition of resale price maintenance by Maruti in contravention of the Act where Rs. 200 crores penalty was imposed upon MSIL by the Commission.

In *International Spirits and Wines Association (ISWAI) case*,[23] there was an allegation of abuse of dominant position by the opposite parties. After the Liquor Order of the State of Uttrakhand, the UAPM Board was appointed as exclusive licensee (wholesale) for liquor in the State. As exclusive wholesaler, the Board had monopoly position in the state with 100% share of liquor supply and distribution market with exclusive rights of procuring and sale of liquor in the State. On the allegation of arbitrary action and denial of market access to the alcoholic products of some brands, the DG analysed the month wise sale charts of different liquor brands and found that there was 59% and 57% drop in sale of liquor of United Spirits and Pernod Record in 2015-16 and an increase of 92% and 114% respectively in sale volume in year 2016-17. The DG analysed that this fluctuation was not the actual demand of liquor but artificially created by the arbitrary procurement by the Board. Again, the indents were also not made for the demand of different brands of alcohol. The stock books showed that the Board did not maintain the fix minimum stock requirement as directed by the Excise Commissioner. By the sale figures charts, indent documents and stock book of minimum stock requirement, the DG concluded that the Board abused its exclusive position which resulted in denial of market access to liquor manufacturers.

The burden of proof and the principles of evidence are uniformly adopted and exercised not only in India but also in European jurisdictions and the USA. Except cartels, in other anti-competitive activities, *rule of reason* has been made the rule to test the adverse effect of the alleged practice. The Turkish Competition Authority in *Sahibinden case*,[24] investigated the excessive pricing and abuse of dominance by *Sahibinden* and held that there was abuse of dominance

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[23] *Re. International Spirits and Wines Association of India (ISWAI)* v. *Uttarakhand Agricultural Produce Marketing Board and others,* Competition Commission of India, Case no. 02 of 2016, Order dated March 30, 2021.

[24] *Sahibinden Bilgi Teknolojileri Pazarlama* v *Tic. A.S.,* Ankara 6th Administrative Court, Case No. E.2019/946, K.2019/2625, decision dated 18th December, 2019.

by charging excessive prices and imposed a fine on *Sahibinden*. Ankara Administrative Court set aside the decision and held that on excessive pricing there was no concrete evidence which can substantiate excessive pricing by *Sahibinden*. The Court also opined that price analysis be conducted with internationally accepted tests and substantive proof beyond any doubt should be the basis of the decisions of the competition body. Again the Turkish Authority in *Enerjisa Enerji A.S.*,[25] investigation was initiated on the allegation of abuse of dominant position against *Enerjisa*. The investigations found violation of the competition law. In appeal the administrative court held that mere assumptions and doubts will not do the job but there must be substantive proof showing the justification and reasons for the decision. Mere doubt cannot be the basis of decision but proof beyond reasonable doubt.[26]

Evidence from the empirical studies, data analysis and market research has been used by the competition authorities in analysing and determining the customer mood and preferences and the enterprises actions about competition, their understanding or cooperation with their competitors as well as players of upstream and downstream market. All cooperation among competitors cannot be perceived as bad under the competition law. Agreements and cooperation among enterprises to increase efficiencies in market are not considered as bad. But, understanding or agreements about prices, quantity or quality restraints, market distribution/allocation among competitors and bid rigging are anti-competitive in nature. In cases of agreements, mere circumstantial evidence are not sufficient to prove the anti-competitive conduct but there should be some direct and substantive proof showing the conspiracy or meeting of minds of the competing enterprises for a common agenda. Further evidence, where

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[25] Ankara 13th Administrative Court, Case No. E.2019/660, K.2020/1315, decisions dated July 16, 2020.

[26] Gönenç Gürkaynak, *Beyond Any Doubt: Administrative Court Decisions Setting the Bar for the 'Standard of Proof' For Abuse of Dominance*, Mondaq News Alert (Dec. 18, 2020) *available at* https://www.mondaq.com/turkey/trade-regulation-practices/1017180/beyond-any-doubt-administrative-court-decisions-setting-the-bar-for-the-standard-of-proof-for-abuse-of-dominance (last visited Aug. 20, 2021).

circumstantial evidence is present, can be given showing coordinated actions of the parties and of the economic results or outcomes of such coordinated actions or parallel conduct.

Evidence: Presumption *(per se violation)* and Proof of Adverse Effect *(rule of reason)*

The Competition Act, 2002 directs that presumption of adverse effects on competition can be drawn in case of proof of an understanding/arrangement in cartels or horizontal agreements. The presumption shows strong probability of adverse effect accepted by the law and is without any regard to the actual harm of an agreement on competition in market. The Commission has to presume, and the informant is relieved from burden of proof by the law itself. In case of cartels and horizontal agreements, its existence may be proved by any circumstantial or direct evidence any proof of meeting of minds, arrangement, agreed conduct of parties or tacit understanding among rival enterprises and the directed action is necessary and enough for any penalty. Any meetings/minutes of meetings among rivals, any trade body or any association of enterprises/persons may be taken into consideration as evidence of arrangement. If the Commission has reason to believe and satisfied that enterprises or any person authorised by it, joined the meeting, and have acted on the decision taken therein which may affect prices of product, quantity, market sharing or rigging of bids, it shall be *per se* void and adverse effect on competition in relevant market will be presumed. Tacit understanding/ arrangement among rivals having identical trade and action in pursuance of the understanding is enough for the penalty.

The reason of presumption in case of cartels is that cartels are having larger and far reaching anti-competitive effects not only on the customers but also on the development of the economy as cartels tend to restrict innovation, technological development, and competitiveness among rivals. In case of price rise of any product, if there is any proof of a meeting and thereafter prices have been increased by all members without any increase/ change in input cost of the product, the case may be considered as violation of the Act. If the enterprises producing similar or identical product situated in different geographical area where the prices may differ in terms of availability of raw material, transportation costs and levy of taxes, and then there is parallel prices

or parallel increase in price, a strong inference can be drawn that producers agree to fix products prices irrespective of considerable variables as to input cost of product. Generally, direct evidence is required for such a presumption but if strong inference is shown by indirect or circumstantial evidence, the commission may presume anti-competitive effect and may impose penalty. Cartels are tacit understanding, secret and concerted actions, it is very hard to find direct evidence as the agreement; understanding or arrangement among rivals may not be on paper. In such cases, circumstantial evidence can be accepted by the competition authorities to nail the agreeing parties. In *Monsanto case*[27] the US Supreme Court held that 'there must be direct or circumstantial evidence that reasonably tends to prove that the parties had a conscious commitment to a common scheme designed to achieve an unlawful objective.'

Apart from the horizontal agreements, there are anti-competitive vertical agreements, abuse of dominant position and mergers/ amalgamations where concrete proof is required as to prove the anti-competitive practice as well as its (appreciable) adverse effect on competition in relevant market and the competition authority shall not presume the practice having adverse effect. The *rule of reason* implies that the authority shall apply reason as to the requirement and sufficiency of proof with its own satisfaction and reasons to believe that the practice has or has not appreciable adverse effect on competition in relevant market. There must be direct proof which shows that the business practice comes within the ambit of the Competition Act, 2002, within the relevant market and having appreciable adverse effect on competition.

The *SVS Raghavan Committee* reported that unlike earlier times when vertical agreements were declared *per se* void by the courts, now these are considered on the *rule of reason* and proof of adverse effect on competition is required to because sometimes these agreements may have pro-competitive effects.[28] The *Working Group on Competition Policy* discussed the *rule of reason* and considered that the law requires the

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[27] *Monsanto Co.* v. *Spray-Rite Service Corp.,* 465 U.S. 752 (1984).

[28] SVS Raghavan Committee Report 2000, *Report of High Level Committee on Competition Policy and Law* (2000, p. 36, para 4.4.0).

Commission to analyse anti-competitive effects on case to case basis in accordance with the factors as provided in the Act and then only it should be decided that there is violation of the Act or not. Presumption cannot be drawn in any information against vertical agreements, abuse of dominance and combinations but proof is required to show exclusionary or exploitative anti-competitive effect caused or likely to be caused in relevant market.[29] For efficiency, the *Working Group* analysed that presumption has also been excluded for joint ventures enhancing efficiencies giving pro-competitive benefits of joint innovation and technological upgradation. 'Tie in arrangements, exclusive supply agreements, exclusive distribution agreements, refusal to deal, resale price maintenance agreements causing or likely to cause an appreciable adverse effect on competition in India are considered anti-competitive. These are types of 'vertical agreements' which have to examined and analysed by Commission on '*Rule of Reason*' test'.[30]

The Competition Commission in *Usha International Ltd.*,[31] e-tender was issued to invite bids for procurement of Picofall-cum-Sewing Machine by Pune Zilla Parishad where identical prices were quoted by the bidders. During investigations, the DG found that one of the competing bidder M/s Klassy Computers utilised its own funds for paying bid money on behalf of and for the bids of M/s Nayan Agencies and M/s Jawahar Brothers. The investigation revealed that as it was an e-tender, the internet protocol (IP) address of M/s Klassy Computers was used for applying bids of all three bidders. Also, the call data record (CDR) of the proprietor of M/s Klassy Computers shows that he was in constant touch/ interacting and talking with the other opposite parties when bids were submitted. On the basis of bid money, IP address and call data record and the admission of the parties, the

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[29] Planning Commission of India, *Report of the Working Group on Competition Policy*, (February 2007, p. 17, para 3.2.3).

[30] *Id.*, p. 18, para 3.2.6.

[31] *People's All India Anti-Corruption and Crime Prevention Society* v. *Usha International Ltd.*, Competition Commission of India, Case no. 90 of 2016, Order dated March 17, 2021. With Usha International other parties in the bid-rigging practice were M/s Klassy Computers (Opposite party no. 2), M/s Nayan Agencies (OP no. 3) and M/s Jawahar Brothers (OP no. 4).

investigation concluded that there was collusion among the parties. On the basis of these evidence, the Commission held contravention of the Act. Hence, because there is agreement among the bidders, it shall be presumed to have anti-competitive effects.

The rules (*per se* and *rule of reason*) are well known in international jurisdiction. The competition jurisprudence developed in the USA and Europe has adopted and applied these principles. In the US, while prosecuting the business concerns under the anti-trust law[32] it appears in the earlier cases that the US court adopted and applied the *per se* rule in all cases which tend to undermine competition.[33] But later the courts realised that all anti-competitive practices cannot be decided with the *per se* rule and they started adopting the *rule of reason*. In *Continental Television case*[34] the court departed from earlier rule and for refusal to deal practice where the television manufacturer refused to deal and denied franchise, the *rule of reason* was incorporated. The court ruled that, 'per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive. The court ruled that TV manufacturer *Sylvania's* conduct violate the Sherman Act, 1890 only if there is an unreasonable restraint of trade resulting into inefficiencies and against market competition which is to be analysed on the basis of the *rule of reason* and proof is required to substantiate unreasonable restraint on trade and commerce in relevant market.

The US Court of Appeal in *Apple ebooks case*,[35] the evidence suggested a conspiracy was hatched by Apple Inc. with major book publishers to

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[32] Sherman Antitrust Act, 1890 (the Act invalidated all conspiracies in restraint of trade); Clayton Antitrust Act, 1914 (the Act expanded the scope of the Sherman Act, 1890, filled loopholes and included some vertical agreements and restraints); Robinson-Patman Act, 1936 (the Act expanded the scope of antitrust law relating to price and discrimination to consumers) and Celler-Kefauver Act, 1950 (the Act provided the prohibition from anti-competitive mergers, amalgamation and combinations).

[33] *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911). *See also, United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

[34] *Continental Television* v. *GTE Sylvania*, 433 U.S. 36 (1977).

[35] *United States* v. *Apple, Inc.*, United States Court of Appeals for the Second Circuit, Case No. 13-3741-cv(L), decided on June 30, 2015.

raise the prices of ebooks made available by Apple on iPad against Amazon's Kindle which offered digital copies of ebooks to readers for $9.99. Apple with the leading book publishers conspired to raise prices of ebooks made available for readers on iPad and iBookstore, with a profit margin of Apple as well as greater margin of publishers on selling ebooks through iBookstore than Amazon's Kindle. The conspiracy was proved by proof showing that Apple's senior Vice-President and Director, Digital Content met with the largest six publishers giving bestselling books. Evidence of constant meetings with the big publishers and numerous phone calls resulted in the launch of iBookstore and ebooks/digital books available on iPad. The interesting part is that Apple's ebooks were not made available in competitive prices but all big publishers conspired and agreed with Apple to raise prices of ebooks for more profits. The Court held that the conspiracy among Apple and the publishers result in restraint of trade and contravenes the Sherman Act, 1890.

The European Union (earlier European Economic Community) also adopts the same requirement of proof as required in the USA. The application of these rules in the US are determined and applied by the courts. However, In Europe, Treaty on the Functioning of European Union (TFEU) specifically lays down rules of competition as well as when the alleged anti-competitive practice will be *per se* void and when the *rule of reason* applies. The Treaty suggests which anti-competitive practice will be automatically void and which practice needs proof to be declared as void. Cartels and collusions affecting prices and trading conditions, production, supply in market and any anti-competitive conditions are automatically void.[36] Further, the practices which may have anti-competitive effects due to dominance and abuse of such dominance in imposing unfair price/conditions and limiting productions are being dealt with the *rule of reason* and proof is required to substantiate the claim of anti-competitive practice having appreciable adverse effect on relevant market.[37] So, the provisions of the Treaty specifically lays down that in cartels and collusions, there is no need of further proof to show anti-competitive restraints. However,

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[36] Treaty on the Functioning of European Union, 2007, art. 101.

[37] *Id.,* art. 102.

for the abuse of dominant position, further proof is required to substantiate that the practice is having appreciable adverse effect on competition in relevant market. In this regard, the Indian Competition Act, 2002 also follows the provisions of the Treaty on the Functioning of European Union and section 3 and 4 of the Act suggest by itself when the *per se* rule and *rule of reason* will be applied.

In the *Diesel Car Emission Reduction Cartel*[38] the European Commission found that in guise of technological cooperation among Daimler, Volkswagen, Porsche, Audi and BMW. The car manufacturers had the nitrogen oxide emissions reduction technology and could clean more than the requirements of Euro emission standards. The meetings of car manufacturers revealed that they agreed on the standard of NOx emission reduction by injecting *'Adblue'* in the gas exhaust, common understanding of *AdBlue* tank size, range and consumption. They eliminated competition by not advancing innovation and technological development for further reduction in diesel car emissions which resulted in limiting innovation and scientific development. It was seen as violation of Article 101 of the European Treaty. € 875 million fine was imposed on the car manufacturers. However, Daimler was given 100% immunity in fine under leniency programme. In *European Government Bonds trading cartel*[39] the Commission on the basis of documentary and electronic evidence concluded that seven banks operated in trust, contacted regularly with each other and passed information relating to prices and explored and talked about strategies before the bond auctions between the economic crisis of 2007 to 2011. The practice by seven banks was treated as a cartel determining the prices of Government bonds and in contravention of Article 101 of the European Treaty. Three banks were fined with € 371 million for their

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[38] European Commission Press Release, *Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars,* European Commission, Brussels (July 08, 2021) *available at* https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581 (last visited Aug. 23, 2021).

[39] European Commission Press Release, *Antitrust: Commission fines investment banks €371 million for participating in a European Governments Bonds trading cartel,* European Commission, Brussels (May 20, 2021) *available at* https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2565 (last visited Aug 23, 2021).

participation in the cartel. However, four banks were not fined either due to leniency provision or limitation and turnover cap rules.

In India, the Commission in *Nagrik Chetna Manch case*,[40] anti-competitive practice (bid rigging) in tenders floated by Pune Municipal Corporation to install, operate and maintain solid waste plant was complained. Investigation disclosed that all the Demand Draft for the payment of tenders' earnest money were prepared from the same branch of a bank however the offices of different bidders were at far away areas and the earnest money were paid by debiting money from the bank account of one person who was proprietor of one bidding party and Director in another competing bidder. The DD were prepared on the same date and in some tenders with consecutive serial numbers. Another proof of an understanding and common design was the common internet protocol address from which bids were made and uploaded tender documents by the competing bidders. The IP address from where bids were made by competing bidders was registered in the name of a person who was proprietor of one bidding party and Director in another competing bidder. These evidences affirm the understanding among bidders and making bids by same person and from same computer on behalf of competing parties. In one tender, the investigation revealed that the contact details and phone number given by one bidder was of a person who was an Executive Director in another competing bidder firm in same tender. With that the proprietors of bidding firms also admitted the existence of a cartel and they are part of it. The Commission held the practice as bid rigging which adversely affect competition and violation of the Act. Again, in the *Dry Cell Battery Cartel case*,[41] the investigations into the cartel found that the Association of the Dry Cell Manufacturers facilitated information dissemination to dry cell manufacturers. The documents seised during investigation, fax and emails among the parties revealed that sensitive trade information was shared by the manufacturers and collectively decided in increasing the

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[40] *Nagrik Chetna Manch* v. *Fortified Security Solutions and others*, Competition Commission of India, Case no. 50 of 2015, Order dated May 01, 2018.

[41] *Re: Cartelisation in respect of zinc carbon dry cell batteries market in India*, Competition Commission of India, Suo Motu Case No. 02 of 2016, Order dated April 19, 2018.

retail prices, component prices, trade discounts and margin of retailers of batteries. It was also revealed that there was an understanding not to indulge in aggressive sales/ competitive price war in dry cell battery market. Manufacturers also agreed on coordinated increase in prices of about 60% during the cartel period.

All cooperation among competitors cannot be perceived as bad under the competition law. Agreements and cooperation among enterprises to increase efficiencies in market are not considered as bad. But, understanding or agreements about prices, quantity or quality restraints, market distribution/allocation among competitors and bid rigging are anti-competitive in nature. In cases of agreements, mere circumstantial evidence are not sufficient to prove the anti-competitive conduct but there should be some direct and substantive proof showing the conspiracy or meeting of minds of the competing enterprises for a common agenda.

Combinations, Combined Market Share and Effects on Market

The aim of the competition policy is to ensure that competition is sustained/ promoted in the market, to protect consumers' interest such practices having adverse effect on market competition be prevented. The proof which can show adverse effects on market competitiveness due to combination is the combined market share of combining entities (whether it forms monopoly), the number of and market share of competitors, competitive effects of imports into market, availability of substitutes; effects on upstream and downstream players due to unfair and exclusionary conditions or market access, if any; market power to sustain price hike after acting freely to market pressures and the overall likely effect on market, availability of product, innovation and efficiency after the combination.[42] The Combinations of business entities (vertical integration) may also have anti-competitive effects as it may tend to foreclosure of market, exploitative/ exclusionary effects or creation of dominance and its abuse.

The combination's adverse effects were analysed by the Commission in combination notice by *Sun Pharma* with the proposal to merge *Ranbaxy Laboratory* with it. Both combining entities belong to

[42] The Competition Act, 2002, s. 20(4).

pharmaceutical industry. While assessing the combination, the Commission analysed that in some molecules or pharma products there are overlapping among products of the combining entities which may result in creation of dominant market player and likely competition concern. The commission analysed the combined market share of the merging entities with its competitors in various relevant product markets. The evidence in the form of production, distribution, and market share data of combining entities shows that in three pharma products, the combined market share will be around 90% to 95% which is near monopoly and a significant market player will be eliminated and likely to have adverse effect. In three other pharma products, the combined market share hovers around 65% to 70% where after combination a significant market player will be eliminate, which again likely to have adverse effect. In one product market, the combined market share would be around 40% to 45% but the share of other competitors is very small, and the combining entities will become a dominant player with the elimination of a competitor hence, in the relevant market it is likely to have adverse effect on competition. In these products, the Commission proposed modification that combining entities shall divest certain products. Other than these products, in 32 other products, no evidence was seen for the creation of monopoly and reduction of a competitor will have significant adverse effect on competition.[43]

In the matter of *Wal-Mart* (for acquisition of *Flipkart*)[44] the business activities of the concerns were analysed to determine if there will be adverse effect on competition post combination. The evidence shows that *Wal-Mart* has departmental stores/ grocery and supermarkets. No evidence to show that *Wal-Mart* was having any retail business in India because of Indian FDI policy but it was having stores and e-commerce business for registered best price members only. On the other hand, *Flipkart* is an e-commerce online marketplace which

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[43] *Sun Pharmaceutical Industries Limited and Ranbaxy Laboratories Limited Combination*, Competition Commission of India, Combination Registration no. C-2014/05/170, Order dated Dec. 05, 2014.

[44] *Wal-Mart International Holdings, Inc. and Flipkart Private Limited Combination*, Competition Commission of India, Combination Registration no. C-2018/05/571, Order dated Aug. 08, 2018.

facilitates the online display of goods by the manufacturer using *Flipkart* platform, where retail consumers can view and buy the product. The Commission found some horizontal overlapping as to consumer goods but concluded it insignificant because the evidence showed that *Flipkart* having strong presence in electronics and mobile business however *Wal-Mart* has greater business in groceries. On the one hand the product market is different and further the *Wal-Mart* stores were available for members only and not for retail consumers and *Flipkart* facilitates commercial activity between consumers and retailers. No evidence was found for any vertical restraints by the Commission. The Commission approved the combination as ex ante no likelihood of the contravention of the Act.

Direct/Indirect Evidence and Factors to be considered by the Commission

Evidence includes any statements, documents, electronic record and a thing/article or a physical object which is relevant to the fact in issue and a proof as to the happening or non-happening of a disputed event.[45] The law of evidence lies down that evidence may be oral/documentary and primary or secondary evidence.[46] Direct evidence can be given by a witness who saw something, heard something, and perceived something. Proof may be oral or documentary and if the later than either primary or secondary.[47] There may also be indirect or circumstantial evidence which gives a strong probability or inference to the court in support of the happening or non-happening of an event.

The direct evidence may be any statement given by the witness who saw, hear or perceive a certain fact. It may also include the agreements between parties, written arrangements, meeting minutes, any corporate statement concerning business strategy, any sales/revenue record, data or any electronic record. Indirect or circumstantial evidence is those which gives an inference or strong circumstantial probability or supposition of the existence of an event. This evidence is

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[45] The Indian Evidence Act, 1872, ss. 3 and 5.

[46] *Id.,* ss. 60-63.

[47] *Id.,* ss. 59, 61-63.

generally used to corroborate any other evidence except in the case if there is strong probability of the existence of an event; no other inference can be drawn and any other evidence is not available. These includes some statistical survey/ data used as evidence, econometric statistics, cost analysis, demand or supply figures, collusion where parties met with each other and then acted in same manner, common bidding behaviour of bidders showing meeting of mind and common design. Circumstantial evidence also includes economic analysis, logical inferences, and probabilities of happening or non-existence of a fact beyond reasonable doubt, any empirical and non-doctrinal studies of market structure/relevant market and the effect of certain practices on the market competition.

As *per se* rule is adopted for cartels, still there must be enough proof to show an agreement, tacit understanding, arrangement, or common design of the parties participating in the cartel. This can be proved by any agreement among parties, minutes of meeting between parties or of any association, any email, messages and fax, digital and technical evidence, mobile call data record etc. If by any direct or circumstantial evidence it is proved that there exists a common design, understanding and there is conspiracy by parties, then the Commission shall presume appreciable adverse effect on competition and there is no requirement of any other proof to show any adverse effect. This is because cartel causes a grave effect on the market and the consumers. On the other hand, in case of vertical agreements and abuse of dominant position, evidence is required to prove not only the restricted business practice but also the appreciable adverse effect of the practice on the relevant market. In case of combination, the evidence may be of market data and statistics which show that after combination, if the combined market strength will create a monopoly in case of horizontal overlap or vertical integration in relevant product market which is likely to have adverse effect on competition in relevant market.

To examine an agreement's adverse effects on competition, the Commission shall pay due regard to formation of barriers for business entrants; any practice which results into market foreclosure; driving out competitors; pro-competitive effects like innovation, efficiencies

and technological development and customer benefit.[48] In case of dominant position due regards be given to the factors like market share, size / resources of entity and its competitors; commercial advantages; vertical integration; consumer dependence; monopoly; entry barriers in sector and market structure.[49] In case of combinations, factors to be considered are the number of and market share of competitors; competitive effects of imports into market; availability of substitutes; effects on upstream and downstream players due to unfair and exclusionary conditions or market access, if any; power to sustain price hike after acting freely to market pressures and the overall likely effect on market, availability of product, innovation and efficiency after the combination.[50]

Way Forward: Technology driven Investigation and Cooperation among Regulators

Every authority which is having investigative or adjudicatory powers depends on the evidence to arrive at conclusions and decisions. The regulatory body must satisfy itself with reasons to be recorded for its orders. It is essential to prove the contravention of the law with the help of substantive proof (agreements, meeting papers, directions, conditions, emails etc.), market sector research and statistical data showing complete picture rather than mere assumptions, inferences, and observations. In the era of information and communication technology and encrypted privacy, it is very difficult to gather communication among enterprises which shows common design and understanding having anti-competitive effects. Due to this increasing use of technology in communication among the parties, there is need to transform the investigation branch and it must be equipped and trained to use technology for the purpose of evidence collection.

Cooperation among different regulators not only domestic but of outside jurisdictions also, is the need of the hour. Regulators may help not only in arriving at the conclusion but also in evidence gathering, market sector research, statistics, structure, and other econometric

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[48] The Competition Act, s. 19(3).

[49] *Id.,* s. 19(4).

[50] *Id.,* s. 20(4).

evidence. Regulators may also provide documents filed with them for determination of issues. For instance, in case of combination among enterprises listed in stock exchange, the Security and Exchange regulator (SEBI in India) can provide entire structure of shareholding and related corporate statements, or the tax department can reveal the production and sales related data on the basis of which the competition regulator can determine the market and market share of entity. The coordination among regulators will be helpful in effective operation and enforcement of law.

The cooperation among competition regulators across jurisdictions is also very important to achieve the objectives and for effective implementation and execution of competition policy. The exchange of information and communication among competition regulators of various jurisdictions will help in maintaining free trade, sustaining competition and welfare. For instance, in automobile sector, Suzuki, Honda and Toyota, all Japanese auto manufacturers, if arrive at an understanding (in Japan), which may adversely affect the Indian auto market (as they are leading players in India also), the Japanese Fair-Trade regulator may provide evidence of such agreements having adverse effect on Indian market to the Competition Commission of India. Such international cooperation in exchange of information will help the regulators to determine if there is contravention of the law. In the recent times, a Memorandum of Understanding for exchange of information and cooperative relation has been entered into by the Competition Commission of India and Japanese Fair-Trade Commission.

Conclusion

The rule of law entails that any authority having power to adjudicate must be satisfied with reasons before taking adverse decision against any party. The Competition Commission has been established to ensure fair trade, promote competition and to restrict acts of enterprises having anti-competitive effects. However, to guide the competition regulator, the Act provides certain factors which must be considered while determining the allegation of contravention. These factors have to be given due regarded and the Commission shall look into evidence suggesting the proof of the factors. The proof must be substantial, sufficient and beyond doubt and in addition, the

circumstantial evidence can be considered to corroborate the anti-competitive practice. The decision must not based on any probabilities, assumption or inferences drawn against an enterprise. To prove any contravention, the order must be based on direct evidence like agreements, arrangements in meetings through its minutes, any sales record, production records and documents suggesting any restraints or conditions applied by vertically integrated and dominant enterprise, regarding the happening of practice. Electronic evidence like emails, fax, call records, internet protocol record and computer data and bank transaction details are equally important as proof of practices in contravention of the Act. Indirect evidence like economic analysis, statistics, cost analysis, survey or other econometric evidence can also be considered for economic analysis and to draw logical inferences which are helpful to corroborate other evidence. The cooperation among international fair-trade regulators in exchange of communication and information for coordination and welfare is also very important to gather proof of acts where the conspiracy hatched in other jurisdictions. Cooperation among domestic regulators is equally important to help each other to attain the intention of legislature.

There is also the need to evaluate and analyse the strength of evidence as per the standard and burden required by the legislation on evidence. In case of cartels, presumption shall be drawn that the practice has anti-competitive effects. But before the presumption, there must be enough proof which shows an agreement, understanding or common design. If that is proved, then presumption can be drawn, in case of restraints or abuse of dominant position, substantive proof must be there to show market dominance regarding market share, the conditions imposed, exclusionary or exploitative practice resulting into abuses and restraint. The anti-trust law has had a long journey and decisions of fair-trade regulators not only in India, but also other jurisdictions are based on proof based on the standard adopted by the law of evidence.

Deconstructing the Gender Binary Schisms in the Geneva Conventions

Bhumika Nanda[*]

Introduction

Amidst the male dominated conventional warfare, women become the centre of orchestrated campaigns such as sexual violence and rape during armed conflicts. The international community has taken considerable time to realise that the occurrence of rape or sexual violence in wartime is not an incidental product of the conflict but often the result of a planned and targeted policy by armed groups. One of the major areas where the principles of International Criminal Law (ICL), International Humanitarian Law (IHL) and International Human Rights Law (IHRL) converge and are inter-linked is with respect to the gender and sexual based violence and position of women during armed conflicts, international and non-international. Women have always been a victim of such conflicts, being viewed as the victor's spoil, resulting in the violation of their human and civil rights. The earliest documents on IHL provide vague provisions prohibiting acts of sexual violence and rape that categorise the same as violation against family 'honor' rather than classifying them as 'grave breaches'.[1] It was only after the Second World War that the Additional Protocols to the Geneva Conventions recognised and included in its text provisions protecting women against 'rape', 'enforced prostitution', and prohibiting sexual

[*] Bhumika Nanda is an Assistant Professor with the School of Law, Bennett University, Greater Noida and can be reached at bhumikananda2000@gmail.com.

[1] Geneva Convention IV, 1949, Article 27 second para provides, 'Women shall be especially protected against any attack on their honour, against rape, enforced prostitution, or any form of indecent assault'.

violence.[2] Nonetheless, the international legal discourses look at the role of men and women from the conceptual constraints of 'male perpetrator versus female victim paradigm'[3] and falls short of considering the men's and women's varying and wide-ranging experiences of sexual and gender based violence in the armed conflict[4]; where men are not only the perpetrator but also the victims of sexual-gender based violence and female are part of the conflict not only in the capacity of victims but also as combatants or perpetrators.[5] Therefore, it is imperative to examine international humanitarian law and its implementation from a gender perspective.

Gendered Text of the Geneva Convention

The term 'Gender' has been used to refer to the socially constructed attributes, values, and differences associated with the roles of women and men whereas 'sex' refers to biological and physical characteristics.[6] Feminist legal scholars have expressed disappointment at IHL especially the Geneva Conventions of 1949 for centering on the armed conflict and its impact from the traditional social norms of men and women and not focusing on the systematic gender inequalities and the diverse ways in which armed conflict impacts men, and women.[7] Thus, understanding and implementing the IHL from traditional social norms, predominantly a 'male norm' which adversely impacts the

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[2] Lieber Code, 1863, Article 19 provides for protection to women as civilian and as combatants and as a prisoner of war in the following words 'Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women…may be removed before the bombardment commences'.

[3] Natalia Linos, *Rethinking Gender Based Violence During War: Is Violence Against Civilian Men a Problem worth Addressing*, 68 SOCIAL SCIENCE AND MEDICINE 1549 (2009).

[4] H. Durham and K. O'Byrne, *The Dialogue of Difference: Gender Perspectives on International Humanitarian Law*, 92 (877) INTERNATIONAL REVIEW OF THE RED CROSS 31 (2010).

[5] A. Barrow, *UN Security Council Resolutions 1325 and 1820: constructing gender in armed conflict and international humanitarian law,* 92 (877) INTERNATIONAL REVIEW OF THE RED CROSS 221 (2010).

[6] Hilary Charlesworth, Christine Chinkin, and Shelley Wright, *Feminist Approaches to International Law,* 85 (4) AMERICAN JOURNAL OF INTERNATIONAL LAW 613 (1991).

[7] *Supra* n. 4.

individual protection, rights and obligations of men and women during the armed conflict.

There is no denying that the Geneva Conventions provide for protection of civilians and combatants in the times of armed conflicts including both women and men, and explicitly prohibits adverse discrimination based on 'sex',[8] however, ensures treatment with all due regard to their sex'.[9] Thus, while looking at the broad framework of the Geneva Conventions, it is evident that though provisions ensuring protection of women as internees, prisoners of war and civilians have been provided in the text,[10] most provisions supposedly protect women in terms of their status as a pregnant women or as a mother, and not as an individual in their own right.[11] Even when it comes to the protection of women from sexual violence, the same is not provided to them as violation of their individual being but is couched in terms of their honour.[12] The use of the term 'honour' is problematic as it attempts to protect the 'family honour and rights', and women is seen as a mere symbolic of cultural and ethnic identity, and thereby misplaces and delegitimises the experience of the victim as an individual.[13]

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[8] Geneva Convention, I to IV, 1949, Common Art. 3.

[9] Geneva Convention IV, 1949, Article 14 states that '…women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favorable as that granted to men…' *Also see*, Art. 16 and 49 of Geneva Convention IV, 1949

[10] Geneva Convention I, 1949, Art. 12; Geneva Convention II, 1949, Art. 12; Geneva Convention III, 1949, Arts. 14, 16, 25, 29, 97 and 108; Geneva Convention IV, 1949, art. 27; Additional Protocol I, 1977, Art. 75; Additional Protocol II, 1977, Art. 4.

[11] Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?* 46 (I) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 55 (1997).

[12] Geneva Convention IV, 1949, Article 27 states that 'women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault'.

[13] Ebba Coghlan, *At War with Honour? Feminist Perspectives on Female Honour and The Regulation Of Wartime Rape*, Faculty of Law, Lund University *available at* http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=8874080&fileOId=8883103, (last visited Oct 27, 2021).

Subsequent legal instruments[14] have had the term 'honour' removed and provided protection against the acts that 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault',[15] and the protection was afforded not only for the acts committed against women but against 'person' at any time and in any place whatsoever.[16] However, the use of a seemingly gender-neutral terminology in the Additional Protocol II, although, indicates the possible acceptance on the existence of male sexual and gender violence victims, nonetheless, it has been observed by the eminent scholars that the protection is afforded to women as an object of special respect guided by dominant masculinities rather than women's experiences during and after the end of armed conflict.[17] Therefore, it is questionable whether the use of gender-neutral terminology indicates a shift in the thought process and recognition of women and men beyond the victim and perpetrators trajectory,[18] since the similar terminology has not been employed in the Additional Protocol I while both the protocols were drafted at the same time.[19]

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[14] Additional Protocol I, 1977, Article 75(2)(b) refers to 'outrages upon personal dignity': 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault' Article 75(1) of Additional Protocol I refers to 'honour' but in a completely different context: 'Each Party shall respect the person, honour, convictions and religious practices of all such persons.' Article 76 of Additional Protocol I refer to 'respect' and delinks rape, etc from honour: 'Women shall be the object of special respect and shall be protected against rape, forced prostitution and any other form of indecent assault.'

[15] *Id.*

[16] *Id.*

[17] Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?* 46 (1) THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 55 (1997).

[18] Laetitia Ruiz, *Gender Jurisprudence for Gender Crimes*, International Crimes database, Brief 20, June 2016 *available at* http://www.internationalcrimesdatabase.org/upload/documents/20160701T104109-ICD%20Brief%2020%20-%20Ruiz.pdf (last visited Oct 28, 2021).

[19] Additional Protocol II, 1977, Art. 4(2) reads – 'without prejudice to the generality of the foregoing, the following acts against the persons…(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'. However, Additional

Furthermore, while the recognition of gender and sexual based violence against women has been slow and gradual; the sexual and gender-based violence against men has received none too little attention within the international community.[20] The silences and shadowing of male experience in the armed conflict beyond what is considered as 'public' manifestation of war such as torture or inhumane treatment and towards what is regarded as 'private' and 'women specific' as rape and sexual violence has predominately been informed by man's perception of war victimhood and notions of masculinity associating men with power, provider, defender, and a violator.[21] Thus, it becomes all the more difficult to report male rape and sexual violence in particular when rape and crimes of sexual violence in general are not recognised and under-investigated.[22] Apart from the fact that sexual violence against men has not yet been recognised widely, reporting also takes a back stage due to over emphasis on the masculinity and the social norms that man can always be either a protector or perpetrator and that sexuality of man can never be violated in the manner like women.[23] Thus it becomes difficult for male victims to come forward and report crimes against them and society to readily accept the same and move away from the hierarchy of power that privileges men.[24]

Protocol I, 1977 does not provide for the gender-neutral fundamental guarantees and Article 76 provides the protection only form women, it reads, 'Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault'.

[20] Chris Dolan, *Into the Mainstream: Addressing Violence against Men and Boys in Conflict*, Reliefweb, May 14, 2014, *available at* https://reliefweb.int/sites/reliefweb.int/files/resources/Into_The_Mainstream-Addressing_Sexual_Violence_against_Men_and_Boys_in_Conflict.pdf (last visited Oct 29, 2021).

[21] Cristian Vale, *A Feminist Critique on the Charging of Male Sexual Violence in International Law*, International Law Blog, July 2021 available at https://internationallaw.blog/2021/07/01/a-feminist-critique-on-the-charging-of-male-sexual-violence-in-international-law/ (last visited Oct 29, 2021) and *also see*, *Supra* n. 6.

[22] Sandesh Sivakumaran, *Sexual Violence against Men in Armed Conflict*, 19(2) THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 253 (2007).

[23] *Id.*

[24] *Supra* n. 18.

While the binding legal instruments fail to explicitly recognise the occurrence of sexual violence and rape against men and adopts a paternalistic approach towards women as a sole potential rape victim in the conflict situations. The International Committee of the Red Cross, have addressed the issue of gender and sexual violence and its magnitude and multi-dimensional vicissitudes on both women and men in their commentaries on the Geneva Conventions wherein the text of Geneva Convention has been interpretated and commented upon in the light of international human rights, international criminal law, and refugee law along with the case laws developed from international courts and tribunals.[25] However, these commentaries are not binding on the state parties in the form of a treaty or customary international law, nonetheless they hold strong grounding and would be relevant when assessing the subsequent practices of parties in interpreting the treaty and will play an indirect important role in identifying customary international law[26].

In the recent times, United Nations Security Council resolutions recognise that men and boys are targets of sexual violence both in wartime and post-conflict situations.[27] Resolution 2106 adopted in 2013 for the first time identifies men and boys as victims of sexual violence during armed conflicts.[28] Resolution 2467 adopted in 2019 recognises

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[25] Jean-Marie Henckaerts, *Joint Series: Locating the Geneva Conventions Commentaries in the International Legal Landscape*, Humanitarian Law and Policy, (June 29, 2016) *available at* https://blogs.icrc.org/law-and-policy/2016/06/29/locating-geneva-conventions-commentaries/ (last visited Oct 29, 2021).

[26] Sean D. Murphy, *Joint Series: The Role of the ICRC Commentaries in Understanding International Humanitarian Law*, Intercross ICRC, (June 6, 2016) *available at* https://intercrossblog.icrc.org/blog/joint-series-the-role-of-the-icrc-commentaries-in-understanding-international-humanitarian-law (last visited Oct 29, 2021).

[27] UNSC, Resolution 2106(2013), 24 June 2013, UN Doc. S/Res/2106(2013), UNSC Res 2106, [UNSC Res 2106].

[28] *Id. See also* Declaration of Commitment to End Sexual Violence in Conflicts, 2013 which refers to an 'individual' and 'victims' and recognises the men as sexual violence victims and request the member states to 'make efforts to sift the stigma of shame from the victims of these crimes to those who commit, command and condone them'. Office of the Special Representative of the Secretary General on Sexual Violence in Conflict, available at https://www.un.org/sexualviolenceinconflict/press-release/122-countries-endorse-historic-

sexual violence against men and boys and echoes growing attention to such sexual violence in conflict and attempts to challenge the stigma and shame surrounding this issue.[29] The Annual Report of the UN Secretary-General António Guterres on conflict-related sexual violence released in March 2019 confirms that men and boys also suffer conflict related sexual violence, and incidents of rape, gang rape and forced nudity and other forms of inhumane and degrading treatment against men has been reported in several conflict ridden countries.[30] The Report admits challenges of the lack of sufficient legal provisions regarding the rape of men and that reporting of such experiences are responded with negative scrutiny and subjected to risk of criminal prosecution due to criminalisation of consensual same sex conduct in most of the countries.[31]The Secretary General recommends 'consistent monitoring and analysis of and reporting on sexual violence against men and boys in the context of formal and informal detention settings and in relation to armed groups and review of the national legislations to protect male victims and strengthening of policies that offer appropriate responses to male victims'.[32]

As stated above, the non-binding resolutions and soft law allows moving away from the silences created by the binding conventions and in a way compel the international community to focus their attention on breaking the silences on entrenched cultural assumptions about male invulnerability to such violence.[33]

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declaration-of-commitment-to-end-sexual-violence-in-conflict/ (last visited Oct 28, 2021).

[29] Z. Pinar Erdem, *Men can experience sexual violence in war too*, Human Rights Watch (May 3, 2019) *available at* https://www.hrw.org/news/2019/05/03/men-can-experience-sexual-violence-war-too (last visited Oct 28, 2021) *See also*, UNSC, Resolution 2467(2019), 23 April 2019, UN Doc. S/Res/2467(2019).

[30] Burundi, the Central African Republic, the Democratic Republic of the Congo, South Sudan, Sri Lanka

[31] Report of the United Nations Secretary General, *Conflict Related Sexual Violence*, United Nations (March 29, 2019) *available at* https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/04/report/s-2019-280/Annual-report-2018.pdf (last visited Oct 28, 2021).

[32] *Id.*

[33] *Id.*

Gendered Use of Sexual Violence on Men in Armed Conflicts

The first step towards inclusion of rape and other gender-based crimes was initiated in the statutes of International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) which explicitly included 'rape' as crime against humanity and ICTR added 'rape' as war crime as violation of common article 3 along with inhuman treatment, enforced prostitution and any form of indecent assault[34]. The judgements of ICTY and ICTR in the early 1990s gradually helped in shaping the understandings of rape and other gender-based crimes. The statues of ICTY, and ICTR share a gender-neutral language regarding the rape victims. [35] The same was also recognised in the statutes of other hybrid criminal tribunals and in the statute of the International Criminal Court (ICC).[36] However, the inclusion of provisions of rape and gender-neutral language did not result in actual convictions. In landmark cases such as *Tadic*,[37]*Celebic Camp*,[38] *Cesic*,[39] *Lubanga*,[40] though the factual findings indicated instances of rape either in the forms of penetration or oral sexual acts, the charges were framed on torture or outrages upon personal dignity or cruel treatment, rather than of rape.[41] Thus instead of focusing on the sexual nature of the crimes the decisions focused more on the violent aspect of the acts. It was only in the *Akayesu* case[42] and *Furundzija* case[43]

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[34] Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993, Art. 5 and Statute of the International Criminal Tribunal for Rwanda, 1994, Art. 5.

[35] *Id*.

[36] *Unheard, Unaccounted: Towards Accountability for Sexual and Gender based Violence at the ICC and Beyond*, FIDH (November 2018). *available at* https://www.fidh.org/IMG/pdf/sgbv_721a_eng_au_20_nov_2018_13h_web.pdf (last visited October 29, 2021).

[37] *Prosecutor* v. *Duško Tadić*, Case No. IT-94-1-I, Second Amended Indictment, 14 December 1995, para. 2.6, IT-94-1-I.

[38] *Prosecutor* v. *Mucić et al.*, Case No. IT-96-21, Indictment, 19 March 1996, paras. 24-25 and 29, IT-96-21.

[39] *Prosecutor* v. *Ranko Češić*, Case No. IT-95-10/1, Third Amended Indictment, 26 November 2002, para. 15, IT-95-10/1-3.

[40] *Prosecutor* v. *Lubanga*, Case No. ICC-01/04-01/06, Appeals Judgement, 8 December 2009, p. 3, ICC01/04-01/06-A.

[41] *Supra* n. 18.

[42] *The Prosecutor* v. *Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber 1, 2 Sept 1998.

[43] *Prosecutor* v. *Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, (ICTY), 10 Dec 1998.

that rape as an offence was charged and the same was defined as a form of aggression and physical invasion of a sexual nature which allow for both men and women to be considered as rape victims.[44]

The Rome Statute went a step ahead in incorporating a wide range of sexual crimes and emphasizing on the gender-neutral language of rape and invasion of the body of a person and thereby recognised the rape of men in times of peace and conflict.[45] Although its provisions promise a lot of potential, judgments delivered by the Court fails to accurately classify, characterise, and prosecute the sexual and gender-based crimes effectively. Though the ICC trial chamber in the case of *Jean Pierre Bemba*[46] for the first time convicted a senior military commander under command responsibility for sexual violence committed under his control, the same was reversed by the appeals chamber on the lack of evidence to link Bemba with the sexual violence and acquitted him of all the charges.[47] Interestingly, in the Dominic Ongwen case, the trial chamber convicted him of crimes including sexual and gender-based crimes committed in various forms against women. However, it fell short of considering the charges of sexual violence against men despite of having testimony of the victims on the same.[48]

At present, the charges against Abd Al Rahman of Sudan and Al Hassan of Mali have been confirmed by the Pre-Trial Chambers and the trial is undergoing.[49] The charges contain counts on sexual and gender-based crimes as part of crime against humanity, and war crimes especially in

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[44] *Supra* n. 43.

[45] Rome Statute of the International Criminal Court, 2002, Article 7 (1) (g) -1.

[46] *Prosecutor* v. *Jean-Pierre Bemba*, Case No. ICC-01/05-01/08, Trial Transcript, ICC-01/05-01/08-T-50Red-ENG, 21 Jan 2011, p. 32, pp. 32, 34-38, T-50-Red-ENG.

[47] Saumya Uma, *Where Does International Criminal Law Stand When It Comes to Sexual and Gender Based Violence*, The Wire (Sept 6, 2021) *available at* https://thewire.in/rights/where-does-international-criminal-law-stand-when-it-comes-to-sexual-and-gender-based-violence (last visited Oct 29, 2021).

[48] *Supra* n. 47.

[49] *The Prosecutor* v. *Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/20, Case Information Sheet ICC, (September 2021) available at https://www.icc-cpi.int/CaseInformationSheets/abd-al-rahmaneng.pdf (last visited Oct 29, 2021) and *see also*, *The Prosecutor* v. *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01.12-01/18, Case Information Sheet ICC (July 2021) *available at* https://www.icc-cpi.int/CaseInformationSheets/al-hassanEng.pdf (last visited Oct 29, 2021).

the Abd-al-Rahman case in which the prosecutor has brought charges of commission of gender-based crimes exclusively against men and boys.[50] Though it would be a promising step in the development of the jurisprudence and actual conviction in the sexual and gender-based crimes, unfortunately the victims have been waiting for almost twenty years to see the suspects being tried and punished at the ICC.[51] Therefore, it is pertinent to strengthen the investigation, collection of evidence and prosecutorial strategies for the sexual and gender-based offences against both women and men to be able to truthfully account for the gendered aspects of crimes.[52]

Conclusion

While courts and tribunals are gradually accepting and implementing a more expansive and gender-conscious concept of rape and sexual violence, the gender perspective to armed conflict still eludes the Geneva Conventions and IHL generally, thereby, creating an apparent silence and misrecognition of sexual offences against men. It is true that the language used in the Geneva Conventions is outdated, and it has been argued in its defence that the same is being updated over time with the 1977 Additional Protocols and in the updated Commentaries drafted by the ICRC. Moreover, wider codification of sexual offences and rape in the ICC statutes and Security Council resolutions is realigning IHL with contemporary understandings of the armed conflict in relationship with realities of gender.

Furthermore, concerns have been expressed regarding the dangers of reopening the basic principles of IHL and weakening the available protection, and the risk that it may not be accepted by the international community.[53] It has been argued that the international community should move forward on the gendered approach to conflicts by enacting alternative legal instruments.[54] However, the author believes that

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[50] Rosemary Grey, *Gender-based Persecution against Men: The ICC's Abd-al-Rahman Case*, OpinioJuris (May 30, 2021) available at http://opiniojuris.org/2021/05/30/gender-based-persecution-against-men-the-iccs-abd-al-rahman-case/ (last visited Oct 29, 2021).

[51] *Id.*

[52] *Supra* n. 18.

[53] *Supra* n. 4.

[54] *Id.*

instead of enacting an alternative legal instrument, it would be more efficient and effective to redress the constraints and problematic relationship between the gender and the IHL by relooking at the original text of IHL i.e., Geneva Conventions and amend the provisions of the Geneva Conventions regarding the gender specific roles and violations assigned to men and women.[55] It is vital to consider in terms of gender inclusivity, the primary text of Geneva Conventions which has been widely accepted and approved by the international community.[56] Thus, by making amendments in the Geneva Conventions it is possible to instill changes in the domestic legal systems, and thus encouraging the countries to adopt a gender-neutral and gender inclusive approach in allocating rights, obligations and protection to both men and women and reconstructing the procedural and substantive laws of rape and sexual violence in times of armed conflicts.

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[55] *See generally*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/52db59a9afda5af5c12563cd00438554 (last visited Oct 29, 2021).

[56] State party to the 1949 Geneva Convention is 196 as against AP I which is 174 and AP II which is 168. The data is published by the ICRC and was last updated on 31st December 2017, *available at* https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp (last visited Oct 28, 2021).
While state party to ICC Rome Statute is 122 countries, International Criminal Court, *available at* https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Oct 28, 2021).

Changing Perspectives of Legal Education: Issues and Challenges in Bangladesh

Abdullah Al Faruque[*]

Introduction

Legal education occupies a special position in the education system as a whole because of its specialised nature and underlying learning objectives. Legal education shapes profoundly the functions of legal profession, and legal system of any country. Legal education is not only formal education on law imparted by the law schools, but also a continuous process throughout the professional lives of lawyers and judges. But what is the most appropriate form of delivering legal education, is much debated, and is still evolving. Certainly, it involves development of knowledge, skills, professional standards and, where desirable, specialisation. While the legal education is a primary vehicle for the transmission of legal knowledge, conceptions of legal understanding and legal reasoning, it is also a technique of imparting legal skill.

Like other disciplines, traditional system of legal education has undergone profound transformation around the world. Under the traditional view of legal education, students need only the ability to understand the laws, legal procedures, and institutions, analyse legal theory and judicial decisions. The traditional legal education system focuses exclusively on students' acquisition of knowledge and expertise in certain subject matter areas which are important for legal practice.[1] Students are exposed to both content of law and process of

[*] Prof. Abdullah Al Faruque is the Former Head of the Department and Dean, Faculty of Law, University of Chittagong, Bangladesh and can be reached at a.alfaruque@cu.ac.bd.

[1] Mary Keyes & Richard Johnstone, *Changing Legal Education: Rhetoric, Realty, and Prospects for the Future*, 26 SYDNEY L. REVIEW 537 (2004).

application of law. In the traditional system of legal education, philosophy of teaching of law is conceived in terms of knowing law and developing argumentative skill and law teaching is essentially teacher-centred where the role of the teachers is to transmit their own expertise in some specific subject matter areas of law to students.[2] The traditional law curriculum gives little express consideration to generic skills (such as oral communication, self-reflection, teamwork, computer skills, and so on) or legal skills (such as legal reasoning and problem solving, legal research, interviewing, negotiation, advocacy and so on) ethics, theory, attitudes and values, interdisciplinary perspectives on law.[3] In traditional legal education system, law is taught mainly to prepare students to work in the private legal profession.[4]

As mentioned above, legal education has undergone profound transformation over the last decades to make it more responsive than ever before to the legal need of the community and the learning needs of students to become professionally competent to play their role in increasingly globalised world.[5] The main focus of such transformation in other parts of the world is on integration of cross-border and international dimensions of legal education, greater emphasis on problem-solving, negotiation, use of new technology and a greater use of clinical legal education for bridging the existing gaps between theory and practice of law.[6]

In Bangladesh, appropriate reform is needed to explore the implications of ongoing globalisation process, bring global perspectives to legal education, and impart such skills to students as are necessary for equipping them to compete in the increasingly transnationalised legal service market.

Although in the law schools of Bangladesh many changes in curriculum, and teaching approaches are observed, we are still facing

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[2] *Id*.

[3] *Id*.

[4] *Id*.

[5] B.C. Nirmal, *Legal Education in India: Problems and Challenges,* 20 INTERNATIONAL ISLAMIC UNIVERSITY OF MALAYSIA LAW JOURNAL 139, 140 (2012).

[6] *Id*.

some challenges including rethinking the relationship of law schools with the legal profession, integrating research in teaching, and conducting research effectively, taking interdisciplinary approach in teaching law, teaching ethics developing collaborative learning in law schools. This article seeks to investigate the following research questions- what kind of teaching approach or teaching philosophy should be adopted by the law teachers in Bangladesh? Is there any dichotomy between knowledge and skill? To what extent is skill based learning integrated in the legal education system of Bangladesh? What is the current situation of the clinical legal education programme in Bangladesh? What are the criteria of student admission, and assessment tools in Bangladesh? How far is interdisciplinary study of law valued in Bangladesh? What is the role of case study method in Bangladesh? Does legal education in Bangladesh adequately address the need for research informed teaching in law and collaborative learning? Is legal education in Bangladesh bifurcated?

From Teacher Centred to Student Centred Teaching Method

Bangladesh still follows this traditional legal education where teaching techniques and assessment process emphasise studying law from 'black letter law' approach that mainly focuses on positivistic view of law. In Bangladesh, the dominant mode of instruction is delivery lectures where most teachers uncritically replicate the learning experiences to large classes in which students are merely passive learners. In lecture method, teachers narrate the provisions of law, explain theories, and sometimes ask students. Students' performance is mostly assessed through written examination. This scenario is still prevalent in most of the law schools of Bangladesh.

But now legal education system has shifted towards student-centred approach, where students take a proactive approach to increase their cognitive engagement in subject matter material. Student-centred teaching involves a method of teaching that shifts the focus away from instruction-based learning in order to allow the student to develop learner autonomy and independence. A central pillar of student-centred teaching is the emphasis on the learner's role in constructing meaning from new information and prior experience. By doing so, it promotes a student's cognitive engagement and reduces the risk of

passive learning. But this approach is yet to be integrated in the legal education system of Bangladesh.

Adopting a Justice oriented Teaching Philosophy

What is the goal of teaching law? Law teachers need to think of any key goals that they would like their students to achieve. They may be specific subject matter goals, but complex teaching philosophies also consider broader goals and assess why these goals are important.[7] Teaching philosophy shapes profoundly the way of teaching by a particular teacher. The legal education in general aims to provide an understanding of the fundamental principles and concepts of law and legal system; to prepare law graduates equipped with substantive and procedural knowledge of law as well as with practical skills to enable them to enter legal profession. But the legal academy in Bangladesh has long neglected the needs to focus teaching and scholarship on the ideals of justice that law faithfully serves. While law is treated as the means, justice is regarded as the ends. Legal academy must appreciate the role that law can play as an instrument of achieving justice. Thus legal education should be justice oriented which is essential for understanding the underlying objectives of law and the legal system. Taking a teaching philosophy of teaching justice through law can lend valuable insight of the ultimate purpose of law. According to Robin West, justice is not a serious subject of pedagogy in the legal academy nor is justice a serious subject of legal scholarship.[8] About the absence of justice discourse in law teaching, one commentator remarks,

> 'Law professors do not ask what justice demands of an entire body of law, of a particular law, or of the resolution of a particular case. They do not ask whether the substance of a law is just or unjust or whether a court's suggested interpretation of a precedent is just or unjust. They do not ask whether an outcome offends a student's sense of justice, and they certainly do not probe what might be the origin of that sense of justice, much less its content. They do not typically devote class

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[7] Brian Coppola, *Writing a Statement of Teaching Philosophy: Fashioning a Framework for Your Classroom*, 31(7) JOURNAL OF THE COLLEGE OF SCIENCE TEACHING 448-53 (2002).

[8] Robin L. West, TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM *59, (*Cambridge University Press 2014).

time or pages in their in their syllabi to varying understandings of the meaning of justice.'[9]

Knowledge v. Skill in Legal Education

The main purposes of the law schools are to transmit knowledge and produce legal scholarship. But legal education should also equip law students with a range of skills such as problem-solving, legal analysis and legal reasoning, conducting legal research, factual investigation, oral and written communication, counselling, negotiation, organising and managing legal work, and recognising and resolving ethical dilemmas. Purely pedagogical approach to legal education enables law students to acquire knowledge, but achieving these skills require going beyond the pedagogical approach. The lawyering process requires a range of essential skills beyond knowledge including legal analysis and reasoning, client interviewing and counselling, persuasive factual analysis, negotiation, and advocacy. Emergence of the realist movement in the USA in the 1960s shifted the emphasis from acquisition of knowledge to development of proficiency in legal analysis, legal reasoning, legal argument, and problem-solving skill. Karl Llewellyn recommended in 1944 that law school should seek to foster not only analysis, but also such matters such as skill in interpretation of statutes, appellate advocacy, drafting, and counselling, and the making of intelligent policy decisions.[10] According to Llewellyn, lawyering skill should be taught in the law schools and this skill instruction assists the cycle of experiential learning by interposing instruction that develops the concepts and theories underlying the skills being taught, and provides reflective evaluation and feedback on the students' performance. In 1984, Anthony G. Amsterdam predicted that by twenty-first century legal education would have shifted its focus from case reading, doctrinal analysis and legal reasoning to a broader spectrum of practical skills, including problem-solving skills.[11]

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[9] *Id*. 58.

[10] Karl Llewellyn, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 377 (The University of Chicago Press 1962).

[11] Anthony Amsterdam, *Clinical Legal Education- A 21st Century Perspective*, 34 JOURNAL OF LEGAL EDUCATION 612-13 (1984).

However, there are some arguments put forward against teaching legal skills in the law schools. Many legal academics believe that acquiring knowledge should be the main goal for the legal education. There is a strong academic logic behind this- that the aim of the law degrees is not to produce practising lawyers only. Their aim is also to produce legal academics, administrators, consultants, policy makers, politicians, activists, campaigners etc. Therefore, it is not necessary to train everyone in practical legal skills in their undergraduate days since not everyone is going to be a practicing lawyer. For specific practical legal skills, there is always the Vocational Stage of professional training which is already in place to serve the purpose. Two general types of justification are offered for pedagogical approach in legal education: first, law as an academic or intellectual enterprise, one must be equipped with elementary knowledge on legal theory. Second, legal education can play a central role in liberal education by helping students to integrate their study of law with their knowledge of other subjects.[12] According to this view, legal education should equip students with a foundation of legal knowledge that distinguishes them from students educated in other academic disciplines. This means law degrees will include a detailed knowledge of the legal institutions of the State, the origins of the law and legal systems, the political processes that generate laws, the systems of dispute resolution, and knowledge of key areas of legal doctrine.[13]

According to this view, a serious understanding of law is an intellectual objective of plain and obvious intrinsic value. An academic course of study is properly demanded as a precondition of entry into the professional practice of law. Whether a student takes a law degree with a view to legal practice or takes one as a general educational qualification, the course of law degree ought to be geared to the aim of the generating a serious understanding of law.[14] That understanding of

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[12] Richard Grimes, *Legal Skills and Clinical Legal Education*, 2 WEB JOURNAL OF CURRENT LEGAL ISSUES 30 (1995).

[13] Alexander Reilly, *Knowledge, Skills and Values in Legal Education*, (2015) *available at* http://www.ialsnet.org/wordpress/wp-content/uploads/2015/08/ Reilly.pdf (last visited March 09, 2017).

[14] William Twining, LAW IN CONTEXT (ENLARGING A DISCIPLINE) *142* (Clarendon Press 1997).

law requires a real and considerable element of theory in the curriculum. Thus, theory is necessary for understanding law.

But law is not purely an intellectual enterprise, it has also practical value. This has been pointed out in the following way: 'perhaps in our need to legitimate law as an intellectual discipline, we forgot that the law is also an activity, a doing, 'more like painting than archaeology…more a process of creation than pure discovery'.[15] One of the main purposes of legal education is to prepare the law students to be lawyers. Lawyering is viewed as the bundle of skills and abilities a good lawyer should possess. One common theme is the importance of a lawyer's ability to integrate factual and legal knowledge and to exercise good judgment considering that integrated understanding.[16] Problem-solving is the fundamental lawyering skill. To develop and evaluate strategies for solving a problem, a lawyer should be familiar with the skills and concepts involved in identifying and diagnosing the problems and generating alternative solutions and strategies. Problem solving is the single intellectual skill on which all law practice is based.[17]

The legal education system in Bangladesh is often criticised for its failure to consider the problem-solving skill of the law students. The dominant idea of legal education in Bangladesh is still analytical. The main strengths of this idea are pedagogy, and analysis of legal language, orientation towards legal theory. On the other hand, its weaknesses include a narrow formalism, a propensity for unjustified dogmatism, and a tendency to be divorced from the practical world. In Bangladesh, there has been a large increase in legal education providers as many private and public universities offer law and a huge growth in law student numbers. As a result, considerable thought should be given to the object of law degrees, and how to balance knowledge, skills and values in curriculum design.

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[15] Dennis M. Patterson, 'Law's Pragmatism: Law as Practice and Narrative' (1990) 76 *Virginia Law Review* 983.

[16] Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory*, 45(3) JOURNAL OF LEGAL EDUCATION, 326 (1995).

[17] Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 JOURNAL OF LEGAL EDUCATION 241 (1992).

There is a great need to combine both pedagogy and skill-based learning to create opportunities to provide quality legal education. In Bangladesh academic aspect of legal education predominates with the result that methods of teaching law are mostly lecture-based. It is necessary to emphasise the need for practical methods of teaching law i.e. Socratic Method, problem method, case study, moot-court and mock trial, clinical legal education etc in order to make legal education more effective and relevant.

The steps of curriculum design should include clarifying educational goals and objectives so that they are directed to problem-solving; injecting legal problem-solving activities into the curriculum to meet these objectives and designing an effective assessment regime that validly tests problem-solving skills. In today's highly fragmented and specialised society problem-solving can teach lawyers to provide answers for people with problems in a way that will build respect for the legal profession and system of justice. But by adding problem-solving courses to the legal curriculum, we should not abandon our traditional courses that expose students to the legal systems from the perspective of jurisprudence. The law students need to be able to diagnose and analyse problems, to talk to and listen to people, to facilitate conversations, to negotiate effectively, to resolve disputes, to use ever-changing technologies, to plan and contextualise a problem.

However, individual skills cannot be neatly compartmentalised from the doctrinal subject matter. They are interrelated in countless way. For example, skills of counselling, negotiation and litigation may require the application of the skills of legal analysis, legal research, factual investigation and communications.[18] While there are legitimate distinctions between substantive courses and skills courses, the two need not be entirely divorced. Students must begin to understand and appreciate the lawyering dimension in substantive classes as well. Substantive classes need not be transformed into modified skills classes. That would be undesirable and unproductive, because students need to study law academically, to learn rules and doctrine, to understand the purposes and policies behind rules, and to think

[18] Robert MacCrate, *Preparing Lawyers to Participate Effectively in the Legal Profession*, 44 JOURNAL OF LEGAL EDUCATION 90 (1994).

about their meaning and application. But students cannot fully understand a substantive area without some consideration of how lawyers and judges' function.[19]

Legal skills learning is incorporated in curriculum either explicitly or implicitly. The explicit incorporation is defined as where the legal skills form a definitive part of a unit of curriculum dedicated to skills. The implicit incorporation refers to the situation where legal skill is delivered to the students as part of an overall educational process.

In Bangladesh, most of the law schools have no explicit incorporation of legal skills in the units of the curriculum. In the law schools of Bangladeshi universities, the students are asked to analyse the provisions of the law, statutes, regulation rather than solving the problems or explaining the case materials in light of given problem of practical importance.

Strengthening Clinical Legal Education Programme

Clinical legal education programme is recognised as an established means of imparting legal skills as discussed earlier. Clinical legal education is the most important way of skill-based learning in law. Legal skills include drafting, research, interviewing, negotiation, advocacy, legal analysis, and communication. Clinical methods as a skill-based learning is important in moving legal education beyond the understanding of legal principles and rules towards a focus on issues of justice.[20] Clinical experiences of teaching skill enable students to appreciate the limitations of the law and legal processes and the importance of access to justice.[21] It can foster constructive engagement between law schools, their communities and the practising legal profession, making legal education more effective. It is a teaching and learning process which is student-focused and student-fed and involves the translation of theory into the development of clinical

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[19] J. Pirie, *Objectives in Legal Education: The Case for Systematic Instructional Design*, 37 JOURNAL OF LEGAL EDUCATION 595 (1987).

[20] Jeff Giddings, PROMOTING JUSTICE THROUGH CLINICAL LEGAL EDUCATION 3, (Justice Press 2013).

[21] *Id.*

knowledge and practical skills.[22] It also involves an intensive small group or solo learning experience in which each student takes responsibility for legal or law-related work for a client-whether real or simulated in collaboration with a supervisor.[23] This student-focused aspect seeks to emphasise the distinctive nature of legal education.[24] The quality of any clinical legal education is influenced by factors including the alignment between the activities and the specified learning outcomes, the capacity of a skilled supervisor to focus on facilitating student learning and the effective sequencing and integration of clinical experiences with the other dimensions of the student learning.[25]Clinical legal education programme is increasingly becoming popular in the law schools as a means of delivering practical skills. The clinical programme requires students to address legal skill (drafting, research, advocacy, interviewing and negotiation) and transferable skills (communication, problem solving, teamwork, organisational and study skills, and the use of new technology). Through clinical legal education programmes, students are exposed to unstructured legal problems arising from real life problems. Clinical legal education is a model where students learn through experience or 'doing' law.

Many law schools around the world run law clinics for conducting moot court, counselling and legal advice, which enhance the integration of knowledge, skills and values in legal education. The law school clinic is the best place for a student to become acculturated to the ethical practice of law.[26] In the typical legal ethics or professional responsibility course conduced in law clinics, law students learn the rules of ethics, study related cases and ethics opinion, work through hypothetical cases highlighting ethical dilemmas and discuss lawyer obligations to clients, third parties and tribunals.[27]

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[22] Lindy McAllister *et. al.* (eds.), FACILITATING LEARNING IN CLINICAL SETTINGS *3*, (Nelson Thornes 1997).

[23] Giddings, (n. 20.) 14.

[24] *Id.*

[25] *Id.* 15.

[26] Peter Joy, *The Law School Clinic as a Model Law Office*, 30 WM MITCHELL L REV. 35 (2003).

[27] *Id.*

However, in some Law Schools of Bangladesh, legal skills are imparted under Clinical legal education programme (CLEP) with a view to providing skills on lawyering process, alternative dispute resolution, and legal process. In Bangladesh, clinical legal education is yet to be fully utilised by law schools due to lack of funding, lack of its' integration within curriculum, and lack of orientation towards it. Therefore, many law schools run clinical legal education on *ad hoc* basis and are dependent on foreign funding. Although clinical legal education is a vital part of legal education in general, it is not yet a graduation requirement at most law schools in Bangladesh.

Assessment of Students and Learning Outcomes

A range of assessment tools need to be in place to evaluate students' performance. Currently in the legal education system of Bangladesh, only summative assessment (final written assessment) and tutorial are used to assess the performance of students. But formative assessment tools such as quizzes, assignment, class presentation, term papers, and continuous assessment need to be used in evaluation of learning by the students. The Madrid Protocol on the Principles of Evaluation of Legal Education, 2015[28] recognises that there is a diversity of approaches of higher legal education evaluation which must respect the competence of the legal academy to set, maintain and improve legal education standards; promote each institution's distinctive mission while taking into account its context; and acknowledge the views of relevant internal and external stakeholders.[29] Therefore, standards of any evaluative process must be formulated with law faculty input and be subject to domestic, and, international peer review; jurisdictionally and institutionally specific; informed by evolving domestic and international evaluative practices; objective; transparent; verifiable; and consistently applied.[30]

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[28] The Protocol, *available at* http://www.ialsnet.org/wordpress/wp-content/uploads/2015/07/MADRID-PROTOCOL-Vladivostok-draft-060615.pdf (last visited August 09, 2020)

[29] *Id.*

[30] *Id.*

The Singapore Declaration on Global Standards and Outcomes of a Legal Education, 2013[31] emphasises that the objectives of legal education should be well defined, transparent; verifiable; consistently applied and informed by evolving domestic and international norms; and jurisdictionally specific.[32] For selection of students, admission standards should be based on established local criteria taking into consideration the jurisdiction's public policy as to admission criteria of students into higher education. Student selection should be: i) Objective; ii) Transparent; iii) Verifiable; iv) Consistently applied; and v) Informed by evolving domestic and international norms.[33] According to the Declaration, evaluation of students should be incorporated in a comprehensive legal educational program to enable law graduates to attain the outcomes specified in the Statement of Principles.[34] It is recognised that there are a variety of forms of student evaluation which vary from jurisdiction to jurisdiction, as well as from institution to institution. It is recognised that there is a growing emphasis on formative rather than purely summative evaluations of student performance. The Declaration reiterates that local standards, needs and resources should guide the recruitment, evaluation, advancement, and retention of law faculty.[35]

About the outcomes of a legal education, Singapore Declaration states that legal education should produce three important outcome-knowledge, skills, and values. For attaining knowledge, a law graduate should know and understand the core areas of substantive and procedural law and the contextual underpinnings of the operation of law. Regarding skills, a law graduate should be proficient in general academic skills, including critical analysis and reasoning; research, and analysing legal materials; problem solving, planning and strategising

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[31] Adopted by the International Association of Law Schools at the inaugural Global Law Deans' Forum, held at the National University of Singapore Faculty of Law, 26 September 2013. The Declaration, *available at* http://www.ialsnet.org/wordpress/wp-content/uploads/2013/09/Singapore-Declaration-2013.pdf (last visited September 07, 2020).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

how to comply with legal requirements; and constructing a legal position and effectively communicating within a legal context.[36] On values, the Singapore Declaration says that a law graduate should know and understand the need to act in accordance with the professional ethics of the jurisdiction; and the fundamental principles of justice and the rule of law.[37]

Legal education system of Bangladesh should incorporate the norms laid down by these important instruments on legal education.

Taking an Interdisciplinary Approach

Another aspect of traditional teaching method is that law is taught as an autonomous and distinct discipline in Bangladesh. But law, by its very nature, is seen as interdisciplinary as it is impossible to understand a legal system without recourse to history, psychology, economics, philosophy, and other academic disciplines.[38] Interdisciplinary approach is also important for creative problem-solving that goes beyond traditional legal boundary. Because one of the fundamental shortcomings of traditional lawyering is an inability to define problems in their broad and multidisciplinary respects.[39] In our traditional legal education system, legal subjects are taught in isolation from each other and even in isolation with other disciplines which results in lack of interconnection and interaction between the disciplines. But law curriculum needs to make room for a broader knowledge base and some subjects such as sociology, economics, can be introduced to explore inter-disciplinary approaches to legal problem-solving. The rise of interdisciplinary scholarship has been perhaps the most dramatic development in legal education in the western countries in the past decades. In place of the previous emphasis on cases and doctrine, the interdisciplinary approach has

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[36] *Id.*

[37] *Id.*

[38] Alan M. Dershowitz, *The Interdisciplinary Study of Law: A Dedicatory Note on the Founding of the NILR*, 1 NORTHWESTERN INTERDISCIPLINARY LAW REVIEW 3 (2008); *See also* Douglas W. Vick, *Interdisciplinarity and the Discipline of Law*, 31(2) JOURNAL OF LAW AND SOCIETY 163-193 (2004).

[39] Janet Weinstein, *Coming of Age: Recognising the Importance of Interdisciplinary Education in Law Practice*, 74 WASHINGTON LAW REVIEW 319, 324 (1999).

emerged as a new paradigm of scholarship and teaching, which mobilises the insights of other disciplines- economics, literature and philosophy – to the analysis of legal material.[40] An interdisciplinary study presents a different perspectives for the understanding of the transactions governed by the law. Each of these perspectives has its own validity, rests on its own presuppositions, and operates within its own disciplinary boundaries.[41] Weinrib argues that exposure to these other perspectives plays an important role for the study of law for several reasons. First, the very contrast between legal and non-legal modes of enquiry casts light on the law's distinctive structure and presuppositions. Second, the contrast reveals the place of law as an intellectual enterprise among other such enterprises. Third, an awareness of the contrast induces an appreciation of the limits of law, and thus a proper sense of humility: although the law governs all of life, the person who is learned in the law is not therefore omniscient.[42] In this way, the interdisciplinary study of law creates an academic conversation with different disciplinary voices.[43] For example, the most influential piece of interdisciplinary legal scholarship of the twentieth century is the economic analysis of law, which is illustrated in Ronald Coase' theory of social cost. The economic problem is how to maximise the value of production, but the legal problem is how to determine liability. These interdisciplinary approaches have taken various forms, including introducing economics, psychiatry, sociology, and anthropology in the curriculum, the appointment of non-lawyers to law faculties from fields such as economics, psychiatry, sociology, and anthropology; joint appointments made in fields such as philosophy, history, political science, or cross-teaching by people on one faculty for students in another, either alone or collaboratively.[44]

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[40] Ernest J. Weinrib, CORRECTIVE JUSTICE 323, (Oxford University Press 2012).

[41] *Id.* 325.

[42] *Id.*

[43] Michael Oakeshott, THE VOICE OF LIBERAL LEARNING 109 (Yale University Press 2001).

[44] Keyes & Johnstone (n. 1.) 549.

Introducing 'Case Study Method' of Teaching

Case study method of teaching is yet to be recognised in the curriculum of the law schools of Bangladesh. Describing dismal scenario of legal education in Bangladesh and emphasising the importance of reading of cases, Malik remarks, 'Legal education centered around reading and memorising provisions of law without paying much attention to the understanding and interpretation through judgements is not conducive to imparting skill and expertise required of a lawyer. Perhaps lack of these skills and abilities is the primary reason why most of our law graduates opt out of the legal profession.'[45] Christopher Columbus Langdell introduced the case method of teaching at Harvard Law School in 1870 which dramatically altered the course of legal education in the United States. His case method involved examination and scrutinisation of judicial decisions coupled with Socratic style analysis. Langdell insisted that instead of lecturing, law professors should employ the 'Socratic method' to guide students in their consideration of judicial decisions. His case method gained widespread acceptance. The main premise of case method, according to Langdell, is based on the theory that law should be viewed as a science.

According to him,

> 'Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced the main through a series of cases'[46]

Today, the case method is unquestionably the primary method of instruction in U.S. law schools. In fact, it remains the most significant

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[45] Dr. Shahdeen Malik, 'Reading cases- Why and How', in Abdullah Al Faruque (ed) *Cases and Materials on Clinical Legal Education*, (HEQEP 2016) 11.

[46] C. Langdell, SELECTION OF CASES ON THE LAW OF CONTRACTS VI, (Boston: Little Brown & Co 1871).

American contribution to legal education. Langdell's case method had marked a fundamental departure from existing teaching methods. He did not lecture students about the meaning of judicial decisions. Instead, he asked students to read decisions and to decide for themselves what the decisions meant. Langdell's interest in the case method stemmed from his beliefs about law. Langdell viewed law as a 'science' and believed that law should be studied by scientific methods. In his opinion, case study is a scientific method as it is an effort to uncover the fundamental rules and principles of law.

In the case study method, students examine cases as primary source materials and then they are expected to reach their own conclusions about how problems should be resolved. The teacher's function is merely to stimulate student's thought in a Socratic fashion. One justification is that the case method provides a desirable context for learning law. Since judicial opinions involve real people mired in real controversies, they can stimulate greater student interest.[47]

However, the case method is not without criticisms. The main criticism against the case method is that pure case method of teaching would teach students to regard law as a mere aggregation of cases.[48]Some other limitations of the case method are more difficult to overcome. For example, one of the major limitations is that it affords students insufficient insight into how lawyers develop cases at the lower level of judiciary. Students only read appellate opinions that involve cases already processed by both lawyers and judges, but they do not see how lawyers develop cases in terms of deciding which legal principles to invoke, developing, and ascertaining the facts, and deciding how to present the facts in relation to the law.[49]Some criticise the case method because it places too much emphasis on judicial decisions, and pays little attention to learning lawyering skills. Another limitation of the case method is that it is not appropriate for every subject of law.

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[47] Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILLANOVA LAW REVIEW 517 (1991).

[48] *Id. See also* Paul D. Carrington, *The Missionary Diocese of Chicago* 44(4) JOURNAL OF LEGAL EDUCATION 467 (1994).

[49] *Id.* 591.

However, case method is appropriate tool for most of the subjects like constitutional law, criminal law, tort law, law of contract, it may not be appropriate for teaching theoretical subjects like jurisprudence and legal theories. Despite of these limitations, the case method is widely viewed as a learning tool, and it facilitates studying law in a more complete way. Case method produces significant learning outcomes in the field of legal knowledge[50] and useful for future lawyers for a critical and reflective practice of the law.[51].

Overcoming Problem of Bifurcated Legal Education

According to Weinrib, legal education exists at the confluence of three activities: the practice of law, the enterprise of understanding that practice and the study of law's possible understandings within the context of a university.[52] The central challenge that has faced legal education is how to integrate the three activities. One critique of legal education laments the growing disjunction between the practice and the university study of law: 'If law schools continue to stray from their principal mission of professional scholarship and training, the disjunction between legal education and the legal profession will grow and society will be the worse for it.'[53] While in most of the countries law teachers are not required to practice law, there is no bar for them to practice law. In Bangladesh, law teachers are neither allowed for law practice nor expected to maintain any connection with any aspect of professional practice. Even they are not allowed to write amici briefs on important cases or represent clients pro bono. Thus, legal academy in Bangladesh is not allowed to take part in bar activities. Consequently, law teachers as a group are divorced from real life scenario and are typically uninformed about legal developments in the judiciary. As a result, the academy and the legal profession are seen as

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[50] Luciano D. Laise, *The Teaching of Philosophy of Law and the Case-Method: Some considerations on its challenges in Latin America*, 10(2) REVISTA DE ESTUDOS CONSTITUCIONAIS, HERMENÊUTICA E TEORIA DO DIREITO (RECHTD) 109-115 (2018).

[51] F.M. Toller, *Foundations for a Revival of the Case Method in Civil Law Education*, 3 JOURNAL OF CIVIL LAW STUDIES 21-65 (2010).

[52] Weinrib (n. 40.) 296.

[53] Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession,* 91 MICHIGAN LAW REVIEW 34, 41 (1992).

two quite distinct institutions. This affects both teaching and scholarship. Due to detachment from the courts, legal scholarship is of decreasing utility for lawyers and judge both.[54] According to West, 'The main reason for the ire of the legal profession, however, when its members contemplate the legal academy's lack of involvement or active disdain for the profession, the poor preparation that results of law graduates for the practice of law.'[55]

Introducing Research Informed Teaching in Law

Research is considered an important requirement for developing legal analysis, legal reasoning and solving legal problems. Teaching and research – two aspects of learning process are often called as integral part of higher education, and both are central to the university as institution. What is the appropriate form of teaching in law has always been debated. While it is well accepted that effective legal education requires not only pedagogical approach to teaching, but also it demands problem-solving skill, participatory learning process, and brain storming, small group discussion, and tutorials as teaching method. Is there any role of research in teaching? What is its significance for the teaching of law in particular? Should there be any impact of research on teaching? Generally, teaching and research are treated as two separate and distinct academic activities, and as such research and teaching are difficult to combine. But nexus between these two spheres of academic activities is now well established in globally reputed universities for many disciplines including law. Teaching and research are now treated complementary aspects of learning by many universities. It is now well accepted that integration of teaching and research can be mutually reinforcing, enriching and beneficial. While excellence in research is not the only precondition for high quality in legal education, undoubtedly, research informed teaching enhances quality of teaching, and it leads to dynamic teaching. Research informed teaching means that research and teaching are fully integrated in curriculum and the individual teacher's primary focus is on teaching which is informed by his or others' research findings. Research informed teaching goes beyond

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[54] *Id.* 78.

[55] West (n. 8.) 134.

reliance on textbooks, acts as a means for engaging students in learning through research and provides a way of critical thinking. Now a days, teaching at university is not only concerned the transmission of knowledge but also encouraging the search for and discovery of new knowledge which can be done through research. Thus, a rigid division between teaching and research is not helpful for students who seek to acquire deeper understanding of the complex issues. On the other hand, a strong teaching-research nexus can be useful in deepening students' understanding of the knowledge bases of discipline; building of students' academic capabilities; development of students' capacity to conduct research and their capacity for independent learning. Research-informed teaching can involve a range of activities including dissemination of research findings among students, teaching students about research processes and methodologies, and engaging students in research activities and projects. Teaching and research can be integrated by introducing the latest research findings in teaching and by encouraging academics to recognise the connections between their research and teaching. The ultimate purpose of research informed teaching is to develop intellectual curiosity as well as skill of research and critical thinking among students. Thus, law curriculum needs to integrate research, should broadly define research objectives, and link research and teaching.

Linking research and teaching can help students in designing research strategies, collecting, and analysing data, enhancing research skill, and discussing and presenting research findings. Involving students in research activities can be useful for contextual approach to learning. Conducting and drawing on research into student learning can make teaching evidence-based, relevant, and creative. But implementing research informed teaching requires a research culture that should be permeated in all teaching and learning activities of an institution. Research generates knowledge and such knowledge may aid and improve an academic's teaching. Integration of teaching and research is essential in advanced fields of law as the strict separation between research and teaching can make learning process isolated from the practical legal world. It is also necessary because the nature of law cannot be fully understood and taught without having some knowledge of how the legal system operates. Thus, research and

teaching should be perceived as complementary as research informed teaching can enhance students' their understanding of the cutting edge issues of law, and their ability to assess and evaluate the key concepts of law.

However, maintaining an appropriate balance between teaching and research is challenging task and benefits of research informed teaching should not always be 'taken for granted'. To achieve a positive nexus between teaching and research, law schools should encourage individual academics' teaching activities to be informed by research findings. A positive nexus between teaching and research must be supported by the institution in its strategic objectives, vision, and mission. Thus, the existence of a positive nexus between teaching and research should not be assumed. Rather, a positive nexus must be explicitly incorporated in culture, curriculum, and strategic vision of law schools. Many law schools of the high ranking universities have undergone a significant shift changing from solely teaching activities to incorporating research activities, from traditional teaching method to research-led and problem-solving approach to teaching. Legal research is not part of legal' education at all in Bangladesh. It becomes imperative for universities of Bangladesh in general and law schools to emulate this global trend to achieve excellence in higher education.

Promoting Collaboration in Legal Education

The traditional model of legal education is sometimes criticised on the ground that it is highly individualised.[56] In fact, this 'individualism' is pervasive in legal education, both in terms of how legal academics work and in terms of how students learn and are assessed.[57] Zimmerman asserts that 'cooperative and collaborative learning cut right to the heart of traditional legal education and challenge its underlying traditions.'[58] It is against this background that collaborative learning has emerged as a new teaching method in many law schools. The main strength of the collaborative learning is that in contrast to competitive and individualistic learning, students can work together

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[56] Keyes & Johnstone (n. 1.) 549.

[57] *Id.*

[58] Clifford Zimmerman, *Thinking Beyond My Own Interpretation: Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZONA STATE LAW JOURNAL 957, 986 (1999).

cooperatively to accomplish shared learning goals through collaborative learning.[59] Each student achieves his or her learning goal if and only if the other group members achieve theirs.[60] Thus, **C**ollaborative learning is the educational approach of using groups to enhance learning through working together.[61] In collaborative learning process, through defending their positions, reframing ideas, listening to other viewpoints and articulating their points, learners gain a more complete understanding as a group than they could as individuals.[62] This approach actively engages learners to process and synthesise information and concepts, rather than using rote memorisation of facts and figures. Learners work with each other on projects, where they must collaborate as a group to understand the concepts being presented to them.[63] It turns learning into a truly active process and promotes learning from others viewpoints.[64] In contrast to the large group traditional law school experience, collaborative learning, composed of smaller groups, embraces collaborative learning that fosters professional and emotional growth among students.[65] But this collaborative learning method is hardly addressed in our legal education.

Integration of Technology in Legal Education

Technological changes and innovation are profoundly shaping the legal education and legal profession. While technology itself cannot improve the quality of legal education, its' use and availability can facilitate students and teachers' access to legal materials and teaching methodology. There is a need to ensure that legal education evolves to reflect technological changes in the profession itself and the workplace

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[59] David W. Johnson, Roger T. Johnson, & Karl A. Smith, 'Cooperative Learning Returns to College: What Evidence Is There That It Works?' *available at* https://eipd.dcs.wisc.edu/non-credit/LAAS-nonDEPD/LMOWS/LMOWS_6500_Leadership/hypothesis%20readings/M6/Cooperative%20learning%20returns%20to%20college%20what%20evidence%20is%20there%20that%20it%20works.pdf (last visited October 15, 2020).

[60] *Id.*

[61] What is Collaborative Learning? *available at* https://www.valamis.com/hub/collaborative-learning (last visited October 18, 2020).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] Donna Erez-Navot, *Tools for the Clinical Professor: Applying Group Development Theory to Collaborative Learning in Law School Mediation Clinics*, 69 DISPUTE RESOLUTION JOURNAL 3 (2014).

more broadly, for students that go into other professional fields. Integration of technology into legal education, including online educational materials that can be freely accessed and shared, such as textbooks, lecture notes, websites, and video, as well as the application of modern communication technologies can greatly facilitates access to legal materials. According to one scholar, 'Integrating technology into modern legal education, particularly in contexts that involve collaboration and practice-based learning opportunities, helps to ensure that law graduates not only acquire necessary legal knowledge, but also have the skills to be effective legal practitioners when they enter the profession, or indeed other workplace environments.'[66] Law graduates require the capacity to work collaboratively with others and to utilise contemporary information and communications technology applications in professional practice.[67] Integrating these technologies into legal education can assist students to understand the growing involvement they will have in their professional lives.[68]

According to a report of the Law Society of New South Wales of Australia, 'Legal education should offer the opportunity for students to engage with a variety of digital media. The aim of this approach is to engender an understanding of different digital tools and their implication for the practitioner and for society. They should support students in developing professional and personally ethical approaches as well as a digital footprint that represents their personal values system.'[69]

In particular, digital technology is changing the nature of work in the legal profession and changing the skills required of law graduates.[70] Digital technologies are required to be used in law teaching to prepare students for future legal practice and to develop their

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[66] Marcus Smith, *Integrating Technology in Contemporary Legal Education,* 54(2) THE LAW TEACHER 209-221 (2020).

[67] *Id.* 221.

[68] *Id.* 215.

[69] Kate Galloway, *A Rationale and Framework for Digital Literacies in Legal Education*, 27 LEGAL EDUCATION REVIEW 1, 24 (2017).

[70] Law Society of New South Wales 2017, *Flip: The Future of Law and Innovation in the Profession.*

general capacity to use these forms of technology.[71] Galloway points out that the challenge for legal academics lies in re-imagining the way in which law is taught and traditional teaching and thinking may stifle the development and reform of the law itself. Thus, legal academics' reflection on their own thinking and practice in digital contexts is central to the reform of legal education.[72] Integration of information technology in teaching and learning will make it easier, attractive and more effective to communicate ideas with the students and teach complex subjects meaningfully in classrooms. Considerable efforts are needed to integrate technology in legal education in Bangladesh.

Conclusion

Legal education of Bangladesh needs to capture global trends of changes mentioned above and it should be redesigned to enable, stimulate, and guide students to develop their own conceptions and abilities. Effective law teaching should not only engage students in critical analysis, but also it should educate students about why such analysis is important. Currently legal education is content driven and little attention is paid to skill-based learning. Integration of knowledge, skill and value in legal education is desirable as the strict separation between theory and practice should not be maintained as both law students and law teachers should not continue to be isolated from the practical legal world.[73] The legal education system of Bangladesh should also embrace the interdisciplinary approach to study law because the nature of law cannot be fully understood and taught without having some knowledge of other disciplines which are intertwined with law. It is also important that individual teacher develops a particular teaching philosophy to direct students to attain a learning objective of studying law. In Bangladesh, introducing research informed teaching, case method in teaching, problem-solving skill, taking an interdisciplinary approach, adopting diverse

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[71] Hongdao and others, *Legal Technologies in Action: The Future of the Legal Market in Light of Disruptive Innovations*, 11 JOURNAL OF SUSTAINABILITY 1015 (2019).

[72] Galloway (n. 69.) 25.

[73] Richard Lewis, 'Clinical Legal Education Revisited' (2000) *available at* https://core.ac.uk/download/pdf/8816908.pdf (last visited September 17, 2020).

assessment tools, recognising collaborative learning methods can enhance the quality of legal education significantly. Legal education curriculum of Bangladesh needs to be reviewed to integrate these developments in order to make legal education more practical, relevant and effective.

Critique of Three Farm Laws*

*Gurpreet Singh***

The two Agriculture Acts, 'The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020' and 'The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act 2020' along with 'The Essential Commodities (Amendment) Act, 2020' have caused havoc and sound like death warrants for the large chunk of farmers, particularly small and marginals. The background of these Acts must be understood in the context of the multilateral 'Agreement on Agriculture' under the WTO Agreement, 1995. Bringing these Acts into force is a move towards enforcement of provisions of the 'Agreement on Agriculture'. Under this agreement, the member parties to the WTO are supposed to reduce substantial agriculture support and protection.[1] It further provides that all members of the WTO will commit towards providing free 'market accesses' to all by eliminating the trade barriers such as 'reduction of tariffs' and 'domestic support commitments.[2]

These Acts would open up the agriculture sector to the big Multi-National Companies (MNCs). The obvious risk is the exposer of small and marginal farmers who constitute approximately 86.21% of the entire farming population.[3] Either they would be wiped out or they

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* This article was accepted for publication before the withdrawal of farm law legislations by the Government of India and was in print. Therefore, the critical comments by the author should be considered from that perspective.

** Dr. Gurpreet Singh is an Assistant Professor with Law Centre-1, Faculty of Law, University of Delhi and can be reached at randhawagurpreetsingh207@gmail.com.

1 Agreement on Agriculture, *available at* https//www.wto.org/ (last visited Jan. 15, 2021).

2 *Id.*

3 Varun B. Krishnan, *What the agriculture census shows about land holdings in India*, The Hindu (Delhi, 3rd October, 2018).

would turn into farm labourers in their own farms. This article highlights some contentious provisions of these Acts and contends that the farmers have a genuine fear that these Acts would give a free hand to corporates to loot and exploit them legally and factually. Furthermore, these Acts are considered as posing a danger to India's food security and public distribution system.[4] The Supreme Court's unprecedented intervention has resulted in no resolution.

Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020

The reasons for introducing this Act are to 'enhance income, put in place an effective and conducive policy regime for agreements and holistic development of the agriculture sector.'[5] This Act makes the provisions for contract farming. On the line of GATS, 1994, the Central Government has smartly incorporated the definition of 'agriculture services' under Section 2(d) which means that agriculture is no longer an 'occupation'.[6] The terms 'service' and 'occupation' have different connotations. The term 'service' is generally used in sense of employer and employee relationship.[7] Hence, in service, an employee works for another. On another hand 'occupation' is generally understood as self-employment in which a person works under no one's command and direction.[8] In India, agriculture has been considered an 'occupation'. Replacing the 'occupation' with 'service' has become necessary to bring the agriculture sector under this act. Because the contract can be done for 'service', not for the 'occupation'. Section 2(g) defines the

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4 *See,* Ashish Mital, *Farm Laws: Claims and Reality,* The Indian Express, (Chandigarh, 9th October, 2020).

5 The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020, *available at* egazette.nic.in (last visited Feb. 11, 2021).

6 *Id.,* s. 2(d).

7 *Black's Law Dictionary*, Bryan. A. Garner (ed.), Seventh Edition, (St. Paul, Minn., 1999). Service has been defined as 'An intangible commodity in the form of human effort, such as labour, skill, or advice.'

8 *Concise Law Dictionary*, P. Ramanatha Aiyar (ed.) (Wadhwa & Company Nagpur, 2004). Occupation has been defined as 'The Principal business of one's life, vocation, calling, trade, the business which a man follows to procure a living or obtain wealth.'

farming agreement as 'a written agreement entered into between a farmer and a Sponsor, or a farmer, a Sponger and any third party, prior to the production or rearing of any farming product of a pre-determined quality, in which the Sponsor agrees to purchase such farming produce from the farmer and to provide farm services.'[9] The term 'third party' has not been defined under the Act.[10] Section 3 contains the terms and conditions for the supply of such produce, including the time of supply, quality, grade, standards, price and such other matters.[11] Section 4(4) provides for a third-party qualified assayer will monitor and 'certify regarding quality, grade and standards of produce'.[12]

From practical aspects, the contract framing will prove detrimental to farmers. First, they are not educated enough to understand the legal intricacies of an agreement. They are easy to be misguided.[13] On the other hand, these big corporates have highly paid legal experts who are smart enough to draft the terms and conditions of agreements in their favour. Under Section 6(2), the sponsor has a right to inspect the quality or any other feature of such produce and can refuse to accept the produce if he found it unsatisfactory.[14] This clause gives an upper hand to the sponsor. He can either refuse to accept the delivery or reduce the price of produce under the quality inspection. The farmers will be left at the mercy of these corporates. The sponsor cannot be held responsible for this rejection under the Act. This sole clause has

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[9] *Supra* n. 5, s. 2(g).

[10] *Supra* n. 4. Ashish Mittal asserts that this Act has created the five layers of middleman. They are sponsor and the middleman under s. 2, farmer service providers under s. 3(1)b, assayers under s. 4(4) and aggregator under s. 10.

[11] *Supra* n. 5, s. 3.

[12] *Id.,* s. 4(4).

[13] *See,* Didem Tali, *available at* India's Rural Farmers Struggle to Read and Write. Here's How 'Agri Apps' Might Change That. - GOOD (last visited Oct. 17, 2021). 'India's rural areas—especially agricultural communities, frequently comprised of lower-caste individuals—face much higher rates of illiteracy than more metropolitan areas. A recent government study estimated that 32 percent of India's rural population is illiterate, compared to 15 percent in urban areas. For farmers, that percentage may be even higher.'

[14] *Supra* n. 5, s. 6(2).

the potential to eliminate the poor and marginal farmers from the agriculture sector.

The Act does not define 'pre-determined quality' of the crop. Rather, the quality of any crop depends upon the climate conditions which are not under the control of farmers. In such a scenario, what will happen if the crop does not meet the required 'pre-determined quality' despite the best efforts by the farmers? The Act does not also provide the qualifications of assayers. How can the impartiality of 'qualified assayers' be maintained? The Act does not provide an answer to this vital question.

The reality is that Section 5 does not make the provision for this. This section provides that 'to ensure best value to the farmer 'such price 'may be linked to the prevailing prices in specified APMC yard or electronic trading and transaction platform or any other suitable benchmark prices.'[15] Thus, this section nowhere talks about the MSP or the Government procurement rate. 'In fact, there will be no declaration of MSP for all crops, determined by Swaminathan formula of C2 costs plus 50 per cent.'[16]

Another noteworthy clause under this Act is Section 7(2) which gives a free license to the corporates to hoard the farming produce without 'quantity restrictions' or 'stock limit' if the produce has been purchased under the farming agreement.[17] This clause gives overriding effect to this Act over the Essential Commodities Act, 1955. The implications of this clause are very dangerous and have a far-reaching impact. Now, these big corporates have a free hand to hoard the stock and create a false scarcity in the market in order to get the maximum gains without legal restrictions. It will increase inflation and real sufferers will be the poor and the middle class.

The next, assault caused to the farming community is by removing the jurisdiction of the judicial courts under the Dispute Settlement. At the initial stage, the dispute will be presented before the Conciliation Board which is likely to be tilted towards corporates as they are smart

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[15] *Id.*, s. 5.

[16] *Supra* n. 4.

[17] *Supra* n. 5, s. 7(2).

enough to outwit the farmers and their representatives. If the case is not solved at this stage, the matter will be referred to the Sub-Divisional Authority and in case of appeal, the Collector or Additional Collector will decide. Unlike judicial officers, they all are executive officers under the control of the government and enjoy less trust from the farmers. These provisions have been inserted unmindfully into both the legislations without considering the fact that the majority of farmers in India are marginal and poor holding a maximum of two acres of land. How can they compete before the fleet of shrewd lawyers engaged by these giant corporates to represent them? Clearly, the legal mechanism set up under the Act is in favour of the corporates.

Lastly, the Government of any state is also helpless to help the farmers because Section 20 of this Act has overriding effect over any state law which simply means that in a case of contradictions with state acts, the provisions of this Act will prevail.[18] This clause impedes any effort of the state Government to nullify the provisions of this Act. In another sense, any prevalent act of any state Government will have no more legal sanctity if that violates the provisions of this Act.

The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020

The objectives of this Act are to provide, 'the farmers and traders the freedom of choice relating to sale and purchase of farmers' produce' and 'to promote efficient, transparent and barrier-free inter-State and intra-State trade and commerce of farmers' produce outside the physical premises of markets or deemed markets notified under various State agricultural produce market legislations'.[19] However, the chief aims of the Central Government are to withdraw from the agriculture sector and promote the private players. These objectives have been achieved by the Central Government by carefully drafting the various provisions of this Act which will be examined here.

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[18] *Id.*, s. 20.

[19] The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020, *available at* egazette.nic.in (last visited Feb. 11, 2021).

Under this Act, the traders have the freedom to trade anywhere in India without any legal restrictions whereas poor and marginal farmers who in fact, constitute an outnumbered majority (86.21%) have limited resources to sell their produce in any part of India.[20] These shark traders such as giant MNCs will buy out the poor and marginal farmers because they have 'the historically proven' weak bargaining power. Thus, in a real sense, this Act is not a freedom for the farmers to trade anywhere but freedom to be exploited by any big traders of any part of India without legal barriers.

Another hallmark of this act is electronic trading and transaction platform defined under Section 2(a), 'to facilitate direct and online buying and selling for the conduct of trade and commerce of farmers' produce through a network of electronic devices and internet applications, where each such transaction results in physical delivery of farmers' produce.'[21] This Act preconceives that the farmers are highly educated and techno-savvy whereas that the majority of farmers know nothing about smart mobile phones. Moreover, the Act nowhere makes the provision for educating the framers regarding electronic trading and, its complexities and intricacies. Without the know-how knowledge of electronic trading, the farmers will be more vulnerable to cyber frauds and exploitation. According to the Indian Telecom Services Performance Indicators, 'the total number of internet subscribers per 100 people in India stands at 57.29, with this number

[20] *Supra* n. 4. 'The reality: 86.2 per cent of Indian farmers own less than 2 hectares land. They are under heavy compulsion to sell their crops immediately after harvest to pay their debts, buy inputs for the next crop, and their other needs and because they have no capacity to store the crop, to transport it (which government procurement did) and bargain for the best price, these farmers go to the nearest mandi. The claimants of 'sell anywhere' are obviously unconcerned with the peasant's plight. Where is the alternative? Companies are alternative to what? The Acts do not say, what they should, that Corporate will be alternative to MSPs and government procurement. There is no 'freedom of choice'.'

[21] *Supra* n. 17, s. 2(a).

being around 3 times higher for urban India (101.74)'[22] 'As per the report of the 75th round (2017-2018) of the National Sample Survey (NSS), household-level statistics reveal that only 4.4% of rural households own a computer as compared to 23.4% for urban households. In terms of access to the internet, 42% of urban households have access to the internet while the corresponding figure for rural households is only 14.9%.'[23] As a result, the claim of an electronic trading and transaction platform appears to be a farce in the face of India's digital divide between urban and rural areas.

This Act would kill the existing Mandi System established under the State APMC Acts (Agricultural Produce Market Committee Act), which regulates markets for agricultural produce in the states. Section 2(f)(ii) makes the provision for establishing the private mandi. It defines, 'private market yards, private market sub-yards, direct marketing collection centers, and private farmer-consumer market yards managed by persons holding licenses or any warehouses, silos, cold storages or other structures notified as markets or deemed markets under each State APMC Act in force in India.'[24] Although this Act has not abolished the state-managed mandi system under the States APMC acts yet, it is the first step towards gradual withdrawal from the state mandi system established under the states APMC Acts. The existing state mandi system under the APMC acts is a very important source of state revenue. As per the Punjab Government figure, the state has generated Rs. 10,382 crores as state revenue in 2020-2021. This revenue is utilised for the development of mandi and rural infrastructure like construction or repairing of rural roads network.[25] However, the present Act under Section 6 abolishes the 'market fee or cess or levy'.[26] This Section is an assault on the state revenue and the

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[22] *See,* Indian Telecom Services Performance Indicators for July-September 2020 quoted from Venugopal Mothkoor and Fatima Mumtaz,The digital dream: Upskilling India for the future, *available at* The digital dream: Upskilling India for the future (ideasforindia.in) (last visited October 17, 2021).

[23] *Id.*

[24] *Supra* n. s. 2(f)(ii).

[25] *Revenue collection in Punjab up by Rs 10,382 crore in 2020-21*, The Tribune (Chandigarh, 2nd April, 2021).

[26] *Supra* n. 17, s. 6.

Central Government has not provided an alternative mechanism for reimbursement of this revenue loss. The motive behind this move is to phase out the state mandi system with the fund starvation and promote the private players who could dominate private mandis with money and muscle power.[27]

The Essential Commodities (Amendment) Act, 2020

The Essential Commodities (Amendment) Act, 2020 has brought to amend Section 3 of 'The Essential Commodities Act, 1955'.[28] While stating objects, the Central Government claims that the farmers have been unable to obtain better prices due to a lack of investment in cold storage, warehouses, processing, and export as entrepreneurs are discouraged by the regulatory mechanisms in this Act. India has become surplus in most agricultural commodities, farmers have been unable to get better prices due to lack of investment in cold storage, warehouses, processing and export as entrepreneurs get discouraged by the regulatory mechanisms in the Essential Commodities Act, 1955. This tall claim looks farce when one looks at the Global Hunger Index 2021 in which India ranked at 101 among 116 countries even much behind Bangladesh, Pakistan and Nepal.[29] Moreover, who has the responsibility to invest in cold storage, warehouses, processing and export? It is the collective failure of the Central and State Governments which have not been able to cash the opportunities to excel in the agriculture sector. In order to hide its failure, the Central Government wants corporates to take over the agriculture sector. Whether the government will do some basic governmental functions or it will abjure in favour of private players as the trends have been already suggesting is a pertinent question to be raised.

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[27] Dheeraj Mishra, Exclusive: Finance Ministry Had Endorsed Mandi Tax, Which BJP Is Criticising to Counter Protests, The Wire, *available at* https://thewire.in/(last visited December 29, 2020).

[28] The Essential Commodities (Amendment) Act, 2020, *available at* egazette.nic.in (last visited Feb 11, 2021).

[29] Global Hunger Index (India), *available at* India - Global Hunger Index (GHI) - peer-reviewed annual publication designed to comprehensively measure and track hunger at the global, regional, and country levels (last visited Oct. 17, 2021). In comparison to India, Pakistan is at 92 and Bangladesh and Nepal are at 76.

By amending Section 3 of the Act, the Central Government has enabled the corporates to hoard even the basic essential commodities such as 'foodstuffs, including cereals, pulses, potato, onions, edible oilseeds and oils'. The Central Government may regulate these items 'by notification under extraordinary circumstances which may include war, famine, extraordinary price rise and natural calamity of grave nature.'[30] The analysis of this provision reveals that the Central Government has imposed restrictions on its powers in order to promote agro-business industries. The amendments in Act will have serious repercussions for consumers all over India. It has the potential to increase inflation at an unprecedented level. If the corporates invent in cold storage, warehouses and processing, they also expect that they will sell the products at their prices. There is always a danger of creating false scarcity in the market by hoarding agricultural products. What will happen to the food security and public distribution system are also two important confronting issues? Whether the private players will ensure food security when millions of people in India are undernourished and poor?

Ashish Mital points out that the subjecting the food security to the world market, the MNCs will have the freedom to import food and grain at the cheapest rate and these MNCs with the collaboration of the Indian companies 'will integrate Indian agricultural production with world markets and demolish the freedom of farmers and work to the detriment of the country's food security.' This is also a threat to India's food and political sovereignty because there is a possibility that these companies will 'promote the banned and dangerous GM seeds, terminator seed technology, which has been restrained due to protests. They will erode our seed sovereignty and threaten our food and political sovereignty. No country has developed by handing over its agricultural sovereignty and development of farmers to foreign powers.'[31]

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[30] *Supra* n. 17, s. 3.

[31] *Supra* n. 4.

Reasons for Farmer Unions' Opposition to Farm Laws

The farmer unions, right from the first meeting with the Central Government have rejected these Acts and amendments. Conceding to the amendments as suggested by the Government have many legal hurdles. According to the farmer unions, both Acts are unconstitutional because they violate the provisions of the Constitution. As per the Constitution, agriculture is exclusively within the domain of the state subject enshrined in the State List under entry 14 which provides, 'Agriculture, including agriculture education and research, protection, against pests and prevention of plant diseases.'[32] The Central Government has wrongly encroached upon the State subject. In fact, the Central Government has enacted these Acts under entry 33 of the Concurrent List which does not empower the Central Government to enact the laws on agriculture.[33] The main argument that has been given by the farmer unions is that the farmers do not produce 'foodstuffs. They produce the 'food grains.

The enactment of these Acts is a classic example of colourable legislation. Conceding to amendments will weaken the stand of farmers and put the stamp of legitimacy and constitutionality on these Acts. This would be a self-defeating goal.

The way these bills were passed in the Rajya Sabha (Upper House) also needs to be scrutinised by the Supreme Court. The Supreme Court has a sacrosanct responsibility to protect the Constitution. Under this, the Supreme Court has the inherent power to examine the conduct of the Deputy Chairman who violated the rules and procedure regarding

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[32] The Constitution of India, 1950. Entry 14 of the state list makes the provision: 'Agriculture, including agricultural education and research, protection against pests and prevention of plant disease.'

[33] Amit Jaiswal, What Will the Legal Challenge to the Modi Government's Farm Bills Look Like? The Wire, *available at* https://thewire.in (last visited Oct. 5, 2020). Entry 33 reads as 'Trade and commerce in, and the production, supply and distribution of (a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products; (b) foodstuffs, including edible oil seeds and oils; (c) cattle fodder, including oilcakes and other concentrates; (d) raw cotton whether ginned or unginned, and cotton seeds; and (e) raw jute.'

the passing of a bill in the Rajya Sabha. It is a matter of record that the opposition MPs demanded a division (recorded votes) under the rule and the Deputy Chairman was bound to grant.[34] This sole technical flaw in the procedure of passing these bills makes them unconstitutional. Being a guarantor of the Constitution, the Supreme Court has *ipso facto* jurisdiction to examine this issue in detail. Furthermore, the Central Government could not claim that this would be interfering with the operation of another organ because this is a case of rule violation, and a healthy democracy operates on the principle of checks and balances.

Supreme Court and the Constitution of Committee

The entry of the Supreme Court (SC) has brought a new shift in ongoing farmers' agitation. Many farmer unions never filed a case before the SC considering that their agitation against the farm laws is purely political. However, while hearing the clutch of petitions to remove the farmers from the roads/highways leading to Delhi, the Apex Court passed an order on January 18, 2021.[35]

This is a unique order. By this order, the SC stayed the implementation of the three farm legislations. However, what is the legal basis of staying the farm legislations is not clear from the order. The general principle of legal jurisprudence is that an Act is always presumed to be legal at first instance. The only strong legal basis for staying the Central legislation is the unconstitutionality on the face of it. Interestingly, the order also contains the third category of writs that support the farm legislations.

The Supreme Court also constituted a committee of four experts for the purpose of listening to the grievances of the farmers relating to the farm laws and the views of the Government and to make recommendations.[36] This committee met with several objections. In the

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[34] S.N. Sahu, The Way Farm Bills Passed in Rajya Sabha Shows Decline in Culture of Legislative Scrutiny, The Wire*, available at* https://thewire.in (last visited Jan. 17, 2021).

[35] *Rakesh Vaishnav* v. *Union of India* Writ Petition(s)(Civil) No(s).1118/2020.

[36] *See, Supreme Court-appointed committee on farm laws submits its report, hearing on the matter scheduled for April 5,* Hindustan Times (Delhi, 18th October, 2020).

first place, nobody demanded the committee. All experts in the committee were pro-government and their views were already in the public domain. Hence, their neutrality was doubtful. The farmer unions rejected this committee because they rightly believed that they have been fighting a political battle.[37] Rather, the recent track record of the Supreme Court is not up to mark. Eroding the public confidence in the Supreme Court is also a worrisome signal. The Supreme Court must retrospect its role and restore its credibility.

The order also stated that 'the representatives of all the farmers' bodies shall participate in the deliberations of the Committee and put forth their viewpoints'.[38] The word 'shall' indicate that the participation of representatives of all farmers unions whether they support or oppose is mandatory. How could the Apex Court's order compel those farmer unions which had never filed a case before it? Rather, their stand was clear from day one. They had been constantly opposing the constitution of such kind of committee. They believed that it was a delaying tactic and attempted to weaken their agitation.

The Supreme Court has clearly gone beyond its role by wading into conflict management. It has ended up performing a hybrid role which some scholars have called 'the executive court' while some others have baptised as 'legislative court' but certainly not the judicial court.'[39]

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[37] *Id.*

[38] *Supra* n. 35.

[39] Anuj Bhuwania, 'Acting Like a Panchayat Than a Constitutional Court', *available at* https://www.livelaw.in/videos/ (last visited Feb 11, 2021).

Plastic Waste:
A Challenge to Sustainable Development

Sneh Yadav*

'The earth does not belong to the man: man belongs to the earth…All things are connected like the blood which unites one family…Whatever befalls the earth, befalls the sons of earth. Man did not weave the web of life: he is merely a strand in it. Whatever he does to the web he does to himself.'[1]

Introduction

This world is one big family, which will live together and drown together, if the time comes. It may seem very idealistic and philosophical now, but this is the law of nature, this is how we were created, and experiences tell us this is how we will have to live on earth. Nature has provided us with everything that we need. It is famously said by Mahatma Gandhi, '*Nature has enough for man's need but not for man's greed.*' If we look at what we now call as 'primitive' or 'backward' societies, the way they coexisted with nature was remarkable. There was a symbiotic relationship, relation of care and respect, of being grateful to nature. Nature has its way of balancing itself, the food chain took care there was no waste left and there is equilibrium. Natural recycling of all waste was done, scavengers are meant to eat dead animals, leftover is decomposed by small insects and micro-organisms; animal and plant waste acts as manure for the soils and helps in growth of plants and at the end forest provide oxygen to us. However human race has been destroying this balance of nature.

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* Sneh Yadav is an Assistant Professor with the Campus Law Centre, Faculty of Law, University of Delhi and can be reached at snehy123@yahoo.co.in.

1 Letter from Chief Seattle, patriarch of the Duwamish and Squamish Indians of Puget Sound to US President Franklin Pierce in 1885. It was written as reply to US President's wish to buy their land, *available at* http://www.csun.edu/~vcpsy00h/seattle.htm (last visited August 15, 2021).

Plastic has become an indispensable part of our lives, right from the time we get up from bed till we sleep we are surrounded with plastic, our toothbrush, bed, slippers, utensils all are made of plastic. This was not the case some years back. The discovery of plastic brought about a revolution. Plastic is light weight, durable, transparent, and convenient to use. With these qualities plastic soon took over our lives. It gave huge impetus to industries. However, the drawbacks of using plastic were realised much later. Producing plastic is easy but disposing it off is difficult. One way of doing so is by recycling, but all plastics are not recyclable, so most of plastic ended up being incinerated, thereby creating air pollution, or it was dumped into landfills. Plastic takes hundreds of years to degenerate. The pile of plastic waste in the landfills kept on increasing thereby damaging the soil and generating chemicals that would percolate down the earth into ground water. Biggest problem was with respect to the single use plastic, that means plastic which is of one time use only. Usage and improper disposal of plastic caused several diseases like cancer, asthma, allergy, to name a few. Packaging industry is one of the major contributors to the plastic problem. This packaging is made of multilayer plastic which is essential for maintaining the freshness of the food item contained, but because of such composition it becomes non-recyclable. When we buy a packet of chips we throw the wrapper in five minutes, but it stays in the environment for hundreds of years.

Developed countries, especially USA is manufacturing huge amount of plastic waste, but they are not recycling it themselves because it is a labour intensive and time-consuming activity. So, what do they do with their waste? Earlier this waste was thrown away in the ocean. It went unnoticed for a long period of time, till the Great Pacific Garbage Patch[2] was discovered and the world woke up to this alarming situation. Plastic waste was thrown into the sea and ocean, it posed danger to numerous aquatic animals. For instance, polythene bag looks like a jellyfish, many turtles consumed it and later died because of the complication it caused in its system.

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[2] Jeannie Evers, *Great Pacific Garbage Patch, available at* https://www.nationalgeographic.org/encyclopedia/great-pacific-garbage-patch/ (last visited August 20,2021).

In sea, plastic eventually breaks down into very tiny plastic particles known as micro plastics. These micro plastics have entered our food chain. It is found in fishes and other aquatic animals. We consume these fishes and it enters our body. Studies have shown that microplastics are present in 90 percent of table salt that we eat.[3] In fact these tiny particles of plastic have found their way even in Antarctica[4]. Once the world community woke up to this problem of plastic waste being dumped into the ocean, there was international pressure and obligations under domestic laws for safe disposal of waste and to look for alternate ways of handling plastic waste. Now developed nations started exporting or dumping their waste to poor, developing or underdeveloped countries. These countries did not have proper technology to segregate and recycle the waste. Most of the waste ended up in landfills or was burnt. It proved to be highly detrimental to the health and environment of those countries. This is also against the principle of sustainable development. This paper will discuss how this plastic waste is managed and find out how sustainable it is.

Development and Environment

Nature has provided us with all the resources to fulfill our needs. However, with the technological advancement and development we have been causing immense damage to the environment. Our vehicles, factories, waste dumps and other sources are pumping atmosphere with gases like sulfur oxides, carbon oxides, chlorofluorocarbons, methane, chlorine. These gases degrade the environment and cause problems like acid rain, ozone depletion, global warming, climate change etc. There is an imminent need to do the balancing of development and environment, otherwise we will kill our planet. So, all the developmental activities must be sustainable, that is development must be in harmony with nature. Professor Gurdip Singh says that 'the

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[3] Laura Parker, *Microplastics found in 90 percent of table salt, available at* https://www.nationalgeographic.com/environment/article/microplastics-found-90-percent-table-salt-sea-salt (last visited August 15, 2021).

[4] Graham Readfearn, *Microplastics found for first time in Antarctic ice where krill source food,* The Guardian (22nd April, 2020) *available at* https://www.theguardian.com/world/2020/apr/22/microplastics-found-for-first-time-in-antarctic-ice-where-krill-source-food (last visited August 10, 2021).

need for sustainable development is so compelling and pressing that in its absence, man finds himself an endangered species.'[5]

Sustainable development as a concept was discussed for the first time in UN Conference on Human Environment at Stockholm in 1972. Sustainable development is defined in Brundtland Report as 'development that meets the needs of the present generation without compromising the ability of the future generation to meet their own needs'[6]. Developmental activities are inevitable for human subsistence, that is how we grow. Human started as cave dwellers and have now reached up to space, this is gift of technology and development. There is a need to make roads, hospitals, buildings and develop other infrastructure. But this development cannot be at the cost of environment. If development is unregulated and not restricted, then it would defeat the principle of sustainable development. Balancing had to be done between ecology and environment. This overlap between ecology and environment is where sustainable development lies.

In 1992, UN conference on Environment and Development was held in Rio de Janeiro, it also emphasised on sustainable development. Rio declaration on environment and development states that, 'The right to development must be fulfilled to equitably meet developmental and environmental needs of present and future generations'[7]. Also, 'to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.'[8] Agenda 21 also needs to be implemented by the states and UN Commission on Sustainable development has been given this duty of reviewing the reports of governments and international organisations for its compliance.

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5 Gurdip Singh, *Human Right to Sustainable Development: An Indian Perspective*, 3(2) SOOCHOW LAW JOURNAL, pp.53-89 (2006).

6 Report of the World Commission on Environment and Development, *Our Common Future* (1987) 43, *available at* https://sustainabledevelopment.un.org /content/documents/5987our-common-future.pdf (last visited August 10, 2021).

7 Rio Declaration on Environment and Development,1992, Principle 3, *available at* https://www.cbd.int/doc/ref/rio-declaration.shtml (last visited August 10, 2021).

8 Rio Declaration on Environment and Development,1992, Principle 4, *available at* https://www.cbd.int/doc/ref/rio-declaration.shtml (last visited August 10, 2021).

Third component was added to sustainable development at the World Summit of Sustainable Development at Johannesburg in 2002, that is, Social Development. Now, sustainable development has three dimensions of – environmental protection, economic development, and social development. All there must be merged, integrated and balanced to achieve the ultimate goal of sustainability.

It is generally believed that development and environment are antithesis to each other, however Prof. Gurdip Singh feels that 'they are in fact synthesis to each other, both are complementary and mutually supportive'.[9]

Poor Countries and Sustainable Development

It is an accepted fact that poverty is the biggest polluter. Poor countries become dumping grounds of waste generated by rich and developed countries. This waste, particularly plastic waste ends up being incinerated causing air pollution, or it is dumped in landfills there by polluting soil and underground water. Due to lack of technology poor countries depend on non-renewable source of energy which generated huge amount of pollution, whereas their rich counterpart has the technology to shift to green fuels. Here huge dependence on natural resources leads to their exploitation. For example, forests being cut to be used as firewood; due to lack of funds and technology factories cannot set up waste treatment plants so, the waste from factories ends up in river water, thereby polluting it. So, it becomes abundantly clear that development is extremely essential for preserving the environment. Development leads to generation of economic resources which can be used for preservation of environment. Johannesburg submit provides for setting up of World Solidarity fund with a motive to promote social and human development and to eradicate poverty in the developing countries.

Sustainable development is based on the principle of equity, which must be seen at two levels, namely intergenerational equity and intragenerational equity. Inter generation equity means equity between generations, where earth is not to be seen as only a resource to be exploited and to be used up by the present generation, rather resources of earth are a trust which has been passed on to us by our ancestors and

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[9] *Supra* n. 5.

we need to preserve it like a trustee and pass it on to the future generation. This does not mean that we will have no access to these resources at all, rather what it means is that we can enjoy them, but we need to pass on these resources to our future generation in no worse condition than how we received it. This shows intergenerational fairness and gives concept of planetary trust. Here each generation is the trustee and well as beneficiary of the earth's resources. Three principles of intergenerational equity are: conservation of options; conservation of quality; conservation of access.

Intra generational equity means equity between nations and within the nations. 'Intragenerational equity is a condition precedent to achieve intergenerational equity.'[10] While studying about intragenerational equity we need to understand that there are different social, economic, cultural circumstances prevailing in different parts of the world. There are inherent inequalities amongst nations. Goal of sustainability can be achieved only when all countries have equitable access to resources and are treated in a just and fair manner. It requires the developed counties to provide funds and environmentally friendly technology to the developing nations for capacity building and protecting the environment.

The developed and developing nations have common but differentiated responsibilities[11] to protect the environment. 'Despite international law's fundamental principle of sovereign equality, which treats all states equally regardless of its size or power, international environmental law distinguishes amongst the states through the principle of common but differentiated responsibility which seeks global solutions for global environmental concerns by considering state's differentiated degrees of responsibility for causing these problems and their divergent capacities to redress them.'[12] The responsibilities are different because developed countries are majorly responsible for causing environmental problems. 'The responsibilities are differentiated due to the difference in economies, the concept of

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[10] Gurdeep Singh, ENVIRONMENTAL LAW IN INDIA 27 (Macmillan, 2005).

[11] Nina E. Bafundo, *Compliance with Ozone Treaty, Weak states and the Principle of Common but differentiated responsibilities*, 21 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 461(2005).

[12] *Id.,* p.*462.*

intragenerational equity is based on the realisation that we have two planets, two worlds, two economies and two humanities.'[13]

There are two major economic systems in the world socialism and capitalism. In socialism state takes care of the basic needs of its citizens and in capitalism, profit earning is the sole purpose. After the second world war, it was era of cold war, where USA and USSR were trying to assert their position as the world power. Millions and millions were spent on arms and armaments, whereas people in developing countries and even in satellite states of USSR themselves were struggling for basic resources. Ultimately with the disintegration of USSR capitalist system dominated the world. It has resulted in increasing gap between rich and poor. There is inequitable distribution of resources. Rich gain at the cost of poor. Capitalism also leads to consumerism, which means more goods are produced, more carbon emission and more waste being generated.

Let us understand the concept of intra generational equity with an illustration relating to carbon emission. Industrialisation started much earlier in USA and other European countries than in Asian and African countries (because of the obvious reasons that they were still colonies struggling for their independence). At that time their carbon emissions were huge. Later when Asian and African countries started their development process, they also started emitting carbon into the environment. By this time effects of carbon emission were felt on the environment. Binding international conventions like Kyoto Protocol was signed by the countries, it gives carbon emission reduction targets. It places stringent obligation on developed countries as it recognises that developed countries are largely responsible for the emission of greenhouse gases in the atmosphere. USA refused to sign the protocol stating that it is unfair to have different emission targets for different countries. Other developed nations also have this grievance, so the target set was never really met. In principle Kyoto protocol embodies the concept of intra generational equity. Kyoto also provides for establishing an adaptation fund for climate change to minimise the impact on developing countries.

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[13] *Supra* n.5.

Human right to Sustainable Development

Human rights mean the rights that a person has by the virtue of being a human being, it is not conferred by anyone, but a person is having it because he is born as human being. Right to life is considered as the most important human right, also called as first generation human right. It is recognised under Universal declaration of human rights[14] and International Covenant on Civil and Political Rights[15]. Life here does not mean mere animal existence, life means life with dignity, life that is healthy. This implies right to healthy environment is also part of right to life. Healthy environment is possible only when we follow sustainable methods of development which ensures clean environment. Sustainable development is *sine qua non* for the existence of not only healthy environment but other basic human rights also.[16] Unsustainable development leads to depriving a person of his right to health, which is recognised as second generation human right and is protected under International Covenant on Economic, Social and Cultural rights. So, right to health also includes sustainable development.

Solidarity rights, the other name given to Third generation human right, has become very relevant and is a blossoming area. It comprises of many new rights like right to development, peace, adequate food supply, benefits from common heritage of mankind, environmental protection etc. 'Both development and environment are human rights, thus the integration of both, namely sustainable development is also a human right.'[17] Sustainable development is not just one of the human rights, but it stands at a very high pedestrian amongst the other rights, which cannot be denied even in emergency. Dominic McGoldrick structurally conceived sustainable development as having a pillared temple like structure- composed of three pillars, namely international human rights, international environmental law, and international economic law.[18]

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[14] Universal Declaration of Human Rights, 1948, Art. 3.

[15] International Covenant on Civil and Political Rights, 1966, Art. 6.

[16] *Supra* n.5.

[17] *Supra* n.5.

[18] Dominic McGoldrick, *Sustainable Development and Human Rights: An Integrated Conception*, 45 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 796(1996).

Indian constitution embodies the principle of equity and justice. Before 1976 there was no express provision in the constitution relating to environment, although this concept was always there in the spirit and soul of constitution. In 1976, forty second amendment to the constitution came into being which introduced Fundamental duties along with several other provisions. Article 48A was added as Directive Principle of State Policy. It puts an obligation on the state to protect and improve the environment. Although directive principle of state policy are non-justiciable rights, still that does not make them less important than fundamental rights. They are fundamental in the governance of the country. This means it is crucial in taking policy decisions. Article 51 A (g) imposes a fundamental duty on the citizens to protect and improve the environment. India traditionally is not a right driven society, but a duty driven society where 'dharma' as duty is part of our culture and upbringing. Constitution places duty on both the citizen and the government to preserve and promote the cause of environment. Article 21 of the constitution which gives fundamental right to life has been given a wide interpretation by the Indian courts. Right to life also includes right to healthy environment, right to clean air, right to health, to name a few. At the same time courts have recognised sustainable development principles of Polluter pays principle, public trusts doctrine, environmental impact assessment, precautionary principle, and environmental audit in numerous judgments.[19]

Role of China in World Waste Trade

When China rose as the major producer of goods, basically it became world's factory, ships carrying goods would go to entire world, especially USA, Europe and Japan. Most of the ships returned empty, thereby increasing the cost of transportation. So, Chinese manufacturers started filing up these ships with plastic waste from USA, and other countries, that was meant to be recycled. It was convenient for developed nations as they didn't have to process and recycle the waste themselves and it was much cheaper to get it done in China as it is an extremely labour- intensive work and cheap labour was abundantly available in China. Also, it helped the developed nations to get Chinese

[19] *Narmada Bachao Andolan* v. *Union of India*, AIR 2000 SC 3751; *AP Pollution control board* v. *M V Naidu*, AIR 1999 SC 812; *MC Mehta* v. *Union of India*, AIR 2002 SC 1696.

products cheaper. For China also it was profitable and a good investment as they would process the waste and make plastic pellets after recycling waste, which is used as raw material for making other products and making new ones would cost them more. So, on the face of it, it looked like a win-win situation where both parties were benefitting from this trade. Trash from USA and Europe ended up being cheap source of recyclable material for China. Most of this waste ended up in rural areas. Waste recycling industries is an extremely profitable business, Zhang Yin, also known as 'Queen of trash,' became world's richest self-made women, by recycling paper.[20] Although it was a good business opportunity, but it had many side effects. Lot of this waste which could not be recycled was burned in open adding to pollution. People involved in these activities suffered from cancer and other respiratory diseases. Many villages in China converted into 'cancer villages.'

In addition to this growing concern, there were also other points issues, China was a growing economy, since it was one of the largest producers of goods in the world, it also ended up producing lots of waste of its own, which it had to recycle. It is expected by 2030 China will generate three times the waste generated by USA.[21] Also, China had literally become a dumping ground for world's waste. It was not good for China's image as a rising power in the world economy and politics.

Concerned by these events China launched Operation Green Fence in 2013 to restrict the illegal waste imports, this resulted in a 26% drop in low-quality waste exports to China from developed countries.[22]

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[20] David Barboza, *China's 'Queen of Trash' finds riches in waste paper*, The New York Times (January 15, 2007) *available at* https://www.nytimes.com/2007/01/15/business/worldbusiness/15iht-trash.4211783.html (last visited on August 23, 2021).

[21] Jeffrey Wasserstrom, CHINA IN THE 21ST CENTURY: WHAT EVERYONE NEEDS TO KNOW, (OUP USA ,2013).

[22] Adomas Balkevicius, *Fending off waste from the west: The impact of China's Operation Green Fence on the international waste trade*, 43(10) THE WORLD ECONOMY, 2742-2761 (Oct 2020) *available at* https://onlinelibrary.wiley.com/doi/epdf/10.1111/twec.12949 (last visited August 23 2021).
This study also assesses the impact of OGF on exports from developed countries to developing countries, excluding China and they found there was no statistically significant effect of OGF on low-quality waste exports from

Thereafter China came up with National sword policy, which made strict provisions regarding waste import into China, where only clean plastic would be accepted, contamination threshold for plastic is 0.5% (which is impossible to get). Earlier, on 18 July 2017, China had notified the WTO that it would be imposing a ban on imports of certain kinds of solid waste by the end of 2017.[23] In 2018 China started working on the Blue Sky Policy, to control air pollution. So, these restrictions banned all waste import to China by 2020. Chinese ban forced these Chinese recyclers to relocate at other southeast Asian countries like Indonesia, Malaysia, Thailand, Vietnam. Malaysia was the most ideal location for them, as it is close to China and there are lots of mandarin speaking people in Malaysia. Most of these recycling units were illegal.[24] A large part of this plastic waste was burnt. It led to health and environmental degradation. Although government tried to curb this illegal plastic waste industry, but mostly they are not successful.

Since there was no place where USA could send their waste now, most of it is send to landfills.[25] Few units started recycling their own waste and some units produced plastic pellets, which are now sold to Chinese companies. USA is not happy with China refusing to accept their waste; however, China is not under any obligation to do so. They have the right to protect their environment and health of their citizens.[26] In fact China is acting according to its obligation under the Basel Convention.

This policy of developed countries and especially USA and EU to dump their waste into developing or poor countries violates the basic principle

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developed countries to developing countries (excluding China). Also, no evidence was found to show that waste to send to those countries where environmental regulations are lenient.

[23] World Trade Organisation, *China's Import Ban on Solid Waste Queried at Import Licencing Meeting* (October 3, 2017) *available at* https://www.wto.org/english/news_e/news17_e/impl_03oct17_e.htm (last visited August 24, 2021).

[24] Adam Minter, JUNKYARD PLANET: TRAVELS IN BILLION-DOLLAR TRASH TRADE (Bloomsbury Publishing India Private Limited, 2013).

[25] Cole Rosengren, *Oregon Recyclers are Cutting Service Because of China's Import Policies, available at* https://www.wastedive.com/news/oregon-recyclers-are-cutting-service-because-of-chinas-import-policies/506910/ (last visited August 12, 2021).

[26] Cody Boteler, *UPDATE: China says US Complaints are 'Unjustifiable, Illegitimate', available at* https://www.wastedive.com/news/us-china-halt-and-revise-import-restrictions/519930/ (last visited August 11, 2021).

of equity. Sustainable development imbodies the principle of inter-generational and intra generational equity. This applies not only to carefully and judiciously using renewable resources so that they do not get exhausted. But also, not to pollute air, water and land, not to endanger animal land bird species. Plastic waste when dumped into the landfills, it stays there for hundreds of years and contaminate land and also underground water, similarly burning plastic pollutes air. Looking it from the perspective of intra generational equity, it means that people within the same generation should also be treated equitably. Developed nations have taken the advantage of industrialisation and modernisation, however the waste they generate in their production units is being dumped into poor and less developed countries like Vietnam, Malaysia, Indonesia, India etc. This goes against the principle of intra generational equity, which imposes common but differentiated responsibility. Where the responsibility is more on the developed nations to assist the developing nations with resources and technology to conserve the environment. However, what is happening is, rich nations are enjoying at the cost of poor countries. Most of the waste recycling in poor countries is done illegally, so the waste ends up being burnt or in landfills, resulting in air, water, and soil pollution. This in turn causes several diseases to people involved in these industries and to people living nearby, cancer being one of them.

To overcome this problem, a very significant amendment was bought about in Basel convention on 14th May 2019, which become effective from 1 January 2021. It related to the plastic waste management. The intention of this plastic amendment of 2019 is to ensure control and transparency of the transboundary movement of the plastic waste that are not likely to be recycled in a proper manner. Fourteenth meeting of the Conference of the Parties to the Basel Convention (COP-14, 29 April–10 May 2019) adopted amendments to Annexes II, VIII and IX to the Convention with the objectives of enhancing the control of the transboundary movements of plastic waste and clarifying the scope of the Convention as it applies to such waste.[27] Basel convention is the sole

[27] United Nations Environment Programme, *Basel Convention Controlling transboundary movements of Hazardous waste and their disposal*, 2019, *available at* http://www.basel.int/Implementation/Plasticwaste/PlasticWasteAmendments/Overview/tabid/8426/Default.aspx(last visited August 12, 2021).

convention on trans boundary movement of waste. It came into being in 1989 and has 187 members. Its primary objective is to protect the developing country from the abuses of hazardous waste exported to them from developed countries. The main features of this convention include: member countries should try to minimise the generation of waste[28], national self-sufficiency, that means that each state is supposed to take care of the waste generated by them[29], minimising all forms of transboundary of hazardous and other waste[30], ensuring environmentally sound management of the waste that is produced[31].

The amendment to Annex VIII, with the insertion of a new entry A3210, clarifies the scope of plastic wastes presumed to be hazardous and therefore subject to the PIC procedure.

The amendment to Annex IX, with a new entry B3011 replacing existing entry B3010, clarifies the types of plastic wastes that are presumed to not be hazardous and, as such, not subject to the PIC procedure. The wastes listed in entry B3011 include: a group of cured resins, non-halogenated and fluorinated polymers, provided the waste is destined for recycling in an environmentally sound manner and almost free from contamination and other types of wastes; mixtures of plastic wastes consisting of polyethylene (PE), polypropylene (PP) or polyethylene terephthalate (PET) provided they are destined for separate recycling of each material and in an environmentally sound manner, and almost free from contamination and other types of wastes.

The third amendment is the insertion of a new entry Y48 in Annex II which covers plastic waste, including mixtures of such wastes unless these are hazardous (as they would fall under A3210) or presumed to not be hazardous (as they would fall under B3011).

The new entries become effective as of 1 January 2021.

[28] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,1989, Art. 4.2.(a).

[29] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,1989, Art. 4.2.(b).

[30] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,1989, Art. 4.2.(d).

[31] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,1989, Art. 4.8.

The convention deals with two kinds of waste, hazardous waste[32] and other waste[33].

The principle of Prior Informed Consent is given great importance in the amendment where the exporting country needs to inform the importing country about the nature of waste and consent of importing country is mandatory. Also, there needs to be assurance of environmentally sound management of the waste. If there is failure to comply with these provisions, it would be considered as illegal traffic and a criminal offence.

It is interesting to look at the reasons and the circumstances in which this amendment was brought, it was firstly, China's refusal to import plastic waste from other countries. Another reason for amendment was marine pollution- the Pacific patch discovery and several other research showed the level of damage caused by plastic being dumped in sea and its impact on the marine life. It created an alarm. Thirdly, Basel convention was a ready to use treaty that was available to regulate transboundary movement of hazardous waste, plastic was also added to it via amendment. This amendment became effective from 1 January 2021 it is expected to change the way plastic waste is traded. Now if there is trade in Annex II plastic between two countries which are parties to Basel convention, it is allowed and legal, but there must be prior informed consent. However, trade of such plastic between a member and non-member country is banned and a punishable offence. USA is not a member of Basel convention (other non-member countries include – East Timur, Grenada, Haiti, San Marino, South Sudan, Solomon Islands and Fiji). From 1 January 2021, if USA engages in trade in Annex II plastic with member countries, it is illegal. This will have serious consequences, as now USA would not be able to send their

[32] Basel Convention, 1989, Art. 1. 1 The following wastes that are subject to transboundary movement shall be 'hazardous wastes' for the purposes of this Convention: (a) Wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III; and (b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.

[33] Basel Convention, 1989, Art. 1.2 Wastes that belong to any category contained in Annex II that are subject to transboundary movement shall be 'other wastes' for the purposes of this Convention.

waste to countries like, China, Malaysia, Indonesia, Vietnam, Turkey, Bangladesh, Thailand, India, Pakistan, Nigeria etc. Hopefully this amendment would be able to achieve its objective.

We have seen from the above discussion that the way plastic waste is being manged is in violation to the intra generational equity principle of sustainable development. Even within a country, for example, in India we find gross violation of this principle, where poor people and even children are segregating hazardous waste with naked hands, resulting in several diseases. Rich enjoy the products and poor pay the price for it. Consumerism is the root cause of this problem, where rich companies are manufacturing goods in huge quantities, much more than the demand. Then they go on to create new markets for these goods, thereby contributing to the degradation of the environment. Duty lies on people to refuse, reduce, reuse, recycle and repurpose plastic waste and save environment.

Even though, the plastic amendment of the Basel convention makes provisions where developing countries can refuse to become dumping ground for foreign plastic waste, but we need to be practical and understand that rich or developed countries will keep on sending their waste to poor countries, if not legally, then illegally, about which the world will never come to know, nor will these countries ever acknowledge this fact. Although recently there have been several instances of countries like Malaysia and Singapore sending back waste filled ships to Japan, USA and France. But this looks more like an exception rather than a practice. When these poor countries receive plastic waste it gives a boost to their economy, people find employment in segregating waste and recycling, also manufacturers get cheap raw material (this happens at the cost of environment and people's health). There is a dire need to implement the plastic amendment in Basel Convention in its true spirit and sense.

Conclusion

The only viable solution to this problem seems to be to reduce plastic production. The problem is the companies are not giving us plastic free alternatives. It is not possible for the consumers to shift to alternatives on their own, because that would mean making their own spoons, straws, toothpaste etc. Companies cannot be allowed to forget the fact that they are bringing plastic into the atmosphere. They should take

more responsibility for the plastic they are producing and start reducing the amount of plastic they produce, instead to taking the convenient path to claim that they would recycle the waste.

Plastic recycling is a big myth. All plastic is not recyclable. Some of it is downcycled or converted into less viable items, while a fraction of it is incinerated or sent to less developed countries where it ends up being in landfills.

Companies know that their production rate is much greater than recycling. Packaging industry is the main culprit, it uses single use plastic. Single use plastic means the plastic which can be used just one time and must be thrown away, for example vegetables wrapped in plastic sheets in supermarket or a packet of potato chips. There are horrid examples of plastic packaging, where even a single potato or apple sold in supermarkets is wrapped in plastic sheet; a single item delivered from online shopping sites has three levels of packaging. Usage of single use plastic has increased manyfold during the covid pandemic. Some countries have banned single use plastic totally, but it is not a solution, we need to have viable and affordable alternatives in place. To encourage people to carry their own shopping bags and to save environment, some states have made laws for charging the consumers for plastic carry bags. For example, from 1 July 2020 stores in Japan started charging fees for plastic bags, to promote use of reusable bags and reduce plastic waste. But this is not a permanent solution to the problem.

Single use plastic does not add any value to our lives. We have survived without plastic for so many years, we can do that in future also. There is need to cut the waste at the source. Consumers can reduce their own plastic footprint. But this is not the solution, the problem is much bigger. Until companies change their ways, this problem can't be solved. Companies need to give us plastic free options.

Extended producer responsibility required producer of plastic to take responsibility of plastic produced till the end of its life. It means the manufacturer of plastic is responsible for safe disposal and recycling (if possible) for the plastic waste that they are adding to the environment. But in most of the countries this policy has not proved to be successful. The recovery rate is very low. In India, Plastic waste Management Rules, 2016, provide for Extended Producer's Responsibility. Although we

have this law, but the problem is with its implementation. The law came in 2016; however, till date (barring a few companies which have provided an action plan for it) we do not find it being implemented.

The duty of collecting waste normally lies with the municipality of an area. We, as citizens pay taxes and municipalities use this money for waste collection and disposal activities. So, we are paying for collection and management of an item over which we have no control on creating. It is the manufacturer or companies which control plastic creation/ production. However, we do find exceptions, for example, in Canada this cost is levied on companies and recovery rate of plastic there is vey impressive. So, Extended Producer Responsibility must be implemented properly by the countries worldwide. Attempts need to be made to recycle at least those plastic products that are recyclable, like plastic bottles. Some innovative steps are taken in this direction like, Bottle deposit system, where consumers put a used bottle into the machine and receive some reward in return. It gives incentive to the consumer to give back bottle in exchange of money. It works on the simple principle that the consumer wants the contents of bottle and not the bottle itself. It makes possible to recycle a thing that is recyclable. It generates employment and cleans the environment. Alternative uses of plastic waste needs to be encouraged. In Ladakh roads are made from plastic, in Uttarakhand mechanism is developed to make petrol from plastic waste. Indian railway has introduced biodegradable tableware made form sugarcane fiber. The success of these uses needs to be tested. Still, more of such innovative methods should be used.

Stricter control on industries that are producing plastic packaging is needed. But we also need to understand that packaging is a necessity, so no matter how many laws are made companies will keep on making and using it. So, there must be innovation and investment in biodegradable or reusable packaging, which can serve as an alternative. Government needs to promote recycling. Although most of the countries have law relating to extended producer responsibility, but it needs to be implemented in its true sense. Most effective tool for preserving environment is creating awareness about it. Education or awareness helps us to realise the problem, then we change our attitude about that issue and ultimately find solution for it.

We have seen from the above discussion that the way plastic waste is being managed is in violation to the intra generational equity principle of sustainable development. UN members adopted the 2030 Agenda for Sustainable development in 2015. It provides for co-operation between developing and developed countries for attaining the goals of good health, no poverty, zero hunger, clean water and sanitation, affordable and clean energy, decent work, and economic growth, reduce inequalities, climate action, to name a few. These goals can be achieved only when developed nations own up to their responsibility to help developing nations with technology, funds and above all with respect. They stop dumping their waste elsewhere and find ways to reduce, reuse and recycle their waste. The time to act is now, otherwise it will be too late. Look at the example of Indonesia, it is forced to shift its capital from Jakarta to East Kalimantan due to pollution and rise in sea level. Duty also lies people to reduce extravagant spending and reduce plastic consumption. Segregation of waste must be done at source. We have only one planet to live on there is no planet B. Air and water know no boundary. Pollution in one will ultimately affect the other. This calls for us as individuals and nations to go back to roots, look inwards and lead a sustainable life.

Book Review

The title of the book is ***'Crime Scene to Court Room – Fundamentals of Medical Jurisprudence and Forensic Science'****, by Durgesh Pandey, Singhal Law Publications, 2021, having 300 pages.*[1]

'Forensics is eloquence and reduction'

— Gertrude Stein

Forensic science is one of the best tools which assists in implementing the great criminal justice system around the world with an interdisciplinary approach. It refers to the application of all branches of science in bringing decipherability in complex criminal and civil cases. Investigation and collection of valuable evidence for criminal adjudications have been greatly enhanced by this field of science. It assists the law enforcers and officers of the court (Judges) to reach to a better understanding of the actual events of a case at hand. Medical jurisprudence on the other hand is an integral part of forensic science which deals with the legal aspects of practising medicine and application of medical knowledge in administration of justice. Use of forensics also increases the efficiency of investigation and evidence presentation. Thus, helps in reducing delay of case disposal.

The author aims to provide an extensive introduction to a range of issues associated with the use of medical jurisprudence and forensic science in the criminal justice system. Relevant case laws, references, case studies, questionnaire for advocates along with coloured photographs are provided at the end of every chapter of this book. The ***author*** is a ***judicial officer*** 2006 onwards and has pronounced many judgements in civil & criminal cases. When one goes through this book, he/she will find page to page pictures along with explanation. The author has applied his vast experience to every chapter of this book and has elucidated it very well. So, it is best suited for the beginners, who want to excel in the field of fundamentals of forensic science. This book

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[1] Dr. Cholaraja Mudimannan is an Assistant Professor with the Campus Law Centre, Faculty of Law, University of Delhi and can be reached at cholawjan10@gmail.com.

is a must read for them as it gives a birds eye view of all the components relating to mainstream forensics. It aims to inculcate in the readers a beginner and cursory understanding of forensic science used in investigation and as evidence. The use of relevant sections of bare acts and additional case material helps in a holistic understanding of the subject and its proper co-relations.

The book is divided into *eight parts* and *twenty-two chapters*. Excluding the first part *(introduction)* and last part *(conclusion)*, each part discusses a completely new topic and is subdivided into chapters for more detailed understanding. Every Part has *reminders* in *bullet form* for practicing advocates on how to deal with the subject in a practical situation. This is really very helpful and innovative. This book discusses everything from 'the meaning of the forensic science' to that of 'applying scientific methods and process for solving crimes.' The application of forensic science and its branches along with medical jurisprudence and differences between both has been dealt in detail in this book.

The *first part* of this book introduces the subject in a beautiful manner and discusses the commonly confused differences between forensic science and medical jurisprudence. A section describing the importance of studying this wonderful subject is also given to arouse interest in the subject. The *second part* deals with bodily and other kinds of injuries and their causation, how an MLC report is prepared and used in criminal cases, the importance of eye-witnesses and much more. It goes without saying that criminal trials in India depend to a great extent on the testimony of witnesses. The chapters on *death (natural)* and *violent (death under duress)* divulge various stages and types of death along with estimating the time and place of death.

The proper '*crime scene investigation and preservation'* is a skill which is necessary to be inculcated. The *third part* briefly explains the fundamentals of inquest, autopsy, viscera, sample collection, DNA profiling, fingerprinting, the legality of narco-analysis & polygraph and the treatment of questioned documents i.e., handwriting, counterfeit detection and so on.

The importance of the *fourth part* cannot be understated as the author rightly reserves an entire part to discuss intricate handling of victims with care and empathy. It discusses the MLC of sexually abused victims,

how to gather their statements, preservation of specimens *et cetera.* The *chapter* on *Acid attacks* deals with various kinds of acids and rehabilitation of victims. Additionally, fire-arms and its resulting ballistic injuries are also discussed in detail like whether someone is shot or not, types of wounds and so on. The difference between a suicide and homicide is also given in a lucid chart format in the *fifth part*.

The *sixth part* discusses the toxicological effect of various poisons in the human body, detection of poison and types of poison. The *Chapter* on *Narcotic drugs and psychotropic substances* deals with the fine line of distinction between drugs and medicine. The elaborate legal provisions while dealing with NDPS accused such as statement recording, and arrest procedure are also discussed. In the information and communication technological era, the **Digital Forensics** is the latest and the fastest growing field in everyday life. The number of cybercrimes that are on rise, it becomes paramount to understand the basics of crime, modus operandi and how to securely collect digital evidence to make them admissible in court. A separate *chapter* on *mobile phone forensics* highlights the importance of call detail records and phases of mobile forensics in the *seventh part*. The last but not the least, the roles, duties, and responsibilities of different officers of courts i.e., advocates, prosecutors, the honourable judges, correctional home officers and the law enforcement officers is also provided for in the *eighth part* of this book. The justice system depends on every component working together and in complete harmony.

Conclusion

In various law schools 'forensic science is not taught as a full-fledged compulsory subject. This book is good for non-forensic background readers. The topics are written lucidly, and minimum jargon is used. Forensic science and medical jurisprudence is crucial in cases based on circumstantial evidence which is often used in criminal law. The book is printed on a good quality matte finish paper which helps in printing colour based images used to further simplify the understanding of the legal and non-legal scholars. It would not be wrong to recommend this book as a *handbook for quick reference regarding forensic science without the hassle of searching* through the bulky books which are widely available on this subject.

The book is well conceptualised and is a must read for anyone looking for fundamental insights into all aspects of medical jurisprudence and forensic science. The title assumes a lot of importance in the present technological era where the masses are getting aware about forensic science. It eloquently brings out the fundamental framework of forensic science and explains every major subject of medical jurisprudence. All the twenty-two chapters have covered most of the areas of forensic science.

One *unique feature* of this book is the *pictorial representation* which is mostly lacking in legal books. The *footnotes* provide further information about the subject and opens the minds of the readers to research various aspects further. This fact cannot be overlooked that the price of the book is reasonable and affordable therefore it would not pinch the pocket to buy such a comprehensive guide for students. Both primary and secondary sources have been used.

The book will pave way for further research on the subject. It needs to be recommended for researchers and libraries.

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Sd/-
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