Journal of Law Teachers of India
Volume 7 (2017-18)

Law Centre-I, Faculty of Law
University of Delhi
Delhi - 110007

Mode of Citation: 7 JOLT-I p__ (2017-18)

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Website: http://lc1.du.ac.in/

Annual subscription:
₹400/- (Domestic); US $25 (Overseas)

ISSN: 2231–1580 JOLT-India

Published by the Professor in-Charge, Law Centre-I, Umang Bhawan, Faculty of Law, University of Delhi, Delhi - 110 007

Printed at
CK Printers, Delhi

Chief Editor's Note

Law is changing, evolving and progressing according to the needs of society, as is the task of legal academia and professionals to answer the burgeoning challenges posed by technology in legal research. In this contemporary scenario, I am delighted to present to the readers the 7th Volume of the Journal of Law Teachers of India (JOLT-I), the prestigious journal of Law Centre-I, Faculty of Law, University of Delhi. This journal reflects the combined academic excellence with professional relevance in the legal field. I am proud to state that this journal is the outcome of the dedicated work of my colleagues who ensure to maintain the quality of research papers submitted by myriad authors from India and abroad. I take this opportunity to acknowledge the efforts initiated by Dr. Sarbjit Kaur and Dr. Sunanda Bharti who took up the primary responsibility of publication of the Journal on a continuous basis. Of course, there are the the peer-reviewers who work anonymously and gave their valuable feedback on the articles submitted that help improve the quality of the papers.

The present issue focuses on some of the developing areas in law from different parts of the world. Impact of Technology on Admissibility of Photographic Evidence by Dr. Kareem Adedokum reflects the challenges and problems posed by digital photography from Nigerian perspective. Caesar Roy examines the issues of child witnesses under the Indian Evidence Act, 1872. The author emphasizes the need to understand the child psychology and child behavior by the prosecutors, police and judicial officers to deal with the cases where children are alleged victims and witnesses of abuse. The intertwined issues of child marriage and cohabitation with minor wives in the light of the apex court decision in *IndependentThought* v. *Union of India* is discussed by G.K. Goswami and Siddhratha Goswami. An overview of the issues of social evil of witch hunting and the legislative framework of the states is examined by Rituparna Bhattacharjee. Siddartha Mishra has discussed the concept of R2P under International law and reflected upon the changing concept of sovereignty.

An interesting article on the right of transgenders by Brajesh Kumar evaluates the trend of the Judiciary in India and suggests to protect the right of transgenders by accepting the global drift in this regard. Nonetheless, now in the view of the latest decision of the apex court in the *Navtej Singh Johar* v. *Union of India*, views expressed by the author needs to be read in the present context of the progressive approach adopted by the Judiciary to recognize the rights of transgenders in India by decriminalizing homosexuality. The complex issue of the refugee regime is discussed by Prakash Sharma by making a comparative study of South Africa, Brazil and India on Refugee Laws. There is an interesting article on the DU Photostat case under the Copyright Law, by Tanvi Sehgal. It offers a critical evaluation of the case. The last under the 'article' segment is a thought provoking piece by Prashant Narang, dealing with the economic analysis of the Contingent Fee rule and builds up a case for lifting the restriction on the same in India.

Apart from the above, Volume 7 offers to the reader a few notes and case comments, as 'some ideas on contours of the limits to state intervention' by Sunanda Bhartiand evolution of status of women in Indian society, by Alok Sharma. The case comments on *Innoventive Industries Ltd* v. *ICICI Bank Ltd* and *Nikesh Tarachand Shah* v. *Union of India*, landmark cases decided by the apex court relating to Insolvency and Bankruptcy Code, 2016 and the provision relating to bail under Prevention of Money Laundering Act, 2002 respectively, offer valuable insight into these cases. The volume also reviews two books.

In all, JOLT-I Volume 7 should give the reader a taste of a motley of interesting and contemporary legal issues. I welcome valuable comments from the readers which will help us to improve the upcoming volumes of this journal of University of Delhi.

Prof.Ved Kumari
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and
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Volume 7, 2017-18

Statement of Ownership and other particulars about the journal

Place of Publication	Law Centre-I, Faculty of Law, Umang Bhawan, University of Delhi, Delhi – 110 007
Language	English
Periodicity	Annual
Printer's Name, Nationality and Address	C.K. Printing Press (Approved on Panel) for University of Delhi, Delhi, India
Publisher's Name, Nationality and Address	Prof. Ved Kumari, Professor-in- Charge, Law Centre-I, Faculty of Law, Umang Bhawan, University of Delhi, Delhi – 110 007
Chief Editor's Name, Nationality and Address	Prof. Ved Kumari Professor-in-Charge, Law Centre-I, Faculty of Law, Umang Bhawan, University of Delhi, Delhi – 110 007
Owner's Name	Law Centre-I, Faculty of Law, Umang Bhawan, University of Delhi, Delhi – 110 007

I, Prof. Ved Kumari, Chief Editor, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-

Dated:, 2018

Prof. Ved Kumari

Impact of Technology on Admissibility of Photographic Evidence: Nigerian Perspective

*Kareem Adedokun**

Introduction

Evidence performs a vital function in adjudication of cases. It is a phenomenon in litigations that ascertains the truth of the fact in issue and as such it constitutes a springboard through which justice is attained in any legal proceedings. It comprises of virtually all the classes of facts which are allowed in law to be adduced in courts as proof of other facts subject to certain exceptions.[1] It is technically called judicial evidence and it may take various forms such as oral, hearsay, direct, circumstantial, documentary or real depending on its mode of rendition.[2] When evidence is the *viva voce* testimony given by a witness in court which relates what the witness knows personally, it is said to be oral; but the one given by a witness who relates not what he or she knows personally, but what others have said and what is therefore dependent on the credibility of someone other than the witness is hearsay evidence. Direct Evidence is the evidence that is based on personal knowledge or observation and that if true, proves a fact without inference or presumption while circumstantial evidence is based on inference and not on personal knowledge or observation. Evidence is documentary when supplied by a writing or other document which must be authenticated before the evidence is admissible. Real evidence is the physical evidence that itself plays a direct part in the incident in question.[3]

As a variety of evidence, the scope of documentary evidence under the Evidence Act, 2011 is widely extensive to include items such as books, plans, photographs, and any matter expressed or described upon any substance by means of letters, figures or marks intended to be used or which may be used for the purpose of recording that matter.[4] In whichever form it manifests, documentary evidence is usually believed to be the best evidence because it

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1 Fidelis Nwadialo, Modern Nigerian LawW of Evidence 4 (University of Lagos Press, 2nd edn.1999).

2 Garner B.A (ed.), Black's Law Dictionary 635-640 (West Publishing Co. U.S.A, 8th Edn. 2009), *See also,* Fidelis Nwadialo, *supra* n.1, pp. 5-11.

3 *Id.,* pp. 5-13 ; Aguda, The Law of Evidence 9-11(Spectrum Books, Ibadan, 2009).

4 The Evidence Act, 2011, s. 258.

is most natural and satisfactory, and as such, it is regarded as the kind of proof which under any possible circumstances affords the greatest certainty of the fact in question.[5] In other words it is a credible evidence not susceptible to easy manipulation. Photograph is a variety of documentary evidence as it shares common attributes of credibility and integrity with documents. In the years of traditional photography, camera was used as optic-gathering and focusing system and through film emulsion medium, images are stored, the final results of this are usually in the form of prints and transparencies.[6] This made many viewers have trust in the aphorism that camera never lies. It is believed that it accommodates no manipulation because photography and the technology that made it possible then were rather crude and cumbersome. Over the time, equipment and technology progressed which evolved photography into the digital realm. Consequently, it makes the practice of digital image manipulation available thereby making faked photos harder to detect. The availability of photographic fakery no doubt, casts doubt upon the proceedings in this era of information and communication technology.[7]

The foregoing discourse makes this paper to explore an in-depth search into the nature of digital photo manipulation and its techniques, critically assess the adequacy of the legal framework for admissibility of photographic evidence in Nigeria; as well as examining the extent of the negative impact of photo manipulation on the credibility of tendering photograph in evidence under the Nigerian legal system. The paper thoroughly dissects the relevant provisions of the Evidence Act, 2011 to confirm if it entails means of evidential authentication of photograph before tendering and admissibility in evidence in order to avoid perversion of justice by incidences of photo manipulation.

Explaining Digital Photo Manipulation and Related Terms

In the years preceding the enactment of the Evidence Act, 2011, admissibility of electronic evidence, particularly digital photograph was a knotty issue in Nigeria as there were conflicting court decisions almost advancing to a point of chaos.[8] The Supreme Court specifically observed that 'in this age of sophisticated technology, photo-tricks are the other of the day and secondary evidence produced in the context of Section 97(2) (c) of the then Evidence Act could be tutored and therefore not authentic. Photo-tricks could be applied in the process of copying the original document with the result that the copy which is secondary evidence does not completely or totally reflect the original and the court has no eagle eye to detect such tricks'.[9] What the apex court referred to as photo-trick is what is called photo manipulation in this work.

5 *Supra* n.2.

6 Van Nostrand's Scientific Encyclopaedia 4080, (John Wiley & Sons, Inc. Hoboken, New Jersey, 10th edn, 2008).

7 *Araka* v. *Egbue* , 7SCNJ 114 P (2003), *per* Niki Tobi J.S.C.

8 Ajileye A.O, A Guide to Admissibility of Electronic Evidence, (P xi Law Lords Publications, 2016).

9 *Id.,* p.126; *See also, Ekiti State Independent Electoral Commission* v. *PDP* (2013) LPELR 20411.

It is a technical expression for the application of image-editing or image-changing techniques to photographs. The epithet 'digital' implies computer-based photo manipulation. Initially, machines called digital computers were designed to calculate or compute automatically the answers to simple arithmetic problems or more difficult mathematical problems involving simple and very complex equations of relationship.[10] To computer designers, it soon became evident that the design elements required to perform arithmetic and mathematical calculations could also be used to manipulate information in other ways such as storing, retrieving ,sorting, classifying among others and such other duties were added to the computer's computing capabilities.[11] Never the less, digital photo manipulation involves transforming or altering a photograph to achieve desired results such as illusion; deception; allurement, political propaganda and of course criminal indictment or exculpation depending on the application or intent. Its various forms are made possible through the use of different techniques. For instance, photographs may be retouched using ink or paint or air brushed. Instant films may be scratched and photos or negatives may be pieced together in the darkroom among others. Photo retouching is a type of image manipulation frequently used in the modelling and acting industries. Photos are retouched to correct or perfect shots with refinement such as removing blemishes or moles, brightening eyes, whitening teeth and smoothening wrinkles.

It is expedient to state that this paper does not intend to analyze all aspects of digital photo manipulation but only the area of it that call to question the authenticity of the admissibility of photograph in evidence. To achieve this, the intention of the photo manipulator and the effect of his manipulating act play prominent roles. Take for instance, if the photo manipulation comes in form of photo editing which consists of smaller changes, there may not be any trepidation as in such a situation, the artist or photographer is just trying to please his viewers; as such the manipulation could be said to be innocent one. Compared to a situation where the photograph of an accused person taken at the scene of an alleged crime is edited out and that of an innocent person is brought in; the act changes the image in a fundamental way, and the intention of the manipulator is to deceive or indict. As such this portrays criminal intent to which action in forgery or cheating may lie because in both offences there is deception caused or intended to be caused by false representations.[12] Be that as it may, it is pertinent to state that advancement in technology and equipment now makes incredible photo manipulation possible such that certain elements may be combined to create a unique image that can convince even the most experienced set of eyes of judges thereby giving a realistic view of an unreal picture. Where then is photographic integrity in the era of digital photo manipulation?

[10] *Supra* n.6, p.1527.
[11] *Id*.
[12] Chukkol K.S, The Law of Crimes in Nigeria 387 (Ahmadu Bello University Press, Zaria, Nigeria, 2010).
[13] S*upra* n. 2, p.53.

It is necessary to state that it is not all pieces of evidence that are admissible to prove facts in legal proceedings, the admissible evidence has to be relevant and credible. Admissibility of evidence therefore connotes the quality of state of allowing evidence in a trial.[13] It can best be thought of as a concept consisting of two quite different aspects which are *disclosure of fact to the court and express or implied permission to use as evidence.* The former is simple while the latter is complex. The complexity is borne out of the fact that evidence may be admissible for one purpose but not for another. Although section 4 of the Evidence Act, 2011 identifies relevance as the basis of admissibility but admissibility of any evidence is subject to all such conditions as may be specified in each case as regulated by the law.[14] As earlier stated, documentary evidence is the statement made in a document which is offered to the court in proof of any fact in issue, such a statement can be proved by the production of the statement itself in evidence for the inspection of the court.[15] Under the English common law, best evidence is required to be given. The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow.[16] The rule was used to require production of original document in court.

Sight should not be lost of the fact that photograph is a kind of documentary evidence and by extension the *best evidence*. Scholars over the years are in unanimity that best evidence is that evidence which is more specific and definite as opposed to that which is merely general and indefinite or descriptive. It is that particular means of proof which is indicated by the nature of the fact under investigation as the most natural and satisfactory or as that kind of proof which under any possible circumstances affords the greatest certainty of the fact in question or as evidence which carries on its face no indication that better remains behind.[17] With the above highlighted instances and illustrations, has digital photo manipulation not eroded the characteristics originality, certainty and authenticity of photograph in evidence in any judicial proceedings?

Be that as it may, it is certain that Evidence Act, 2011, has thrown new challenges to legal practitioners and judges dealing with proof of facts in disputes in every trial whether civil or criminal where admissibility of digital photographic evidence is in issue. This, no doubt, is indicative of the fact that Nigeria is making progress with respect to electronically generated evidence and as such Legal practitioners, judges, prosecutors and magistrates must now be familiar with the general principles for admissibility of such evidence, how to introduce them in court and other conditions created by digital environment .[18] However, it must be stated that there is still a long way to go if Nigeria intends to keep pace with global developments.

[14] The Evidence Act, 2011, ss. 2, 3.
[15] *Id*., s. 86.
[16] S*upra* n. 3, p. 11.
[17] S*upra* n.2, pp.635-636, *See also, supra* n.1, p.14.
[18] S*upra* n.8, p.xiii.

Theoretical and Legal Framework for Admissibility of Photographic Evidence

The study adopts legal dynamism theory to explain the changes that occurred as a result of digital photo manipulation. The theory is built on the responsive nature of law to social, political and technological changes in the society. In other words, the content of the law of any society is usually the product of the prevailing social, political, economic and technological conditions at a particular time.[19] This goes to explain the fact that as photography changes from traditional to electronic there should be provisions in Evidence Act for detecting incidences of electronic photo manipulation otherwise the evidence jurisprudence will be growing at a disproportionate rate to the growth in science and technology.

In Nigeria, the issue of evidence in judicial proceedings is regulated by statutory enactment, which is Evidence Act, 2011. Part (v) thereof classifies documentary evidence into four categories thus: Documents produced by computer; Private document; Public document and affidavits.[20] A document is taken to have been produced by a computer under the Act if it was produced by it directly with or without human intervention or by means of any appropriate equipment;[21] while computer itself means any device for storing and processing information.[22] Therefore, one may not be under any fault to assert that the digital camera used by a photographer as well as the electronic medium used in the studio are computer devices. To that extent, the photograph generated from them falls under the documents produced by computer as provided for under the Evidence Act. Section 84 (1) of the Act provides that in any proceeding, a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible provided it is shown that the conditions in sub-section (2) of the section are satisfied in relation to the statement and computer in question. The conditions referred to are stated below in verbatim:

a) That the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual

b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived

[19] Abiola Sanni, Introduction to Nigerian Legal Method 19, (Obafemi Awolowo University Press Ltd, 2012).

[20] The Evidence Act, 2011, ss. 83-120.

[21] *Id.*, s. 84 (3)(c).

[22] *Id.*, s. 258.

c) that throughout the material of that period the computer was operating properly or, if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents and

d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

However, in any proceeding where it is desired to give a statement in evidence by virtue of the section, a certificate must be issued identifying the document containing the statement and describing the manner in which it was produced or the certificate must give such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer.[23] At this juncture, the crucial question that comes to mind is whether meeting up with the above highlighted conditions backed up with presentation of certificate is adequate enough to detect photo manipulation in court. Put differently, how can a piece of digital photograph as a species of electronic evidence be authenticated under Section 84 of the Evidence Act, 2011? To be precise, photo manipulation is achieved through discrete electronic computer. Can an opposing counsel or the judge in the hallowed temple of justice detect the manipulation manually? The basic function of the evidence law is to ensure that justice is done and the truth is as far as practicable, ascertained. The adversary system that Nigeria operates confines a judge to the evidence before him adduced by parties, and he is not allowed to take an active part in fact finding through interrogation of the accused or examination of documents as in the inquisitorial system. It is therefore paramount that there should be an effective system of discerning which evidence is admitted or rejected in proof of a matter.[24] The fact that photograph is a documentary evidence presupposes that there must be a means of authenticating it before the evidence is admissible. What section 84 provides for are conditions for laying foundation for admissibility and some of the conditions are more appropriately considered as affecting weight attachable to computer generated evidence and in this discourse digital photograph. A basic defect of the provision is in the absence of a requirement for verifying the accuracy of the input or data from the digital camera.[25] There is no clear guide in Section 84 of the Evidence Act, this is unlike the situation in the United States of America where the Federal Rules of Evidence make elaborate provisions for authenticating evidence generally, which have been made to apply to electronically generated evidence.[26] This is a big lacuna under the Nigerian Evidence Act because if section 84 is considered very

[23] *Id.*, s. 83(3).

[24] Workshop Papers on Reform of the Evidence Act, 1995 at p.16.

[25] Yemi Osinbajo, *Electronically Generated Evidence* in Afe Babalola (ed), Law & Practice of Evidence in Nigeria 243(Sibon Books Ltd, Ibadan, 2001).

[26] *See*, Rules 401 and 901 of the Federal Rules of Evidence of the United States of America. *See also*, A.O *supra* n.8, p.106.

critically, it generalizes computer and its uses rather than distinguishing between the use of computer as a mere calculator where it is used to perform computations from information supplied to it, and a computer used as an independent data recorder into which the human agent enters statement of facts or opinion and from which such statements are subsequently retrieved.[27] The conditions highlighted in section 84 of the Evidence Act lean more towards the use of computer as a mere calculator for computation and the conditions may hardly be adequate to capture the incidences of the use of computer as a discrete data recorder obtainable in digital photography. In any event, there are other challenges incidental to the accuracy of digital photograph for the purpose of admissibility in evidence such as the problem of proof and problem of identifying the maker among others.

Challenge of Proof

Proof is essential to the admissibility of digital photograph in evidence. It establishes or refutes an alleged fact by evidence. It is a well-established law of evidence that the contents of documents are proved either by primary or secondary evidence regardless of whether the document is generated by computer or not.[28] Primary evidence in the context of this discourse is the digital photograph itself produced for the inspection of the court.[29] By virtue of section 86(1) of the Evidence Act, photographs are classified as documents made by one uniform process and each shall be primary evidence of the contents of the rest. But where they are all copies of a common original, they are not to be primary evidence of the contents of the original. Hitherto the negatives of photograph used to be the primary evidence while the print outs are secondary; but for the fact that the images are captured by digital camera and translated to another computer in the laboratory or studio before being assembled in the form of print outs, which one will be the primary or secondary evidence? The images are stored on either internal or external memory card in the camera. Can one say this storage device belong to a known category of evidence? Even the evidential status of the print out is not free from controversy?[30] The Supreme Court's decision in *Kubor & Anor.* v. *Dickson,*[31] recently sets a standard reference of compliance for admissibility of computer generated evidence in Section 84(2) of the Evidence Act, 2011 that it is mandatory to fulfill all the cumulative conditions in the section and the conditions must be proved by oral evidence. No doubt, this position is in tandem with that of the Supreme Court in India in *Anvar* v. *Basheer*[32] where the court held that computer output is not admissible without compliance with section 65B of the Evidence Act of India(as amended)[33], and that of South

[27] *Id.,* p.248.
[28] The Evidence Act, 2011, s.85.
[29] *Id*., s.86.
[30] *Supra* n.25, p.247.
[31] (2014) 4NWLR (Pt.1345) 534.
[32] (2014) 10 SCC 473.
[33] *See also,* decision of the House of Lords in *R* v. *Shephard* (1993)1 All ER 225.

African Court in *S* v. *Ndiki*,[34] but both from the Evidence Act or case laws there is no guide as to what form should the certificate of authenticity required by section 84(4) of the Evidence Act take, especially that what the law requires is not certification but a certificate. But for the fact that Section 84(4) (b) requires the statement of affirmation to the best of knowledge and belief of the person stating it is suggestive of the fact that the certificate may take the form of affidavit. Comparatively, under the Singapore's Evidence Act(as amended) authenticity of electronic records, reliability and accuracy of the process of their production can be established by affidavit,[35] therefore nothing should be offensive in using affidavit to establish the facts required in Section 84(4) of the Evidence Act.

Problem of Identifying the Maker

The maker is the person who caused digital photograph to exist either with or without manipulation. In a proceeding where direct oral evidence of a fact is admissible any documentary evidence which seems to establish that fact shall on production of the original document be equally admissible as evidence of that fact whether or not the maker had personal knowledge of the content of the document provided the maker is called as witness in the proceeding.[36] To qualify as the maker, a person must have made or produced the photograph (document) or the material part of it by himself with his own hand.[37] To produce photograph digitally, the photographer is involved as well as the computer operator in the studio, the duo of who participated in the making of the photograph. The photographer does the snapping while the studio operator does the manipulation. Who between the two can be said to be the maker of the photograph in view of the provision of the Evidence Act. The requirement that to be regarded as the maker of the photograph, the person must have made or produced it by his own hand is one which certainly seals hope of any extensive use of the section to admit print-outs.[38] Besides it is clear that the provision of Section 83(4) to the effect that the maker must be one who makes or produces with his own hand does not envisage computer-generated evidence like digital photography. But a critical examination of Section 84 will reveal the desirability of an expert in court whenever digital photograph is to be tendered for the purpose of admissibility in evidence as he would be in the best position to explain to the court the reliability of the digital camera and the entire process of the production of the photograph for the purpose of authenticity.

Problem of Authenticity

To expect a judge to detect manipulation for any desire of the maker of digital

[34] (2007)2 All SA 185(CK).
[35] S*upra* n.8, p.114.
[36] Evidence Act, 2011, s. 83 (1) (a) & (b).
[37] *Id*., s.83(4).
[38] *Andrews* v. *Cordiner* (1947) 1KB 655; Per Oliver J. quoted in Yemi Osinbajo *supra* n.25, P 255.

photograph is akin to the difficulty in expecting a camel to pass through the eye of a needle. As earlier stated, the advancement in technology and equipment now makes incredible photo manipulation possible such that certain elements may be combined to create a unique image that can convince even the most experienced set of eyes of judges thereby giving a realistic view of an unreal picture. Section 84 of the Evidence Act in its entirety cannot assist a judge in detecting the manipulation since he is neither an expert in photography nor in digital computer and he is not a super human with a wand to detect the manipulation. For instance how can an accused person that put up the defense of alibi[39] be exonerated when he was fraudulently edited in as being physically present at the scene of a crime in a photograph tendered in evidence before a court? To this extent, the provision of section 84 is weak in detecting digital photo manipulation and there is need for amendment to cater for evidential means of authenticating digital photo manipulation which may be by means of expert evidence.

Conclusion

Digital photography is a product of advancement in technology but with attendant challenges and problems. One of the problems is the one that can be brought about by manipulation of digital photograph particularly for negative desire. The paper, while discussing the impact of digital photo manipulation on the admissibility of photograph in evidence found that Section 84 of the Evidence *Act* though purportedly provided for admissibility of statement in document produced by computers, is complex by generalizing computer and its uses and by providing for cumbersome conditions which may confuse the understanding of the people in the administration of justice. Besides, the section of the law is weak by not providing for mode of evidential authentication of fake photograph in any judicial proceeding. The paper also found that the mode of generating digital photograph strain the traditional rule of proof of evidence. It is therefore suggested that section 84 of the *Evidence Act* be amended to particularly distinguish computer and its uses for the purposes of admissibility of computer generated evidence in court. The amendment suggested should equally provide for electronic means of detecting digital photo manipulation to eschew the perversion of justice in Nigeria.

[39] The defense that the accused person or defendant was elsewhere when an offence was committed.

Position of Child Witness under Indian Evidence Act, 1872 – An Analytical Study

*Caesar Roy**

Introduction

Child witnesses are generally prone to tutoring and when something is repeated to them by their elders, they begin to imagine them and really feel them to be the truth. Their innocent brains are like blank papers and can retain anything written over them by repeated communication. But that does not mean that they cannot remember anything. The memories of children are also better and what they see specially when under strain, they seldom forget for a long time unless it is over written by some effort. It is not that what they state is always result of imagination but it may sometimes be an effect of imagination created by others and for that one needs another to cast that imagination and then lastly the duty of court would be to work out portions improved and deal with them according to law. Under section 118 of Indian Evidence Act, 1872 a child is competent to testify, if it can understand the question put to it and give rational answers thereto.

Meaning and Competency of Witness

Witnesses and documents are the main sources of evidence. A witness is a person who gives evidence before any court. As per Bentham, witnesses are the eyes and ears of justice. Witnesses can be the person who gives valuable input for the case. It is through witnesses and documents that evidence is placed before the court. So, the law has to be very clear with regard to certain issues like who are a competent witness and how can the credibility of the witness be tested.

Section 118 of Indian Evidence Act, 1872 explains who may testify, i.e. competency of witness. A witness is said to be competent when there is nothing in law to prevent him from appearing in court and giving evidence. Under this section all persons are competent to testify. They are incapable of giving evidence or understanding the questions put to them because of tender years, extreme old age, disease or any other cause of the same kind.

Indian Evidence Act, 1872 does not prescribe any particular age as determinative factor to treat a witness to be a competent one. So according to section 118 of the Evidence Act a child of tender age can be allowed to testify if he had intellectual capacity to understand questions and given rational answers thereto.

Competency of a witness must be distinguished from his compellability and from privilege. A witness is said to be competent when there is nothing in law to prevent him from being sworn and examined if he wishes to give evidence. Though the general rule is that a witness who is competent is also compellable, yet there are cases where a witness is competent but not compellable to give evidence, as for example, sovereigns and ambassadors of foreign states. Even under section 5 of the Banker's Books Evidence Act, 1891 no officer of the bank shall in any proceeding to which the bank is not a party be compellable to produce any banker's book or to appear as a witness, unless by order of the court for a special cause. In divorce and other matrimonial proceedings the parties are competent witnesses but not compellable (e.g. section 51 and 52 of Divorce Act).

Again, compellability to be sworn and examined must be distinguished from privilege, i.e., from compellability, when sworn, to answer certain specific questions. Sections 118 to 121 and section 133 deal with competency, the subject of general compellability is not specially dealt with by the Evidence Act; and section 121 to 132 deals with privilege. The admissibility of evidence is not solely dependent on the competency of the witness. A witness may be competent, yet his evidence may be inadmissible, as for instance, where it relates to hearsay or to confession made to a police officer.[1]

Competency of Child Witness

With respect to children, a child may be allowed to testify, if the court is satisfied that the child is capable of understanding the question put to him and give rational answers to the court. No absolute age is fixed by law within which they are exempted from giving evidence on the ground that they have not sufficient understanding. Actually it is not possible to lay down any specific rule regarding the degree of intelligence and knowledge which will render a child a competent or credible witness. So it is the discretion of the court to judge whether the child is capable of understanding the question put to him and give rational answers to the court.

Before examining a child as a witness the court should test his intellectual capacity by putting a few simple and ordinary questions to him and should also record a brief proceeding of the inquiry so that the appellate court may feel satisfied as to the capacity of the child to give evidence. If the court is not satisfied as to the child's capacity to depose it should decline to examine him, but if it is satisfied as to this matter, it should administer oath to the witness and examine him in the ordinary way unless he is under twelve years of age

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[1] Monir. M (ed.), Principles and Digest of the Law Evidence, 2037-2038(The University Book Agency, Allahabad 2001).

and does not understand the nature of an oath or affirmation. It is desirable that judges or magistrates should always record their opinion that the witness understands the duty of speaking the truth and state why they think that; otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether.[2]

In *Nivrutti Pandurang Kokate* v. *State of Maharashtra*,[3] the Supreme Court dealing with the child witness has observed that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

In *Himmat Sukhadeo Wahurwagh* v. *State of Maharashtra*,[4] the Supreme Court held that the evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him.

In *Ratansinh Dalsukhbhai Nayak* v. *State of Gujarat*[5] the Supreme Court observed that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle

[2] *Id*.
[3] AIR 2008 SWC 1460.
[4] AIR 2009 SC 2292.
[5] AIR 2004 SC 23 *See also*, *Golla Yelugu Givindu* v. *State of A.P*, AIR 2008 SC 1842.

that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaked and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

In case of *Baby Kandayanathil* v. *State of Kerala*,[6] the learned trial judge has put preliminary questions to each of the witnesses and satisfying himself that they were answering questions intelligently without any fear whatsoever, proceeded to record the evidence.

Voir dire Test

Voir dire means to speak the truth. It is a preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury.[7] According to the Law Lexicon it is a special form of oath administered to a witness whose competency to give evidence in the particular matter before the court is in question, or who is to be examined as to some other collateral matter.[8] Voir dire means to tell the truth. A sort of preliminary examination by the judge, in which the witness is required to speak the truth with respect to the questions put to him, when, if incompetency appear from his answers, he is rejected and even if they are satisfactory, the judge may receive evidence to contradict them or establish other facts showing the witness to be in competent. According to Encyclopaedic Law Dictionary, voir dire means an examination of a witness upon the voir dire in a series of questions by the court and usually in the nature of an examination as to his competency to give evidence on some other collateral matter. And this takes place generally prior to his examination-in-chief.[9]

Credibility and Admissibility of Child Witness

Dr. Henry Gross, who has been described by many as the father of criminal research, has set out in his book, "Criminal Investigation" the nature and character of evidence given by children. He has said that in one sense the best witnesses are children of seven to ten years of age, as at that time love and hatred, ambition and hypocrisy, considerations of religion rank etc. are yet unknown to them. He has, however, pointed out the great drawbacks which have made more distrustful of the capacity of children. They are apt to say much more from imagination than they actually know.[10]

In *Panchhi* v. *State of U.P*[11] the Supreme Court held that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that

[6] AIR 1993 SC 2275.
[7] Bryan A. Garner (ed.), Black's Law Dictionary 2041(West Group, 8th edn., 2004).
[8] P Ramanatha Aiyar (ed.), The Law Lexicon 1965, (Wadhwa and Company, 2nd Edition, 2000).
[9] Biswas, A.R (ed.), Encyclopaedic Law Dictionary 1512. (Wadha and Company, Nagpur, 2008).
[10] Dr. Henry Gross, Criminal Investigation 61-62 (1934)
[11] Sarkar S., : Law of Evidence 2127, (Wadhwa and Company, Nagpur, 16th edn, 2007).

if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and thus a child witness is an easy prey to tutoring.

In *State of Assam* v. *Mafzuddin Ahmed*,[12] it was held by the Supreme Court that it is hazardous to rely on the sole testimony of the child witness as it is not available immediately after the occurrence of the incidental before there were any possibility of coaching and tutoring him.

In *Mangoo* v. *State of M.P.*,[13] the Supreme Court while dealing with the evidence of a child observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

Competency of a person to be a witness is quite different from reliability of the witness. Unless a child is found competent to be a witness his statement is not admissible as evidence. Thus a child has to be a competent witness first then only his statement is admissible. Thereafter, the admissibility of the child witness has to be considered for reliability on scrutiny of his evidence. If the child is found to be reliable then only the child may be taken as a reliable witness. Otherwise rule of prudence which has been christened as a rule of law is that generally it is unsafe to rely upon statement of a child witness as children are easily tutored or threatened or persuaded to speak in the way as told by others. Hence the statement of the child witness has to be examined carefully to see that he was not been tutored.[14] Admissibility of evidence is not solely dependent on competency of witnesses. A witness may be competent within section 118, yet his evidence may be inadmissible if he states his opinions or beliefs instead of facts within his knowledge or gives hearsay evidence.[15]

Evidence of Child Witness without Oath

Under section 4 of the Oaths Act, 1969 all witnesses are to take oaths or affirmation. The proviso says that sections 4 and 5 of the said Act shall not apply to a child witness under twelve years of age. The proviso to section 4 of the Oaths Act, 1969 must be read along with section 118 of the Indian Evidence Act and section 7 of Oaths Act. An omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is dealt with, in section 118 of the Evidence Act. Every witness is competent unless the court considers he is prevented from understanding the questions put to him, or from giving rational answers, by

[12] AIR 1998 SC 2726.
[13] AIR 1983 SC 274.
[14] AIR 1959 SC 959.
[15] *Supra* n.10, p.2124.

reason of tender years, extreme old age, disease whether of body or mind or any other cause of the same kind. Therefore, unless the Oaths Act adds additional grounds of incompetency, it is evident that section 118 of the Evidence Act must prevail.[16] The Oaths Act does not deal with competency. In *Bhagwania* v. *State of Rajasthan*,[17] it was held that an omission to administer oath under the Oaths Act, 1969 does not affect the admissibility of evidence unless the judge considers the witness to be otherwise incompetent. Further, in *Ghewar Ram* v. *State of Rajasthan*,[18] it was held that once the child witness is found competent, his inability to take or understand oath or omission in administering it, neither invalidates the proceedings nor renders his evidence inadmissible.

In *Rameshwar* v. *State of Rajasthan*,[19] the Supreme Court held that an omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is dealt with is section 118 of the Evidence Act. Every witness is competent unless the court considers he is prevented from understanding the questions put to him, or from giving rational answers by reason of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. It is further held that judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. The Supreme Court in *Dattu Ramrao Sakhare* v. *State of Maharashtra*,[20] further held that even in the absence of oath the evidence of a child witness can be considered under section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness is that the witness must be a reliable any other competent witness and there is no likelihood of being tutored.

Need for Corroboration

Children are most dangerous witnesses, for due to tender age they often mistake dreams for reality. They are capable of cramming things easily and reproducing them. They repeat as their own knowledge what they have heard from others and are greatly influenced by fear of punishment, by hope of reward and by desire of notoriety. Hence, it is unsafe to rely on uncorroborated testimony of a child. In *Mohamed Sunal* v. *King*,[21] it was held that in England

[16] *Id.*, p.2123.
[17] *Rameshwar* v. *State of Rajasthan*, AIR 1952 SC 54.
[18] 2001 Cri.L.J 3719 (Raj).
[19] 2001 Cri.L.J 4460 (Raj).
[20] AIR 1952 SC 54.
[21] (1997) 5 SCC 341; *See also*, *State of Karnataka* v. *Shantappa Madivalappa Galapuji and others*, AIR 2009 SC 2144.

where provision has been made for the reception of unsworned evidence, from a child it has always been provided that the evidence must be corroborated in some material particulars implicating the accused. But in Indian Acts there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence court can act upon it. It is sound rule in practice not to act on the uncorroborated evidence of a child, whether sworned or unsworned but this is a rule of prudence and not of law. In *Gagan Kanojia* v. *State of Punjab*,[22] the Supreme Court held that part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of hostile witness.

In *Arbind Singh* v. *State of Bihar*,[23] the Supreme Court observed that it is well settled that a child witness is prone to tutoring and hence the court should look for corroboration particularly when the evidence betrays traces of tutoring. Further in *Bhagwan Singh* v. *State of M.P*,[24] the Supreme Court observed that the law recognizes the child as a competent witness but a child who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the court to be a witness whose sole testimony can be relied without other corroborative evidence. The evidence of child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony. But in *Suryanarayan* v. *State of Karnataka*,[25] the Supreme Court held that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not.

Suggestions and Conclusion

In case of child witness, the question on which his competency depends is whether he can understand and answer the question put him. The evidence of the child is required to be evaluated carefully as he is an easy prey to

[22] AIR 1946 PC 3.
[23] (2006)13 SCC 516.
[24] AIR 1994 SC 1068.
[25] AIR 2003 SC 1088.

tutoring. So it will be unsafe to rely the testimony of the child witness without corroboration, though it is not the rule but a measure of caution and prudence. Some suggestions are put forward to make the provisions relating to child witness more effective –

(i) When any witness who is under examination is a child, the court should comply section 118 of the Evidence Act properly, i.e., court should apply its discretion to judge whether the child is capable of understanding the question put to him and give rational answers.

(ii) The examination in chief and cross examination of the child witness should properly be controlled by the judicial officers. The court should monitor the leading questions which are faced by the child witness.

(iii) Whenever possible the child should be permitted to testify via closed circuit television or through video conferencing. Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you, i.e., in your presence. The advancement of science and technology is such that now it is possible to set up video conferencing equipments in the court itself. In that case evidence would be recorded by the magistrate or under his dictation in the open court as observed by the Supreme Court in *Sakshi* v. *Union of India*.[26] The suggestions made by the Law Commission of India in its 198th Report regarding witness protection may be considered.[27]

(iv) In criminal justice system in India, speedy trial is regarded as one of the fundamental rights. In order to ensure this right, the court should take appropriate action to ensure a speedy trial in order to minimize the length of time a child must endure the stress of his or her involvement in the proceeding. Also the court should take the appropriate steps to avoid repeated appearance of a child witness before the court.

(v) Prosecutors, Police, Judicial Officers should be well equipped with child psychology and child behavior. They should receive proper training in this regard to deal with the cases where children are alleged victims and witnesses of abuse.

[26] (2001) 9 SCC 129.
[27] AIR 2004 SC 3566.
[28] Law Commission of India, *198th Report on Witness Identity Protection and Witness Protection Programmes*, (August 2006). Number of district courts in Delhi are equipped with video conferencing facilities.

'No' to Marital Rape Exemption in Indian Law: Stepping Stone to Gender Justice

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Introduction

Rape, regardless of victim's age, is an insult to womanhood which violates her sexual and bodily integrity, erodes honour of life and infringes upon her right to sexual self-determination. Sir Hale's dictum enabled legal exemption to husbands from criminal liability of marital rape. Sexual violence under legally protected cocoon of 'matrimonial right of cohabitation' represents husband's dominance over wife to inflict indescribable pain and relentless humiliation upon her. The bride's consent for marriage has been unilaterally interpolated in favour of husband as her perpetual and irrevocable approval for copulation even against her will and consent. The legal fiction of conjugal cohabitation, deeply embedded in socio-cultural milieu, entails lifelong sexual bondage of wife, promoting gender discrimination and female subjugation. For ages, various socio-cultural constructs, power imbalance and legislative leniency turned a blind eye to child marriages where minor girls silently suffered from coerced sex and untimely pregnancies compromising their mental and physical health. Conspicuous silence of law makers and judiciary on child marriage indeed facilitated sexual exploitation of minors, brazenly abridging the best interest of the child and their right to self-determination. There is an emerging global legal trend to criminalize marital rape, despite existing formidable socio-cultural and legal impediments, to ensure justice for women facing sexual assault in intimate relationship.

The Supreme Court of India in the *Independent Thought* v. *Union of India*,[1] has recently addressed the legal discrimination of child brides between the age of 15 to 18 years by reading down Exception-2 of the section 375 of the Indian Penal Code (IPC), 1860 and annulled the legal exception for marital rape.[2]The judgement reflects harmonious and purposive construction to bring synergy between section 375 of IPC and sections 5 and6 of the Protection of the Children from Sexual Offences (POCSO) Act, 2012 for defining and punishing rape with minor brides in absence of the age of consent. In a patriarchal society, marriage, sex and rape have always been seen from masculine lens and the Exception-2 legitimizes spousal rape with wife of age above 15 years by granting impunity to husband breaching fundamental *jus cogens* norms necessary for due diligence standard of human rights.

This verdict may prove to be a milestone in highlighting and removing the anomaly in Indian law, which permits marriage and consummation of such marriage to child brides in the name of tradition, thus protecting sexual abuse of children within bedrooms. The verdict is a stepping stone for jurisprudential progress on marital rape providing a ray of hope to millions of victim wives suffering from sexual abusein the guise of nuptial obligation. This article delves upon the intertwined tenets of child marriage and cohabitation with minor wives as deliberated in the '*Independent Thought*'. Legal inconsistencies and impediments prevailing in [marital] rape laws in India have also been examined, in addition to comparing legal regimes of other jurisdictions to comprehend global scenario on sexual violence within conjugal sphere.

Child Marriage and Marital Rape: Historical and contemporary landscape

Child marriage is a global phenomenon but India has highest number of child brides in the world.[3] UNICEF has reported that globally 7% girls get married before the age of 15, and 27% before 18.[4]Several international and regional instruments on human rights and domestic laws have provision for child protection from sexual abuse, but omnipresent legal exception for marital rape irrespective of age of wife grossly discriminatesagainst a married girl child. Reprehensible practice of child marriage is five times more common among girls than boys.[5] Marriage of minors continues to be a pandemic reality prevailing in Africa, Asia and Latin America. In USA and United Kingdom, couples having minor female partners live under informal union, officially called cohabitation. In Unites States, 0.35 million babies are annually born to

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1 (2017) 10 SCC 800: The Writ Petition (Civil) No. 382 of 2013 under Article 32 of the Indian Constitution was filed before the Supreme Court of India by the Petitioner, the 'Independent Thought' – a human rights organisation in India, raising several inconsistencies in Indian laws especially related to child marriage and sexual exploitation of child bride, and sought for directions of the nature of certiorari to declare Exception – 2 of s. 375 of IPC as arbitrary and unconstitutional qua it violates beneficial legislative intent as enshrined under Articles 14, 15 and 21 of the Indian Constitution..

2 Marital rape is a variant of aggravated form of domestic violence using forced sex as weapon and may be defined as the act of carnal knowledge with one's spouse without will and the consent of other spouse.

3 UNICEF State of the World's Children, 2017, *available at* https://www.girlsnotbrides.org/child-marriage/india/ (last visited August 24, 2018).

4 *Supra* n.3.

5 *Supra* n.3.

teenage mothers.[6]

Child Marriage: Nature and Scope

Marriage between male and female (heterosexual), a precursor to a stable family, is a vital social institution mainly for regulating sexuality, ensuring perpetuity of generations and social security. In Hinduism, marriage is presumed as a sacrament but many religions such as Islam consider matrimony as a contract. Marriage in India is governed by various Personal Laws but matrimonial registration is not mandatory despite a secular enactment, the Special Marriage Act, 1954, being in place. Homosexuality, to some extent prevails in society, but constitutes a punishable act under Indian criminal law; however, judicial proceedings are in progress to evaluate its constitutional validity.[7]

Traditionally, child marriage with the consent of parents has been a socio-culturally approved marriage of children, before attaining legally prescribed marriageable age. Since ancient times, girls were often married at the onset of their puberty, and boys tied nuptial knot in their teens, in order to comply with the social norms. Poverty, illiteracy, insecurity, bride price, dowry remained few among several pressing raison d'êtrebehind continuation of this social evil in addition to various political frameworks and religious milieu. Early marriage grossly impinges with myriads of domestic laws, regional and international instruments of human rights; and further entails enormous risks to survival, health and development of young girls and to children born to them bearing inter-generational impact.[8] Unfortunately practice of early marriage is also apotent modus operandi of trafficking.

ICRW-UNICEF data reveals that in 2015-16, 27 % girls in India got married before the age of 18 years.[9] India is member of the South Asian Initiative to

6 *Breaking the cycle of teen pregnancy CDS*, US Government (April 2013) *available at* https://www.cdc.gov/features/vitalsigns/teenpregnancy/ (last visited August 24, 2018).

7 Homosexuality [among Lesbian, Gay, Transgender and Transgender (LGBT)], since ages, was criminalized globally. Indian penal laws under s. 377 of IPC punish the unnatural sex – 'voluntarily carnal intercourse against the nature'. Like many other jurisdictions across world, in 2009 Delhi High Court, after recognition of alternative sexual preferences and orientation, had decriminalized consensual homosexuality between adults in a Writ Petition (Civil) No. 7455/2001 namely *Naz Foundation* v. *Government of NCTDelhi* [2010 CriLJ 94]. Later in December 2013, the apex court of India in *Suresh Kumar Koushal* v. *Naz Foundation*(2014) 1 SCC 1 uphold the constitutional validity of s. 377 by reversing the judgement of Delhi High Court, thus brought back life to s. 377 IPC. In 2014, the Apex Court has also recognized transgender as 'third gender' in the *National Legal Service Authority* v. *Union of India* (2014) 5 SCC 438. Since the judgement in the *Suresh Kousal* received overwhelming criticism; the Chief Justice of India has recently referred the matter to 05 Judges Constitutional Bench of the Supreme Court to review the issue of criminality for homosexuality by saying social morality changes from age to age and "what is natural to one may not be natural to other. Individual who exercise his choice should not "remain in a state of fear" and law can't "trample or curtail' the constitutional right to life and liberty. The matter is still *sub juidice*.

8 *Supra* n. 1, para 87.

9 Child Marriage Facts and Figures, *available at* https://www.icrw.org/child-marriage-facts-and-figures/ (last visited August 24, 2018).

End Violence against Children (SAIEVAC), a regional action plan to be implemented in 2015-2018, to end child marriage.[10] Further India is among 12 countries identified for the Global Programme to Accelerate Action to End Child Marriage initiated by UNFPA and UNICEF.[11] The National Family Health Survey of India has reported that about 10 million girls globally get married every year before the age of 18 years, and one-third of them live in India.[12] Minimum age for marriage in India was fixed for the first time by introducing the Child Marriage Restraint Act, 1929 which was repealed by the Prohibition of Child Marriage Act, 2006 (PCMA) by enhancing valid age as 18 for female and 21 for male.[13] However, in 2008 the LCI has suggested certain amendments in the PCMA, 2006 by observing that "child marriage below 18 years for both girls and boys should be prohibited and the marriage below 16 be made void while those between 16 to 18 be made voidable".[14] Despite having prohibitive laws, one out of five marriages in India brutally violates the provisions of the Prohibition of Child Marriage Act, 2006 and the Hindu Marriage Act, 1955.[15] This article attempts to highlight the complex legal issues incorporated in different legislation which creates a self defeatist model of justice, presenting a male dominant solution for a problem plaguing women.

The United Nations through series of Conventions like Universal Declaration of Human Rights (UDHR), 1948, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW),[16] and the UN Child Rights Convention (UNCRC), 1989 has declared child marriage an infringement of human rights. The first resolution against child marriage was adopted by the UN Human Rights Council in 2013,[17] and the UN Commission on the Status of Women issued a document to eliminate child marriage.[18] In May 2018, Delaware became the first State of US to ban child marriage without exceptions,[19] followed by New Jersey in June 2018.[20] India being the signatory

10 *Supra* n.3.

11 *Supra* n.3.

12 National Health Survey of India, *available at* http://rchiips.org/nfhs/ (last visited August 24, 2018).

13 Minimum legal age for marriage in India is 18 for female and 21 years for male since 1978, however, the majority age is gender neutral for the purpose of various laws on property, contracts and adult suffrage.

14 Law Commission of India, *172nd Report on Review of Rape Laws* (March 2000).

15 *Supra* n. 1, para 31.

16 CEDAW was signed on 18 December, 1979 but became effective from 03 September, 1981. However, it entered into force on August 08, 1993.

17 UN Takes Major Action to End Child Marriage, Centre for Reproductive Rights, *available at* https://www.reproductiverights.org/feature/un-takes-major-action-to-end-child-marriage (last visited August 24, 2018).

18 Liz Ford, *Campaigners welcome 'milestone' agreement at UN gender equality talk- Global development*, The Guardian, 23 March, 2014, *available at* https://www.theguardian.com/global-development/2014/mar/23/campaigners-welcome-agreement-un-gender-csw-talks (last visited August 24, 2018).

19 Delaware become first State to ban child marriage, *available at* http://thehill.com/homenews/state-watch/387212-delaware-becomes-first-state-to-ban-child-marriage (last visited August 24, 2018).

of the CEDAW[21] must adjust its legal regime for women protection on sexual self-determination to attune it with international standards especially in addressing issues of nuptial age and age of consent for cohabitation.

Marital Sex: Hale's Dicta on Implied Consent and Legal Apathy

The celebrated dictum propounded by Sir Matthew Hale, the Chief Justice of England, as far back as 1736, continued to prevail among Common Law jurisdictions for granting exemption to husband against spousal rape, which says, "the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, whom she cannot retract."[22] The implied consent theory of marriage and legal immunity for marital rape by Sir Hale stems from the notion of marital unity assuming that when two persons marry they become one and thus husband cannot rape himself; and thus *suomoto* presumes irrevocable consent of wife for attending to sexual desires of husband by pledging her complete autonomy because she gives up her body to husband at the time of marriage. This old aphorism buttressed the baseline patriarchal notion for ensuring 'control' over the wives. Various societies promote and legalize masculine dominance and subordination of women in core decision making for marital and familial affairs.[23]

Right to sexual self-determination, an inherent ingredient of the right to life with dignity, aspires for equal status of partners in making intimate sexual relationship, and spouse cannot be an exception. The presumptive notion of deemed ongoing consent of wife for having sex with husband is the root cause for legal impunity to nuptial rape and is breeding ground for gendered inequality and domestic violence. The perpetual 'immunity' against marital rape, further demoralizes females with the presumption that their bodies are subservient to husbands for the purpose of attaining sexual pleasure. Refutation of presumptive implied consent would broadly equalize the status of women, and affirmative consent of woman for each sexual liaison must be the bottom line to determine culpability for violent sexual conduct irrespective of marital status of the parties.

Marital Rape: Issues and Challenges

Rape constitutes a crime against basic human rights that infringes upon a

[20] New Jersey law gives momentum to U.S. efforts to ban child marriage, *available at* https://www.reuters.com/article/us-usa-marriage-children/new-jersey-law-gives-momentum-to-u-s-efforts-to-ban-child-marriage-idUSKBN1JI2X9 (last visited August 24, 2018).

[21] India became signatory for CEDAW on July 30, 1980 and ratified on July 09, 1993 with the caveat that "the betrothal and the marriage of a child shall have no legal effect, and all necessary action including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."

[22] Mathew Hale, History of the Pleas of the Crown 629 (Vol. 1 London Professional Books, Ch. 58, 1736).

[23] Melina Lundquist Denton, *Gender and Marital Decision Making: Negotiating Religious Ideology and Practice*, 82(3) Social Forces, 1151-1180 (2004).

victim's most cherished fundamental right, namely, the right to life.[24] Spousal rape manifests masculine predatory sexuality having inequitable power relationship between married partners for non-consensual sexual intercourse or penetration (vaginal, anal or oral) under the influence of duress, coercion, threat of force, physical and emotional violence or when victim partner is incompetent or unable to give consent. Sexual violence perpetrated against married women reflects conscious manifestation of abuse, belligerence, intimidation, and domineering; as a result victims face unrelenting threats of recurring assaults, coerced sex, dishonour, stigma, withdrawal of shelter and allied economic support, polygamy and catena of humiliating consequences like gynaecological infections, schizophrenic disorder, sexual dysfunction, unintended pregnancies, miscarriage, stillbirths, insomnia, emotional pain, flashback, and maternal mortality and morbidity in addition to loss of conjugal faith.[25] Dependence for socio-economic needs including residence especially in patriarchal societies;[26] and bonding with children as mother further aggravate vulnerability for secondary victimisation of married women. The females are reared to consider domestic violence and marital sex as fait accompli since such intimate violence predominantly remain unrecognized and unreported worldwide due to social stigma and misogynist mindset of law enforcers.

It is observed that "sexual assault committed in familiar settings by assailants known to the victims, including spouses, occur at a greater frequency than those committed in high risk situations by unknown assailants,"[27] and "[marital rape] is minimized somewhat in terms of seriousness in contrast to other types of rape".[28] David Finkelhor and KrestiYllo have commented that 'the marriage license is a raping license'.[29] A woman can legally protect her right to life and liberty, but not her bodily integrity, within her marriage, which is just ironical. Women victims of gendered brutality and their children often require special support, protection and care because of high risk of secondary and repeat victimization, intimidation and retaliation by their male counterparts.[30] Diana Russell, in her study, observed that every seventh

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

[25] Arati Rao, *Right in the Home: Feminist Theoretical Perspectives on International Human Rights* in Ratna Kapur (ed,) Feminist Terrains in Legal Domains: Inter-Disciplinary Essays on Women and Law in India, (Kali for Women, New Delhi 1996).

[26] European Union Council Directive 2012/29, 2012 O.J. (L 315) para 18.

[27] Lana Stermac, Gianetta Del Bove and Mary Addison, *Violence, Injury, and Presentation Patterns in Spousal Sexual Assaults*, 7 Violence Against Women 1218 (2001).

[28] Kelly Simonson and Linda Mezydlo Subich, *Rape Perceptions as a Function of Gender-Role Traditionality and Victim-Perpetrator Association*, 40 Sex Roles 617, 629 (1999).

[29] David Finkelhor and KerstiYllo, *Rape in Marriage: A Sociological View* in David Finkelhor, Richard J. Gelles, Gerald T. Hotaling and Murray A. Straus (eds.) The Dark Side of Families: Current Family Violence Research, 119 (Safe Publications, Inc. California, 1983).

[30] *Id.*, para 17.

married women reported being raped by her husband.[31] The societal and legislative response towards marital sexual violence is a tale of apathy making wives as second grade partners, unequal between equals, in marital chores.

Legal Perspective on Marital Rape: Global Bird's View

Feminists since long have raised voice to criminalize sexual violence with marital boundaries. *R* v. *Clarence*[32] first time ignited a debate against absolute immunity to husband for rape within marriage; however, appeal was allowed by acquitting the accused husband on the grounds, firstly there was no intention of husband to sexually transmit infection to her, and secondly sexual intercourse was presumed consensual in absence of any physical assault on wife. BryneJ. in R. v. *Clarke*[33] compared sex in marriage as 'contract' which may be revoked by a decree of separation from competent court. The Hale's Principle of marital rape immunity was given the burial by Lord Chief Justice Lane, he said, "Criminalisation of marital rape ... is not the creation of new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon".[34] A husband lost his immunity from spousal rape if spouse has a decree of judicial separation or a decree nisi of divorce.[35]

In England, the House of Lords put marital rape exemption to halt in *R* v. *R*[36] and set the judicial tone for criminalizing sexual violence within marriage by convicted husband for attempted rape on her wife despite her expressed denial. The Lords held that the marital rape exemption provided to husband is illogical since "the fiction of implied consent had no useful purpose to serve today in the law of rape." Lord Keith observed that "*Hale's proposition on the marriage contract reflected the state of affairs in these respects at the time it was enunciated. Since the status of women… has changed out of all recognition…* [M]arriage*is in modern times regarded as a partnership of equals and no longer one in which wife must be subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her* irrevocable consent to sexual intercourse with her husband underall circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable". The view was echoed in a speech by

[31] Diana E.H. Russell, Rape in Marriage, (Indiana University Press, 1990). Her finding are based on empirical study where she interviewed random sample of more than 900 women, among them 644 were married.

[32] (1888) L.R. 22 Q.B.D. 23. The defendant husband, Charles James Clarence, without disclosing that he was suffering from gonorrhoea, had intercourse with his wife causing infection to her. Ms. Selina Clarence, the wife filed the case, under sections 20 and 47 of the Offences against the Person Act, 1861, for unlawfully and maliciously inflicting bodily injuries upon her by knowingly transmitting Gonorrhoea.

[33] [1949] 2 All E.R. 448.

[34] [1992] 1 AC.

[35] *R.* v. *O'Brien* [1974] 3 All E.R. 663.

[36] [1991] UKHL 12: (1992) 94Cr App R 216: [1992] 1 AC 599 (HL) (appeal taken from England).

Lord Lane CJ when he dismissed Sir Mathew Hale's dictum as a 'statement of the common law at that epoch' and ruled that "the time has now arrived that the law should declare that a rapist remains a rapist subject to the criminal law regardless of their relationship to the victim".[37] This case was instrumental for revision of the Sexual Offences Act, 1956 for abolishing the marital rape exemption in 1994.

The European Commission of Human Rights in *C.R.* v. *United Kingdom*[38] had endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim.[39] In *Eisenstadt* v. *Baird*,[40] the US Supreme Court observed that a married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.[41] In '*Independent Thought*', the Indian Apex Court has observed, "On a combined reading of *C.R.* v. *UK* and *Eisenstadt* v. *Baird*, it is quite clear that a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist".[42]

Sexual violence within marriage constitutes torture and cruelty on wives which squarely attracts violation of all international instruments on human rights. Marital rape satisfies all elements of act of torture as defined under Article 1 of the UNCAT,[43] since it is an act of (i) infliction of severe pain and suffering; (ii) for a prohibited purpose that includes coercion, intimidation, or discrimination, and (iii) is acquiesced to or condoned by a state actor.Article 2 of the Declaration of the Elimination of Violence against Women, 1993 includes marital rape explicitly in the definition of violence against women. The CEDAW Committee has similarly affirmed that sexual crime especially under intimate relationship must be treated as violations of bodily integrity of a woman instead of considering as crime against moral violations.[44] Legal immunity for men who sexually violate their wives is patently incompatible with criminalization of other sexual and physical assaults. It was observed that "states must ensure that criminal law provides that any act of violence against a person, in particular physical or sexual violence, constitutes a violation of that person's physical, psychological and/or sexual freedom and integrity, and not solely a violation of *morality, honor or decency.*"[45]

[37] [1992] 1 AC, p. 610-611.

[38] Publ. ECHR Ser.A No. 335-C.

[39] *Supra* n. 1, para 74.

[40] 405 US 438 31 L Ed 349, 92 S Ct 1092.

[41] *Supra* n. 1, para 72.

[42] *Id.*, para 73.

[43] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) was signed on 04 February 1985 and came into effect from 26 June 1987. India is signatory since 14 October, 1987, but yet to ratify.

[44] Concluding Comments of the Commission on the Elimination of Discrimination against Women: Hungary, 39th Session, U.N. Doc. CEDAW/C/HUN/CO/6, paras. 20–21 (Aug. 10, 2007).

[45] Council of Europe Committee of Ministers, Recommendation of the Committee of Ministers to Member States on the Protection of Women Against Violence,para 34 (Apr. 30, 2002) *available at*: https://wcd.coe.int/ViewDoc.jsp?id=280915 (last visited August 24, 2018).

Poland in 1932 became the first country to explicitly criminalize rape in marriage. Several other jurisdictions like Czechoslovakia (1950), Soviet Union (1960), Australia (1953)[46], Denmark (1965), Norway (1971), Canada (1983)[47] and South Africa (1993)[48] have also criminalized marital rape by abolishing exemption clause.[49] Statutory provisions necessitates that spousal rape be recognized as an offence against safety and liberty for sexual self-determination to protect bodily integrity rather than defining sexual violence as crime against family and sexual morality like in Hungary and Mexico.[50,51] Sexual assaults by husband upon separated wives invoke punishment in several jurisdictions like Singapore,[52] India,[53] and Sri Lanka.[54] Jurisdictions like Tunisia, Cameroon, and Bulgaria, perpetrators of rape are exempted from criminal liability provided they marry the victims.[55] In Latin America, Arab, Denmark and Morocco, a rape survivor may be compelled to marry the rapist so that marital rape exemption may be extended from retrospective effect.[56] This approach brace the misogynistic construct that woman is 'damaged goods' if she is raped outside the marriage but concurrently promulgates that sexual assault within wedlock is not rape.[57]

Legal Landscape in India: Inherent Legal Inconsistencies

Indian criminal laws have inherent inconsistencies with regard to deviant sexual conduct of husband with his wife whether minor or major. During British rule in India, on the pretext of family stability, husbands were

46 Child protection from violence, exploitation and abuse, UNICEF Report *available at* https://www.unicef.org/protection/57929_58008.html (last visited August 24, 2018).

47 The Criminal Law Consolidation Act, 1953, s.73 (4) incorporates, "No person shall, by any reasonably of the fact that he is married to some other person, be presumed to have consented to an indecent assault by that other person".

48 The Family Violence Act, 1993, s.5 states, "Notwithstanding anything to the contrary in any law or in common law; a husband may be convicted of rape of his wife."

49 Arima Pankaj, *Independent Thought* v. *Union of India: An evaluation of the judgement and its repercussion in the field of marital laws* 22(11) IOSR Journal of Humanities and Social Sciences 79-85 (2017).

50 Amnesty International, Hungary: Cries Unheard: The Failure to Protect Women from Rape and Sexual Violence in the Home, AI Index EUR 27/002/2007, p. 4–5 (May 10, 2007).

51 Marianne Mollmann, Ending Impunity for Rape, Washington Post (December, 27, 2008) *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/12/26/AR2008122601493.html (last visited August 24, 2018).

52 The Penal Code of Singapore, s.375.

53 The Indian Penal Code, 1960, s.376B.

54 The Penal Code of Sri Lanka, s.363(e).

55 Melanie Randall and Vasanthi Enkatesh, *The Right to No: The Crime of Marital Rape. Women's Human Rights, and International Law*, 41(1) Brook. J. Int'l L. 153 (2015).

56 Morgan McDaniel, *From Morocco to Denmark: Rape Survivors around the World Are Forced to Marry Attackers*, Women under Single Project (2013) *available at* http://www.womenundersiegeproject.org/blog/entry/from-morocco-todenmark-rape-survivors-around-the-world-are-forced-to-marry (last visited August 24, 2018).

57 Radhika Coomaraswamy (Special Rapporteur on Violence against Women, Its Causes and Consequences), Cultural Practices in the Family that Are Violent towards Women, U.N. Doc E/CN.4/2002/83, para 58 (January 31, 2002).

exempted from criminal liability for marital rape. Section 375 of the penal code defines rape, and s. 376 classify and quantify punishment for rape under different circumstances. Section 375 under Chapter XVI of the Indian Penal Code, 1860 read with the Criminal Law (Amendment) Act, 2013[58] prescribes minimum age of consent for female as 18 years for sexual intercourse and violation shall attract penal action for statutory rape.[59] However, Exception-2[60] nullifies the effect of clause Sixthly of section 375 of the penal code. Section 376B of the Code criminalises sexual intercourse by husband upon his wife during separation.[61] However, section 498A of IPC penalize husbands and other relatives for subjecting wife to cruelty, but in absence of explicitly mention of sexual cruelty, it could not passably address the perverse sexual cruelty and violence against married women. The females under live-in relationship do not have 'legal' marital obligation of consummation, consequently may legally allege their male partners for sexual abuse unlike legally wedded wives.

After Nirbhaya Rape case in 2012,[62] the government of India constituted a Committee on Amendment to Criminal Laws headed by Justice JS Verma. The committee opined that rapist is a rapist irrespective of his affiliation with victim, and recommended to delete marital rape exemption under the penal laws, but no suggestion was made to change the age of consent.[63] Interestingly, contrary to the recommendations, the Indian legislature raised

58 The Criminal Law (Amendment Act), 2013 (Act No. 13 of 2013), with effect from February 03, 2013.

59 Statutory rape, a generic term used in Common Law jurisdictions, means non-forcible unlawful carnal knowledge where one individual is below legal age of consent. Indeed consent or no consent of minor becomes immaterial for invoking penal action against an accused for indulging in sexual activity with a minor. Clause Sixthly of 375 of IPC has provision of statutory rape wherein willingness or consent of a woman below the age of 18 years for having sexual intercourse is rendered irrelevant and inconsequential but Exception -2 to section 375 of IPC provides that it is not rape if a man has sexual intercourse with a girl above 15 years of age and if that girl is his wife regardless of her willingness or her consent. Consent of wife aged above 12 and below 15 is necessary for marital sex. Statutory rape for husband may be invoked provided wife is of age below 12 years.

60 Exception -2 of s. 375 of IPC: Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape. [s. 9 of the Criminal Law (Amendment) Act, 2013].

61 Law Commission of India, *The 42nd Report on Indian Penal Code* (June 1971). LCI recommended for criminalizing act of intercourse by a husband with his minor wife. The recommendation was rejected on the premise that a husband cannot be penalized for intercourse with his wife since consent to marriage is *sine qua non* to perpetual implied consent of wife for copulation. However, The Criminal Law (Amendment) Act, 1972 introduced s. 376B in the India Penal Code for punishing husband for sexual intercourse with his wife without her consent during the period of a decree of judicial separation.

62 The 2012 Delhi gang rape popularly known as the Nirbhaya Rape case involved rape and fatal assault on 16 December, 2016 in South Delhi. A 23 year old female physiotherapy intern was brutally beaten up and gang raped who later succumbed to injuries on 29 December, 2016. The incident generated global uproar of public sentiment leading to paradigm shift in socio-legal approach towards rape jurisprudence.

63 *Supra* n. 1, para 50.

the age of consent to 18 years by introducing the Criminal Law (Amendment) Act, 2013 but did not bring any change in marital rape exemption. Since the laws are in place approve minimum age of consent and marriageable age for girl as 18 years, marital rape exception evidently seems arbitrary, capricious, discriminatory and oppressive to minors.

Defining Child

Legally speaking, a child is a person below the age of majority. A child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.[64] Age of majority varies among jurisdictions; the Children and Young Act of Singapore defines child is a person below 14 years but under US Immigration law child is one below age of 21. The age of majority in India varies under different legal provisions causing vital legal absurdity, as discussed under subsequent sections. A child is considered immature to take decision to protect her best interest, hence legally considered incompetent to consent for making valid contract including marriage and carnal relationship. Parents, legal guardian or court are legally competent to take decision on behalf of the child in accordance to protect her best interest. Ideally speaking, the age of majority, the age of responsibility[65] and the age of consent must be same, but due to various reasons.

Age of Consent

The Indian Penal Code since beginning provided immunity to husbands against marital rape. The minor brides suffered from sexual violence by husbands to the extent that an eleven years old bride died due to excessive bleeding from ruptured vagina as a result of violent coitus by her husband as reported in *Queen Empress* v. *Haree Mohan Mythee*.[66] This case attracted judicial prudence and legislative attention, introducing the Criminal Law (Amendment) Act, 1891 raising the age of consent to 12 years for sexual cohabitation both within and outside marriage for protection of minor girls from pre-mature sexual engagements and pregnancies. After long legislative battle at the beginning of the 20th century, the Criminal Law (Amendment) Act, 1925 further raised the age of consent with distinction between marital and extra-marital rape to 13 years and 14 years respectively. The distinction was further accentuated by incorporating the phrase under section 376,

[64] The United Nations Convention on the Rights of the Child, 1989, art.1. The convention was signed on November 20, 1989 and became effective from September 02, 1990. It is ratified by 192 out of 194 member countries, and India has on 11 December, 1992 with few caveats related to child labour.

[65] The age of responsibility denotes the age of a person liable for their acts. Since ages a child was regarded as not culpable for crime. In India, under general exceptions for criminal liability, a child is *ab initio* exonerated of any criminal liability for child up to age 7 years under s. 82 of IPC in accordance with the doctrine of *doliincapax*. Act of a child above 7 years of age and under 12 who has not attained sufficient maturity of understanding to judge the nature and consequence of his conduct is not an offence under s. 83 of IPC (based on the test under the doctrine of *dolicapax*).

[66] ILR 1891 Cal 49.

"unless the woman raped is his own wife and is not under twelve years of age", punishment for which was diluted by prescribing maximum of two years imprisonment. Until the Criminal Law (Amendment) Act, 2013, the punishment was two years for rape of wife of having age between 12 to 15 years against her consent. The law holds the husband guilty of statutory rape only if wife is aged below 12 years.

Explanation 2 of section 375 IPC elucidates, "Consent means an unequivocal voluntary agreement when the woman by words, gesture or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act". Valid consent is crucial to determine criminality based on consensual or forced sex. The apex court in the instant case has referred to the observations of the Law Commission of India (LCI) vide Report No. 84[67] for deliberating on legal growth for the age of consent under Indian law.[68] The updated matrix for jurisprudential growth of the age of consent, marital exception and marriageable age under Indian legal lexicon is represented below:

Year with reference of Amendment	Age of Consent under s. 375 (5th clause) of IPC (years)	Age mentioned in the Exception to s. 375 of IPC(years)	Minimum age for marriage under the Child Marriage Restraint Act (years)
1860	10	10	-
1891 (Act 10 of 1891)	12	12	-
1925	14	13	-
1929 (after the Child Marriage Restraint Act, 1929)	14	13	14
1940 (after amendment of the Penal Code and the Child Marriage Act)	16	15	15
1978	16	15	18
2013 [The Criminal Law (Amendment) Act, 2013]	18	15	18 (F) and 21 (M) under the PCMA, 2006
2017 (after *Independent Thought* verdict dated 11 October, 2018.	18	18	18 (F) and 21 (M) under the PCMA, 2006

[67] Law Commission of India, *84th Report on Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence*, (April, 1980).

[68] *Supra* n. 1, para 6.

A minor is incompetent to consent, is the dictum of global jurisprudence, so the age of consent for sexual conduct and cohabitation cannot be justified below the age of majority. The Apex Court held that "under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse".[69] Since marriage below 18 years is prohibited under law since 1978, the apex court argued that age for sexual intercourse must be raised accordingly and marital rape exception is unjustified for extrapolating consent for marriage as perpetual and implied consent of wife above 15 years.

Legal Exemption for Marital Rape

The marital rape exception, echoing archaic sentiments of Lord Hale for enabling immunity to husbands, exists in the Indian Penal Code, 1860 since its inception. A person is held guilty for committing statutory rape under the clause Sixthly of s. 375 of the penal code which reads, "With or without her consent when she is under eighteen years of age". However, the Exception-2 of clause Sixthly discriminates against married minor girls by saying "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape".[70] The LCI, in 1980, argued for deleting marital exception by rising age of consent to 18.[71]In 2000, the Commission recommended for increasing the age of consent for all girls to 16 but turned volte face on rape exemption clause on the pretext of excessive interference in conjugal affairs.[72] It further pointed out that a husband is exempted for marital rape with wife of age above 15 years, but he would be held guilty for molestation under s. 354 of the Indian Penal Code.[73] In 2008, the LCI again recommends that "the age for sexual consent should be 16 for all young girls, regardless of marriage ... registration of marriage be made compulsory".[74]

The Criminal Law (Amendment) Ordinance, 2013 raised the age to 16 years as Exception to Explanation-3 under section 375 IPC,[75] but in the Criminal Law (Amendment) Act, 2013, the age for minor wife was brought back to 15 years as Exception-2 of Explanation-2 under section 375 IPC.[76] Indeed Exception-2 discriminates against a married minor girl aged between 15 to 18 years who is not considered a minor, and like a major wife, is made vulnerable for sexual exploitation by her husband causing irreparable harm to her body and mind. The exception lacks reasonable nexus with the amended age for consent and marriage to 18 years exposing flagrant contradictions in various special laws enacted for child protection. Rape is statutory, if prosecutrix is below 18 years, but in case of a husband, rape laws are

69 *Supra* n. 1, para 77.
70 The Criminal Law (Amendment) Act, 2013, s.9.
71 *Supra* n. 66.
72 *Supra* n. 14, para 3.1.
73 *Id.*, para 1.2.1(2), *supra* n. para 32.
74 Law Commission of India, *205th Report on Proposal to Amend the Prohibition of Child Marriage Act, 2006 and other Allied Laws*, (February, 2008), p.7.
75 The Ordinance, 2013, s.8 p.8.
76 *Supra* n. 70.

desperately compromised. The apex court has observed, "There is no question of a girl child giving express or implied consent for sexual intercourse. The age of consent is statutorily and definitively fixed at 18 years and there is no law that provides for any specific deviation from this...It must be remembered that those days are long gone when a married woman or a married girl child could be treated as subordinate to her husband or at his beck and call or as his property. Constitutionally a female has equal rights as a male and no statute should be interpreted or understood to derogate from this position. If there is some theory that propounds such an unconstitutional myth, then that theory deserves to be completely demolished".[77]

Exception-2 *vis*-a-*vis* Special Enactments

The Exception in effect contravenes very ethos of the Preamble of the POCSO Act intended for protecting rights of children enshrined under Article 15(3) of the Constitution of India in addition to evident violation of Article 34 of the United Nations Convention on the Rights of Child (UNCRC), 1989.[78] The Apex Court has observed, "Exception-2 to s. 375 of the Indian Penal Code, 1860 answers this in negative, but in our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and definitely not in the best interest of the girl child".[79]

The court further observed that duality of marital exemption clause sharply conflicts with the provisions under the POCSO Act[80] and the JJ Act.[81] No material difference exits for defining rape under sec. 375 of IPC and penetrative sexual assault under section 3 of the POCSO Act. Contrarily, IPC grants exemption to marital rape reflecting the underlying traditional notion of treating wife as subservient chattel of her husband. The apex court has observed, "Clause (n) of Section 5 provides that if a person commits penetrative sexual assault with a child, then that person actually commits aggravated penetrative sexual assault if that person is related to the child, inter alia, through marriage. Therefore, if the husband of a girl child commits penetrative sexual assault on his wife, he actually commits aggravated penetrative sexual assault as defined in Section 5(n) of the POCSO Act which is punishable under Section 6 of the POCSO Act by a term of rigorous imprisonment of not less than ten years and which may extend to imprisonment for life and fine".[82]

77 *Supra* n. 1, para 82.
78 Article 34 of the CRC, aspires from member country to undertake all appropriate national, bilateral and multi-lateral measures to prevent the coercion of a child to engage in any unlawful sexual activity.
79 *Supra* n. 1, para 1.
80 The Protection of Children from Sexual Offences Act, 2012.
81 The Juvenile Justice (Care and Protection) Act, 2015.
82 *Supra* n. 1, paras 45 and 97.

The amended POSCO Act, 2013[83] has introduced section 42-A for enabling overriding effect to the Act on the provisions of any other law to the extent of inconsistency.[84] The POCSO Act has no provision of marital rape exception, thus exposing inconsistency to attract provisions under section 42-A of the POCSO Act read with sections 5 and 41 of IPC.[85] The apex court referred to the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016[86] to harmonise provisions under the penal code, and three pro-child enactments namely the PCM Act, 2006,[87] the POCSO Act, 2012 and the JJ Act, 2015. The PCMA, 2006 recognizes child marriage as valid marriage, but *'voidable'* under section 3, at the option of the minor contracting party. The (Amendment) Act, 2016 has introduced sub-section 1-A of section 3 declaring every marriage *ab initio* void, if violates specified minimum age necessity.[88] This amendment attracts criminal liability of husband of minor wife under the POCSO Act, if both are cohabiting. The apex court has urged the governments of other states to consider similar amendment in the PCMA.[89]

Contribution of '*Independent Thought*' Judgement

The '*Independent Thought*', a historical judgement, is vivid illustration of craftsmanship becoming mouthpiece to voiceless minor wives against their sexual abuse. The judgement may be seen as progressive step especially in making unprecedented dent in the marital rape exemption by recognizing wife's volition and consent for sexual liaison. The verdict explicitly underscores the way marital rape with minor brides constitutes an incursion on minor's bodily integrity and their reproductive choice. The court has firmly declined the argument of the central government for non-interference in religion and socio-cultural traditions braced marital affairs. Affirming 'constitutional morality for preventing the endangerment of minor girls, the apex court has firmly observed that "as time and situations change, so must views, traditions and conventions".[90] The court has protected the best interest of child, by holding Exception-2 unconstitutional since it arbitrarily protects husbands from statutory rape with minor wives of specified age by equating them as major and legitimizes their perpetual and silent sexual abuse.

The '*Independent Thought*' may be equated in many respects with *R* v. *R*[91] of the

83 Came into force from 03 February, 2013.

84 *Supra* n. 1, para 48.

85 *Id.,* para 49.

86 The Karnataka Act No. 26 of 2017.

87 The Prohibition of Child Marriage Act (PCMA), 2006. (Act No. 06 of 2007), came into force on 01 November, 2007.

88 *Supra* n. 1, para 46.

89 *Id.*, para 46. Deepak Gupta J. observed, "This is how the law should have been throughout the country. Where the marriage is void, there cannot be a husband or a wife and I have no doubt that protection of Exception 2 to Section 375 IPC cannot be availed of by those persons, who claim to be husband of child brides pursuant to a marriage which is illegal and void."

90 *Supra* note 1, para 78.

91 *Supra* n. at 36.

House of Lords since both judgements have hammered on long lasting sermon of Lord Hale on men's dominance in marital sexuality being translated into enactment of criminal laws in India and England in 1860s. The apex court of India has observed that "In sum, marital rape of a girl child is effectively nothing but aggravated penetrative sexual assault and there is no reason why it should not be punishable under the provisions of the IPC. Therefore, it does appear that only a notional or linguistic distinction is sought to be made between rape and penetrative sexual assault and rape of a married girl child and aggravated penetrative sexual assault. There is no rationale for this distinction and it is nothing but a completely arbitrary and discriminatory distinction."[92]

Deepak Gupta J., in the '*Independent Thought*' judgement, has observed, "In my opinion, the PCMA is a secular Act applicable to all. It being a special Act dealing with children, the provisions of this Act will prevail over the provisions of both the Hindu Marriage Act and the Muslim Marriages and Divorce Act, in so far as children are concerned".[93] Thus existing age differential for dealing with child marriage in the Personal Laws must be addressed by the legislature and non-obstante clause under s. 2 of the Majority Act must be amended suitably.[94] The court observed, "...the PCMA ... makes a child marriage voidable and punishableon the one hand and on the other, it otherwise collaterally legitimizes the pernicious practice ofchild marriages".[95] The JJ Act enables care and protection for a girl child who is under imminent risk of marriage before age of 18 years,[96] so it is highly incongruous to say that a minor bride loses her status as a child solely because of her untimely marriage. The multiplicity of laws in India on child marriage creates confusion and provides escape routes to continue with this archaic practice of child marriage, while Exception-2 of section 375 IPC further brace injustice to minor married girls to legalize their sexual exploitation.

The court upheld the primacy of the PCMA over religion oriented personal laws and emphasized that under the JJ Act, minor married girls must be deemed "children in need of care and protection' to avail safeguards. The court has considered various options to lessen the perils to a girl child holding that there is absolutely no other option but to harmonise the legal provisions and exception-2 to section 375 IPC must meaningfully be read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape".[97] The judgement will strengthen child rights with prospective effect to punish rape accused irrespective of his relationship with minor victimwith judicial clarification, "... Section 198(6)

92 *Supra* n. 1, para 78.

93 *Id.*, para 19.

94 The Majority Act, 1875, s.2, Nothing herein contained shall effect- (a) the capacity of any person to act in the following matters (namely), marriage, dower, divorce and adoption; (b) the religion or religious rites and usage of any class of [persons].

95 *Supra* n. 1, para 91.

96 The JJ Act, s. 2(14)(xii).

97 *Supra* n. 1, para 105.

of the Code will apply to cases of rape of wives below 18 years, and cognizance can be taken only in accordance with the provisions of Section 198(6) of the Code".[98] Albeit the court has maintained self-drawn restraint not to deliberate upon marital rape with wives above 18 years,but during discourse evident footprints indicate that in near future marital rape would be a hotbed for judicial scrutiny.[99,100]

Pressing Legal Issues and Way Forward

Rape laws in India palpably discriminate against minor wives by unreasonable classification to protect husband violating the best interest of child bride. Marital rape is an issue irrespective of age of wife and predominately challenges equitable status of women. This verdict addressed part of the problem by annulling exemption to marital rape with minor wives, but large spectrum of adult married women continue to face bedroom carnal trauma within wedlock and judiciary in this judgement missed an opportunity to criminalize wanton sexual dominance of husbands over their wives. Further the verdict maintains conspicuous silence on continuation of child marriage in India and suggested the State legislature to imitate Karnataka Amendment in the PCMA, but despite the amended PCMA, child marriages are still in practice.[101]

Declaring marriage of a minor girl *ab initio* void is like putting the cart before the horse since this legal recourse will stigmatize the child bride by stamping her a 'divorcee'. Can every girl display promethean spirit and courage to fight against her family forannulment of her child marriage without having resources? It appears travesty of law and utopian supposition that a child bride on becoming adult (till age of 20 years) would be capable of re-writing her marital fate, despite being deprived of education, socio-economic means, and psycho-legal support. If a child groom consummates his marriage tothe child bride, he must be offered handcuffs in accordance with new judge made law; such hapless child groom is a victim or perpetrator, law makers must attend to this legal conundrum. In fact legislature and higher judiciary need to muster courage and willpower to absolutely annul any format of child marriage by handling violators with iron hands.

A minor (girl) below 18 years is incompetent to give consent for her untimely marriage and cohabitation, so legally speaking every case of consummation of child bride amounts to statutory rape irrespective of her consent, and

98 *Id.,* para 89.

99 *Id.,* para 90. Gupta J. holds the opinion saying "it is reiterated that nothing said in this judgement shall be taken to be an observation one way or the other with regards to the issue of marital rape".

100 Vandana, *Marital Rape – Exemption under Indian Penal Code: Quest for Recognition and Liability*, 2 Ili Law Review 2-19 (2017).

101 Karnataka home to 23 percent child marriage in country. Indian Express 26 September, 2017 *available at* http://www.newindianexpress.com/states/karnataka/2017/sep/26/karnataka-home-to-23-per-cent-child-marriages-in-country-1662732.html (last visited August 24, 2018).

attract penal action under the POCSO Act. The apex court in the instant case deliberated upon the age of consent but held that it is legislature's domain to determine whether this age necessitates amendment. The age of majority under Indian legal lexicon needs to be addressed to bring uniformity and section 2(a) of the PCMA[102] must be amended to 18 years irrespective of gender.Further, it appears unfair to bar the courts under section 198(6) of the Cr.PC. from taking cognizance of offence under section 376 of the Code against a man with his own wife below 18 years of age, and if more than one year is lapsed from the date of incidence.[103] Section 198B of Cr. PC further restricts the court from taking cognizance under section 376B of the IPC except upon prima facie satisfaction about the allegations raised by wife against her husband.[104] The court in the '*Independent Thought*' has observed, "...that while amendingSection 198 of the Code, the legislature was visualising that there can be marital rape with a wifeaged less than 18 years but was prescribing a limitation of one year, for taking cognizance of such anoffence. However, no consequential amendment was made to Exception-2 of Section 375 IPC".[105] The legislative discrimination reflects misogynistic bias towards married women on pretext of misuse of legal provisions by wives, and legal regime on marital rape in India needs holistic restructuring with objective viewpoint.

The governments must ensure compulsory registration of marriage as directed by the apex court in *Seema (Smt.)* v. *Ashwani Kumar*.[106] Several laws have been enacted to address the pressing social needs against traditions,[107] now the legislature must seriously attend legal inconsistencies related toinstitution of marriage to uplift status of women in family building to build righteous and egalitarian society. Many a times, minor rape victim (with her claimed consent) get married to the rapist with the consent of both family members and they wish to withdraw rape case in the interest of the victim (and her child, if she get impregnated) and in order to save rapist husband, the victim and other prosecution witness turn hostile during trial. In some cases, courts also express lenient view considering future of the victim (and her child).[108] This multifaceted social perspective needs comprehensive academic enquiry and legal dialogue.

102 The PCMA, 2006, s.2(a), 'Child' means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age;
The PCMA, 2006, s.2(f), "minor" means a person who, under the provisions of the Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority.

103 The age eighteen was substituted for fifteen by the Act 5 of 2009, with effect from 31 December, 2009.

104 *Supra* n. 58.

105 *Supra* n. 1, para 26.

106 (2006) 2 SCC 578.

107 The Hindu Succession (Amendment) Act, 2005, s.3 has substituted new s. 6 to the principal Act, 1956 enabling devolution of interest, in coparcener property of a joint Hindu family governed by the Mitakshara law, to the daughter (irrespective of her marriage) like a son and she can be appointed as 'karta' (who manage family affairs). This amendment brought revolutionary empowerment to Hindu women.

108 *Sate of NCT Delhi* v. *Umesh* [Crl. Rev.P 266/2014], Delhi High Court has upheld the discharge order passed by the Session Judge of Delhi for offences 363/376 of IPC and s.

Law reforms alone may only partially address the issue of sexual violence within conjugal outfit, emphasis needs to be given to public education and awareness to bring about a change in attitudes, professional training to bring apposite system responses, sexual violence prevention efforts to mitigate coercive sexual encounters in addition to provide passable victim services. A customized global campaign to promote socio-legal educational initiatives must be designed to promote gender equality in addition to women's inherent right to say 'no' to unwanted sex under any kind of relationship or circumstances. 'Educating boys and men to view women as valuable partners in life, in the development of society and the attainment of peace are just as important as taking legal steps protect women's human rights', says the UN.[109] The archaic notion of "marital right of intercourse" strips off the right of sexual integrity of a woman, and for ensuring equal protection under rule of law, such misogynistic social approval and legal interpretation must be annulled. Additionally, all other social and legal support for gender inequality in marital and family affairs must be removed.

Conclusion

Apathy in legislative processing, judicial interpretation and social attention many often promotes sexual exploitation of vulnerable targets. Tradition based cultural notion for rape exemption may serve as a raison d'état promoting women subjugation. Intertwined social constructs of child marriage and marital rape are abysmal events and law makers must break silence on age old presumption considering consent for marriage as *sine qua non* for perpetual license to husband even for perverse sex by sacrificing wife's sexual liberty at the altar of marital privacy. In the globalized legal panorama with changing social values, the masculine fallacy about rape adjunct with stereotyped notion of sexual obligation of wives towards husbands must be put to an end. Further, irrespective of gender, majority age must be 18 for all socio-legal purposes ranging from marriage, adult franchise, succession, or valid consent.

Law must be dynamic and cannot be static and repugnant to address evolving social needs. 'We the People of India' place higher reliance and confidence in judiciary to get justice, and as Lord Denning said, "A judge must not alter the material of which it is wo**ve**n, but he can and should iron out the creases,"[110] judiciary under the process of judicial review must remove legal inconsistencies with dealing rape and gendered violence under marital and marital-type relationship. Law makers and judiciary must timely break the proverbial expression that 'Law is an ass – an idiot', first used in 1883 by Charles Dickens, by ensuring legal reforms necessary for rape laws.[111] The '*Independent Thought*' verdict has ardently flagged groundbreaking issues of child marriage causing continuum of sexual and reproductive health harms, and has aptly removed congruity of conflicting legal provisionslike anachronistic doctrine of nuptial rape exemption but several obtrusive inconsistencies are yet to be settled both for substantive and procedural laws dealing with sexual violence.

4 of the POCSO Act. The High Court observed, "There is also no material on record to show that accused committed rape upon child victim as it has come on record that whatever sexual relations were developed between child victim and accused were pursuant to marriage".

[109] *Human rights: Women and Violence Factsheet*, The United Nations Department of Public Information DPI/1772/HR-February 1996.

[110] *Seaford Courts Estates Ltd.* v. *Asher* [1949] 2 KB 481: [1949] 2 ALL ER 155 (CA).

[111] Oliver Twist', a classical fiction of Charles Dickens, Mr Brumble, a disgruntled spouse of a domineering wife was asked in the court that law presumes that your wife acts under your control. 'If the law supposes that,' said Mr. Brumble, 'squeezing his hat emphatically in both hands, 'the law is an ass – an idiot.' p. 425 (1867).

Witch Hunting- An Oblivied Transgression of Human Rights

*Rituparna Bhattacharjee**

Introduction

At the very outset of dimensionality of social amelioration, a progressing nation has to rule out the impetus underlying. The much dormant and passive beliefs rise out of dead graves creating a holocausting catastrophe. Witch hunting or *Dyian Hatya* is one of such vicious evils of social dynamics. Although this has been practiced over generations now, the question of the hour is how long shall the women of this fragmented society keep silent and remain victims to such obnoxious practices. On this date it is the failure on part of the administration that such bare basic needs of social infrastructure of hygiene, sanitation, medical aid, education, awareness has not been made available to the affected regions. This paper is an attempt to put forward the monstrous picturesque violation of human rights.

Many years have passed from the dreadful incident of Lachkera in 2001[1]. Three women in the village of Lachkera in Chhattisgarh were labeled as witches and were braded the 'Dayan' on their foreheads with live electric wires. The torture did not end with that, they were beaten, groped, striped, and paraded in the village. This is not a single reported event; there lies walloping reported and unreported incidents of 'dyan hatya' or 'witch hunting'. Since then till date, it is a botching deficiency of the legal regime of the country to not be able to curb these holocaust practices of the society.

Witch hunting as quoted[2] 'Witch-hunting did not disappear from the repertoire of the bourgeoisie with the abolition of slavery. On the contrary, the global expansion of capitalism through colonization and Christianization ensured that this persecution would be planted in the body of colonized societies, and, in time, would be carried out by the subjugated communities in their own name and against their own members'

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1 Shiv S. Singh, *The witches of Jharkhand*, The Hindu 4 (Ranchi, 24th Dec, 2016).

2 Federici Silvia, Caliban and The Witch, Women: The Body and Primitive Accumulation 238 (Autonomedia USA, 1st edn., 2004).

India is often referred to as land of magic and mystery. This land of mystic essentially is self possessed with superstitions. Although the inception behind these popular superstition is unknown, meanwhile these have become a powerful weapon to shape up the ulterior motives. Women have been subject to generations of atrocities and barbarity. The male despotism has in some or the other form injured and impaired her. The patriarchal set up of Indian society in addition to the misogynous ideology has never been less to degrade women to to their feeble and fragile form. To amplify the violations and infiltrations the practice of witch hunting has been incendiary.

The National Crimes Record Bureau in its report submitted that, predominantly murders of witches followed a pattern[3]. Such pattern involved consistently women, age group 40-60, all married, in charge of property etc. It has been submitted over and over again that the belief system, has much of its roots in annihilating ethos, disparity of gender and age long custom of demeaning women.

The egregious issue of violations of human rights is not a matter of a single state but is present throughout the nation.[4] A group of villagers in rural odisha assaulted and forced three people, including two women, to walk naked through the village. In another a boy was killed for the purpose of human sacrifice. In Assam, two women were being labeled as witches, later only to find that such accusation was in pretext to hide rape. In another reported case, a man hired a local healer to cure his wife's illness, however as the health detoriated, she was labeled as witch and was made subject to torture. Further the ignorance and lack of admistration of law has made the elderly and the weak sections also subject to these torments. In Jharkhand when two senior citizens were held to be responsible for the death of livestock, they were forced to ingest human urine and excrement. A man being pulled out in middle of the night and burned alive, or, before burning down a mother daughter alive parading them naked in the village subject to disrobing and slitting down the throats, are not de facto presence of evils souls, but to the contrary is the possible most disgraceful opprobrium under the name of custom and belief.

Defining 'Witch'

Terms such as *dayan, tohni, chudail,* etc., are used to label a woman as a witch. The term *tohna* is used for males who are labelled as a witch. The preponderance of terms used for women is one indication that this is a gendered practice. Whatever the different practices and understandings of the term 'witch' may be, it involves one common feature[5] – the attribution of certain 'supernatural'

3 National Crime Records, Statistics 2012, *Report on Murders of Witch Hunting.*

4 *Ryan Shaffer,* Modern Witch Hunting and Superstitious Murder in India,*Skeptical Inquirer (Aug. 2014) available at* https://www.csicop.org/si/show/modern_witch_hunting_and_superstitious_murder_in_india (last visited Dec. 23, 2017).

5 Agarwal.A, Mehra. M, Contemporary Practicces on Witch Hunting 48 (Starbooksuk, 1st edn., 2014).

powers to a person by others. An attribution of a person as a witch is nearly always negative, fearful and destructive. Although, such attribution draws upon what may be treated as superstition, it does not necessarily arise from superstition. In many cases, interpersonal animosity, rivalry and conflict is over various material sources may lie behind the labelling of a person as a witch. Once a person is labelled, whether or not such labelling is malicious in nature, a complex set of reactions and fear are invoked, making it very difficult for the women (sometimes men) targeted as witch to defend themselves. Witch hunts might in some (not all) cases be accompanied by extreme brutality and violence including Forcible stripping, being paraded naked in public, cutting or tonsuring of the hair, blackening of the face, cutting off of the nose, pulling of the teeth to 'defang', gouging out the eye, whipping, gang rape, forcible consumption of human excreta, cow dung or other noxious substances, sexual assault, and killing by hanging, hacking, lynching or burying alive. Subsequent to the branding and the accompanying physical violence there may be several other negative fall-outs, social stigma, psychological torture, social and economic boycott, loss of livelihood and violence for the survivors of witch hunting. This kind of societal alienation and violence can be for short period of time or go on for years and sometimes can last a lifetime.

Witch and witchcraft essentially involves an individual with evil potential to cause harm to others. These powers are are believed can be acquired from practicing certain kind of ritual and chanting specific mantras. Ritual practices like worshipping tress or stones or performing specific dances under trees on new moon night are believed to be medium to acquire super natural powers.[6] It is believed that witches can cause drought, disease, death of children and livestock. Also another common believe is that witch can change forms i.e. from human to animal and vice versa. Superstition about evil eye, fear of supernatural, and anti-dotes for self-protection are common across regions and communities with social and economic disparities.

Discerning the Victims

Over the years, number of studies has been conducted to understand, the motivating factors analyze the trends and impetus underlying behind such vices. Ministry of Women and Child development in association with numerous NGO's greased elbows into this drilling.

Broadly the vulnerable targets consistently involve either of the following factors:

i) Social factors
ii) Economic factors
iii) Individual factors.

i) Social factors can be further sub categorized into:

[6] Jyotsna Chatterji, CHALLENGING WITCHCRAFT AND CULTURAL AND CUSTODY PRACTICES 227-234 (Gyan, New Delhi 2002).

- Gender domination: In *Witchcraft, Women and Society*, Levack (1992)[7] uses two approaches to analyze the literature in pursuit of an answer to the question: Why are women popular targets during witch hunts? Levack raises the critical point that witches in all contexts have traditionally been women. First, he assumes that women have typically participated in roles (as traditional healers, midwives, heretics, and cult leaders) in which they have been portrayed as powerful actors rather than as helpless scapegoats. These roles are in stark contrast to the evil role of the witch. Levack contends that by performing these powerful roles, women are rebelling against the traditional view that they are passive and powerless. Levack's second approach emphasizes the belief that women, because they are consideredto be morally weaker than men, are more susceptible to the advances of the devil and, therefore, practice witchcraft more frequently than men do.

  From the Indian context, women have always been subordinated,a second class citizen. Right from the practice of Sati, outcasting the widows to Manu mentioning 'women are supposed to be in custody of their father and then under their husband and in old age under son. In no circumstances they must be allowed to assert herself independently. Educating a girl has been considered as a bad investment since she shall leave her paternal house to serve someone else.'

- Age: It has been observed (in the selected samples) that the vulnerability of being targeted as a witch has a lot to do with the age of the victims. The age group of 40- 60 were the most susceptible to the end. However it must be considered that there are other socio –economic factors contributing to individual state to identify the pattern. The general indication is that condition of the region purports and inverse effect to the category of the age.

- Marital status: Third important aspect of social position of women who are targeted as witches is their marital status. The comparative approach to the data collected[8] indicates majority of the victims to be married. However such women are further categorized into widowed, separated, and migrated. It holds an important clue to understanding the social dynamics of witch hunting. This can thus be seen as an important sociological feature of this form of violence against women. Also that the marital kin and kith of these women play a stimuli to the vindication.

ii) Economic factors

Economic factors can be further sub categorized into:

- Occupation: As already stated that, there lies an inverse proportion of the condition of the state to that of the victim. The condition is essentially

[7] Levack & Brian P, (eds.) WITCHCRAFT, WOMEN, AND SOCIETY (Garland Pub New York 1992).
[8] *Supra* n.5, p.11 annexure I, table 1.10-1.11.

depicted by source of income dominated in that area. It was found that the larger section of these vulnerable group formed from the below poverty line class, mainly involving casual labor, rickshaw puller, cobbler etc. It also involved a section of women, whose husbands would usually migrate to larger place for work.

- Status: The social infrastructure being so feeble, generally leads to one rise over the other with only marginal difference (ownership of land, livestock, vehicles in most rudimentary form), yet, when individual factors mix up with the inferiority complex, such events ought to take place. In other words 'the mixing of old superstition with modern material desires has proved deadly for these women'.
- Educational qualification: Not to surprise, the section vandalized with the practice of witch hunting, essentially lacks in bare minimum educational. The states of awareness of the women are in the most deplorable position. Lack of such knowledge binds then to be dependent in the same community which inflicts anguishes upon them.

iii) Individual factors

Individual factors can be further sub categorized into:

- Illness, deaths and tragedies

  The accusation of witch craft is triggered by a situation that spurs the instigator in some way. There are also individual tragedies or collective ones that lead to despair and search for a resolution in some way. At time it could be illness or death of a human or an animal and the attribution of this to the victim. Illness such as wounds infection, mental illness, stomach, ulcers, diarrheas, fever, malaria, jaundice etc. due to lack of medical facility attracts local healers, ojhas etc. Such quacks then address the plausible factors to such misfortune which forms a catalyst to the accusations. These targets further are excruciated if a familial proximity with the instigator is established.

- Animosity and conflict

  Often, inconsequential or random events such as repeated bad dreams, death on account of an undiagnosed illness after feast offered by the victim or altercation with the victim trigger accusations, especially where preexisting conflict, tension is evident. The accusations of witchcraft enable the instigator to resolve such conflicts through means that brook no opposition or debate. The reports mention cases, where the need to rationalize a death or illness have been combined with desire to settle scores with an inconvenient relative or neighbor or coworker. In an intriguing case the victim was traumatized being labeled as a witch by a male proposition who made sexual advances and wanted to impose on her, who hit back leading to the consequence.

- Material reasons: dispute over lands, land grabbing, forcible acquisition of legitimate lands, jealousy over victim's prosperity, inheritance issues, failure to assert dominancy over victim, second marriage are few of the consistent reasons found during the analysis.
- Disobedient orientation: the personality of the victim, her assertiveness and outspoken which distinguished her from the typical stereotyped female characteristics also become a reason for labeling. In one case the victim was labeled such due to her outspoken terms to demand justice for her sister's murder. The action of choosing to marry outside community or to be sociable with men creates a assailable image.

  These remains few recorded reasons for the sample cases taken for consideration. However it is for conformity that the factors contributing to target the victims remain and round the drawn analysis.

  Physically different attributes such as humps, long knees, broad waist, big forehead, extra growth of body parts, eye color, dead lock (jata) play much needed persuaders.

Selected Few Sample Cases

During the span of data collection in states of Assam, Bihar, Chhattisgarh and Jharkhand done by Partners for Law and Development in association with Ministry of Child and welfare(MWCD) more than 100 cases were taken into consideration; of which a few main streamlined samples are herein after re-produced.

Sample Case 1: Assam Case-1[9]

In this case the victim was a 50-60 aged lady belonging to a ST community from Goalpara district of Assam. She has done her primary education. Her family mainly was into agriculture and weaving. They owned nearly 10 acres of land along with few trees cows and bullocks. The triggering of the event took place when the main instigator's wife fell ill and saw the victim in her dreams. They consulted an ojha who confirmed the victim being a witch. Soon after the perpetrator's wife died. He then made arrangements to kill the victim. Dressed in army uniform one sudden night they infiltrate into victim's house claiming to search ULFA persons. On not finding any they asked them to show the way to river. After reaching a secluded point they threatened the husband to leave his wife alone since she was a witch. Unable to defend her husband left. Next morning victim's dead body was found with wounds on it.

All these due to the reason that they belonged to Vaishavism and she continued to have non-vegetarian food after converting. The villagers found this reason and suspected her to practice witchcraft.

[9] Mehra. M, Witch Hunting in Assam: Individual Structural and Legal Dimensions 59(NEN, Soninpur 2015).

The police intervened the matter on the complaint. The conducted a meeting and urged the accomplices to surrender. Police arrested the instigator, however was released on bail after three months. The status of the matter is unknown to the family of the victim.

Sample Case 2: Assam case-8[10]

The victim is this case was a 36 year old lady. She was married and had a daughter. She had no education and worked as a labor in a tea garden. She belonged to adhivasi community (OBC) from Sonitpur district. Her marriage was not accepted by her husband's community since she belonged to different community. Her husband was in prison for a few years, when she lived with her daughter in the said village. Being a tea garden labor she often used to drink, purporting an image to allow sexual relations with other men. They also had problems with victim's methods of worshipping and suspected to be practicing witch craft and using evil forces. One of the drinking partner who was also an ojha tried to sexually force upon her and was left injured. He declared her being the cause to bring illness in the village. He branded her *diani*. Few days later, one midnight a group of men entered their home dragged out the victim and other family member's. They were tied to a tree and brutally beaten with rods and raped. The other member was hit on the head and a rod was inserted in his anus. The victim's daughter was gang raped and rod was inserted into vagina after with acid was thrown onto their private parts.

The police arrested the accused on receipt of the complaint however they were released immediately on bail after few months of imprisonment.

Sample Case 3: Jharkhand case-2[11]

Radha and Bandhan are an old couple, who primarily work as agricultural laborers. Following a series of deaths in the village, both of them were declared as witches by the villagers. In this, the leadership to the villagers was provided by one Ranojay Singh, who was an influential Upper Caste political leader. There had been a discord between Ranojay Singh and Radha's family. Ranojay Singh's daughter-in-law had been the Convener of the Mother's Committee in the local government school. She was removed from that position following proved allegations of financial embezzlement against her. In her place, Radha's daughter-in-law, Rameshwari, was elected. After some time, she was also elected as the President of the Village Self Help Group, run by the ICDS. Ranojay Singh reportedly asked her for Rs. 25,000 in return of the position of President or to give it up. This was refused by Radha and her family. This angered Ranojay Singh and he threatened the entire family with dire consequences.

When a number of deaths took place in the village in quick succession during September-October 2011, Ranojay Singh used it as an opportunity to take his

[10] *Id.*, p. 70.
[11] *Supra* n.5., p.67.

revenge. A large number of villagers under his leadership went to a neighboring village to consult a sorcerer. The sorcerer declared to nearly 150 villagers who had gone there, that Radha and Bandhan were witches and that they were responsible for the deaths. After the people returned to the village, a meeting was called, where Radha and Bandhan were asked to come. In front of the entire village, both of them were declared as witches. They were physically assaulted and forced to drink the blood of a cat. Their daughter-in-law, Rameshwari tried to defend them. But attempts were made to strip her clothes as well.

The Gram Pradhan themselves asked the family to pay a fine of Rs. 1, 25,000 to the village for causing harm through their witchcraft. Ultimately the family borrowed the money and paid the fine in two installments. After that incident Radha and Bandhan fled the village. Villagers have threatened to kill them, if they are even sighted near the village. The couple went to the local police station, but police refused to register the complaint against the instigator and villagers. She was also threatened that if any external support was taken they would face death. Therefore the family kept quiet

Sample Case 4: Bihar Case-13[12]

In this case the victim was a 60 year old female named Champa Devi, belonging to OBC category. The instigator was her son one Jheena Rajak. Champa Devi's grandson, Badri Rajak (Jheena Rajak's son) was very ill. Instead of being given medical treatment he was taken to a quack. Jheena Rajak blamed Champa for this illness. He accused Champa of practicing witch-craft and got into a verbal fight with her. He took his mother to an ojha who identified her as a witch. Whenever Champa's son and other relatives verbally abused and physically tortured her, the neighbors also contributed in name calling. Only one or two neighbors spoke on her behalf. The community members became suspicious of her. People from community hide their children from her, spit on the road if she happens to cross their way and verbally abuse her. She was taken to an ojha for jhaar phunk and he verified Champa as a *dayan*. He interrogated her and while hitting her, brutally pulled her hair, thrashed her head on the ground, and forced her to admit that she is a *dayan.* She was also verbally abused and physically violated by her relatives and neighbours. Champa was tied to a tree and brutally beaten up with wooden rods.

The police has not been able to gather witnesses in the case and so the case has not gone beyond the investigation level.

Legislative Modus Operandi

Indian Constitution

The Part III of Indian Constitution dealing with fundamental rights includes invincible sets of rights. Honorable Supreme Court has time and again

[12] *Supra* n.5, p.62.

emphasized the need to adhere by it. The meaning and scope of Article 14 has been dealt in deep by Supreme Court in several cases. In fact Supreme Court itself has observed that *'The decisions of the Supreme Court on Article 14 are legion; to recall all of them is merely idle parade of familiar learning.*[13] In the case of *R.K. Dalmia*[14] it was held that 'Article-*14 condemns discrimination not only by substantive law but by a law of procedure also*.' In *Maneka Gandhi's case*[15] Justice P.N.Bhagawati delivered the majority judgment, adopted a dynamic approach. Guarding Individual liberty is the most forceful manner, mere prescription of some kind of procedure is not enough, but it must be fair just and reasonable. By inter-relating Article 14 and 19 with Article 21 Justice Bhagwati brought revolution in the area of constitutional interpretation and had shown that constitution weaves a pattern of guarantees on texture of basic human rights. Further in the case of *Minerva Mills*[16] Chief Justice Chandrachud described Article 14-19-21 as a golden triangle[17]. Pronounced further, the principle of egalitarianism is an essential element of social and economic justice and therefore, where a law is enacted for giving effect to directive principle with a view to promote social and economic justice would not be violative of basic doctrine , even if it infringes equality before law in its narrow and formalistic manner.

The preservation of human life is of paramount importance. It serves as a pre requisite for enjoyment of freedoms and liberties. Justice Field's in *Munn* v. *Illinois* [18] observed : '*By the term 'life', something more is meant than mere animal existence. The inhibitions against its deprivation extend beyond those limbs and faculties by which life is enjoyed. The provision equally prohibits mutilation of the body by amputation of arm or leg or destruction of any other body organ*'. In *Francis Corolie Mullin case*[19] the concept was implemented and further amplified in 1978 by including under its purview right to education, livelihood, access to justice, etc. Also in *A.K Gopalan's case*[20] 'Personal Liberty' was interpreted as a compendious term to include within itself all varieties of rights creating an intersection with Article 19(1).Malignant practice of Witch Hunting incites encroachment of the basic human rights as severe blows to the constitutional cartilages. Unless scientific temperament via executive dynamics is radically brought about, the voluminous judgments shall collapse under its weight.

International Treaties and Obligations

a) The Universal Declaration of Human Rights (UDHR)[21] 1948, which being international law provides protection against any discrimination and promotes equality before law. It also confirms right to life and liberty to every human being.

b) International Covenant on Civil and Political Rights (ICCPR)[22], India associated with it in 1979, which being an international body promotes equality between men and women by ensuring equal rights to men and women in civil as well as political sphere and prohibits others from subsuming anyone's basic rights. Article 7 explicitly mentions prohibition of cruelty, inhuman or degrading treatment and by associating with the covenant it is obligatory for Indian government to implement these rules.

c) In addition to UDHR and ICCPR, India has signed Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[23] in 1993 and had agreed to eliminate discrimination and social cruelty against women. In addition to it Sec.5 (a) of the concerned convention explicitly provides that the states should take appropriate measures to modify the social and cultural patterns of conduct of men and women.

National Laws and Statues

The Indian Penal Code is the most frequently used, providing as it does the most comprehensive framework that responds to threats, intimidation, the physical forms of violence and murder. However, until 2012, the penal code was totally inadequate for addressing sexualized gender-based violence that is Intrinsically part of such victimization. Acts of forced disrobing and parading were dealt with as simple hurt (s.323) or as outraging the modesty of a woman (Sec. 354) or using word or gesture to insult the modesty of woman (Sec.509); acts of stoning, tonsuring the hair, blackening the face, forced consumption of excreta too were treated as simple hurt (Sec. 323) – all trivial in comparison to the gravity of the violence, the degradation and cruelty intentionally perpetrated through such acts, often resulting in long-term ostracism. Some of this has changed with the passage of the Criminal Law (Amendment) Act, 2013[24], which gives due recognition to forced disrobing as a serious offence, strengthens the older provision on outraging the modesty (Sec. 354), and criminalizes sexual harassment. These amendments have introduced the right to compensation and medical treatment for victims of acid attack and rape, which in fact need to be expanded to include all victims of sexual and gender based violence. What remains missing in the law are provisions that adequately respond to the public acts of cruelty such as forced consumption of excreta, tonsuring, parading, and similar acts that are intended to demonize and denigrate the victim, almost irreparably, in the eyes of the community.

[13] AIR 1983 SC 420.
[14] AIR 1958 SC 538.
[15] AIR 1978 SC 27.
[16] AIR 1973 SC 1461.
[17] AIR 1989 SC 1789 p.1809.
[18] (1876) 94 US 113.
[19] AIR 1981 SC 746.
[20] AIR 1950 SC 27.
[21] *United Declarations of Human Rights* (1948) *available at* http://www.un.org/en/universal-declaration-human-rights(last visited Dec 24, 2017).
[22] *International Covenant on Civil and Political Rights* (1966) *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx (last visited December 24 2017).
[23] *Convention on the Elimination of All Forms of Discrimination against Women* (1993) *available at* http://www.un.org/womenwatch/daw/cedaw/cedaw.htm (last visited Dec 24, 2017); *see also,* http://www.un.org/womenwatch/daw/cedaw/cedaw27/tun3-4.pdf.
[24] *Criminal Law (Amendment) Act*(no.13 of 2013) *available at* http://indiacode.nic.in/acts-in-pdf/132013.pdf (last visited Dec 25, 2017).

Beyond the penal responses, there are two concerns – one, the continued victimization in the aftermath of violence and targeting, that is, the long-term consequences of witch hunting for which there is no remedy available; and second, the underlying causes that allow a continuum of victimization to be orchestrated in public with impunity. There is no law or policy framework of reparations to help the victim recover from the consequences of witch hunting. Forced displacement, involving expulsion from home/land/livelihood/village either temporarily or permanently, is routine.

State Laws

Bihar though being most backward was the first state in India to pass a law against witch hunting in the year 1999, which was named "Prevention of Witch (Dayan) Practices[25] Act."

Jharkhand followed it and established "Anti Witchcraft Act[26]" in 2001 to protect women from inhuman treatment as well to provide victim legal recourse to abuse. Basically Section 3, 4, 5 and 6 of the concerned Act talks about the punishment which will be granted if any one identify someone as witch, tries to cure the witch and any damages caused to them , whereas Section 7 states the procedure for trial.

Chhattisgarh government passed a bill in 2005 named "Chhattisgarh Tonhi Pratama Act[27]", which was established to prevent atrocities on women in name of Tonhi.

Rajasthan government has also passed a bill "Rajasthan Women (Prevention and Protection from Atrocities)" 2006,which makes it illegal as well punishable for calling any woman as "dayan" or to accuse a woman for practicing witchcraft, which extends to three years of imprisonment and Rs 5000 fine.

Maharashtra government passed the "Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Bill[28]", as an ordinance, which eventually was passed and made law by the same name in 2013. It recognizes 12 categories of offenses as non-bailable and cognizable and imposes a fine from 5000 to 50000 rupees in contravention

Assam government has passed Assam Witch Hunting (Prohibition, Prevention and Protection) Bill, 2015[29]. It has made such offence as non-bailable, non-compoundable and cognizable. It further imposes 7 years of imprisonment and upto five lakh rupees fines. Another distinct feature that this law provides is setting up of special courts for trial of such offences.

[25] Prevention of Witch (Dayan) Practices Act Bihar Act, 1999.
[26] The Prevention of Witch (DAAIN) Practices Act, 2001.
[27] Chhattisgarh Tonhi Pratama Act, 2005.
[28] The Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013.
[29] PTI, Assam Assembly passes bill to end witch-hunting, The Hindu (Guwahati, 14 Aug, 2015). This Bill Received the assent of the Presiden on June 13, 2018 and it is now The Assam Witch Hunting (Prohibition Prevention and Protection) Act, 2015. The present article was received prior to this development, hence the authors view are based on the Bill.

Judiciary's Role

Over the years of slogging advancement, up till recently the state high courts and Supreme Court has taken a proactive role to put an end to these violations of human rights. In *Ashok Laxman Sohoni* v. *State Of Maharastra,*[30] the Supreme Court rejected the defendant's argument that his murder conviction should be overturned based on his belief that the victim was a witch. In *Budhu Munda and Others* v. *State Of Bihar,*[31] Jharkhand high court dismissed an appeal by defendants who were convicted of assaulting a suspected witch and her family. Also in *Konde Munda and Others* v. *State Of Bihar,*[32] the court upheld a conviction calling defendant's petition devoid of merit when it could not be proved beyond reasonable doubt that petitioner was a witch. In another *Tula Devi and Others* v. *State of Jharkhand,*[33] the high court convicted eight defendants in charge of assaulting a suspected witch.

It is also notable that the courts have *suo-motu* taken up these matters and expressed its concern. In *Mohan Singh* v. *State Of Rajasthan,*[34] the high court applying the sections of offences under Rajasthan prevention of witch hunting act, put forward a strong precedent. Likewise in *Iswar Attaka and Others* v. *State of Odisha.*[35] the high court while dismissing the grant of bail to the petitioners set forth a strong legal regime to discourage such practices. In a very recent criminal petition the accused were convicted to rigorourous imprisonment of one year by the Guwahati high court.

Proposed Draft National Bill on Witch-Hunting

In the year 2016, Shri Raghav Lakhanpal, (M.P) introduced the Prevention of Witch-Hunting Bill, 2016 to provide for more effective measures to prevent and protect women from 'witch-hunt' practices to eliminate their torture, oppression, humiliation and killing by providing punishment for such offences, relief and rehabilitation of women victims of such offences and for matters connected therewith. Sailent features of the bill are:

It specifically defines the following :

"abettor or identifier" means any person who brands or identifies any woman as a witch;

"ojha" means a person who claims that he has got power or knowledge to identify witches and to have a capacity to attain control over them or who

[30] AIR 1977 SC 1319.
[31] 2004 CriLJ 549.
[32] 2003 (3) JCR 156 Jhr.
[33] 2006 (3) JCR 222 Jhr.
[34] 2005 Cri L J 2127.
[35] 2015 WP(C) 23486/2015 Odi.

uses Jhad Phoonk, either to cure or protect from evil spirit or who causes damage, suffering or harm for the purposes of healing any disease by giving Tabij, Mantra or any substance claiming to have the power to heal from witchcraft sufferings and includes persons known as Guni, Shekha or Jan or by any other name.

It categorizes offenses into the following-

(i) Whoever, accuses or identifies or defames a woman, either by words or actions by claiming that she is a Daain or Dayan or Dakan or Dakin or Chudail or Bhootni or Bhootdi or Chilavan or Opri or Ranndkadi or Tonahi or Tonaha or Banamati or Chetabadi or Chillangi or Hawa or Evil Eye or Halka or Daini or by using of any other name or symbol suggesting her to be a witch; or accuses a woman of performing witchcraft or any puja or use of mantra or tantra aimed at harming any person by supernatural means, shall be punished with imprisonment for a term which shall not be less than one year but may extend upto three years and with fine which shall not be less than one thousand rupees but may extend upon five thousand rupees

(ii) Whoever, labels a woman a witch and blames that woman for any misfortune, which may include natural disasters like droughts, floods or crop loss, that befalls village or any illness or death in the village shall be punished with imprisonment for a term which may extend upon three years and a fine which shall not be less than one thousand rupees but which may extend upto ten thousand rupees

(iii) Whoever, intimidates a woman, calls her a witch and accuses her practicing witchcraft, to the extent that the woman is compelled to commit suicide, shall be punished with imprisonment for a term which shall not be less than three years but which may extend upto imprisonment for life and with fine which shall not be less than twenty-five thousand rupees but which may extend upto fifty thousand rupees

It also describes the kind of vindication if done shall be subject to punishments. Whoever subjects a woman to any form of torture including acts of stoning, hanging, stabbing, dragging, public beatings, burns insertion of wooden or sharp objects into her private parts, burning of her hair, forced hair shavings, pulling of her teeth out, cutting of her nose or other body-parts, blackening of her face, whipping or branding; or forces that woman to perform public acts of humiliation or eat human excrement or drink urine or drink or eat inedible or obnoxious substances or socially ostracize that woman or stigmatize her for life or prohibit her to participate in auspicious occasions or curtail her movements or employment, shall be punished with imprisonment for a term which shall not be less than three years but which may extend up to five years and with fine which shall not be less than twenty five thousand rupees but which may extend up to fifty thousand rupees.

A new chapter has been proposed titled 'Measures for Prevention and

Protection of Women'[36] which essentially elaborates the steps to be taken by the appropriate authorizes for their safeguarding. It mentions, when a police officer receives any information or a report that a witch-hunt is likely to be committed or there are reasonable grounds to suspect that a witch-hunt has been committed against a woman, he shall forthwith proceed to the place and shall take all suitable measures to prevent the witch-hunt and to provide protection to the woman including getting her admitted to a recognized protective refuge or shelter home, in case the woman has no safe shelter. In addition to it the police officer shall immediately remove the person and the objects expected to harm the woman and shall verbally or in writing warn the person or persons accused of intending or attempting a witch-hunt against the woman to leave the place immediately and abstain from inflicting any harm upon the woman.

The bill also has made changes regarding government's initiative. It has added to it the provision to relief and compensation, put forward rehabilitation mechanisms, provide counseling services, and promote education and awareness about the evil of witch hunting including in school curriculum.

A critical evaluation of the Bill leads us to three important points. Firstly even though the extensive measures in the bill like- conducting padyatras, awareness camps, ensuring confidentiality during testimony of victim, proper monitoring and following up of reported incidences are mentioned, the problem faced at the foundational level is that, these issues are from places with lack of infrastructure, education or even basic sanitation arrangements. Precisely from the far-flung section of the rural areas. Merely passing a bill or suggesting number of ways to deal with the evil beast does not deal away with it. The population dwelling in such areas is within the circlet of such practices and belief system. It is a ponderous task to break through such wires of ethical opinions guarded by the self sustaining mechanism. The victims and the perpetrators or insinuators both belong to same locality and community in most cases. An attempt to directly exterminate the local ethos without any other groundwork might create Frankenstein monster. Hence a very sensitive approach needs to be carved out. Also crores of money spent on the awareness camps and other measures does not ensure its achievability since the hierarchy to be followed by the victims to secure their rights in place, are already traumatized and threatened to be ousted from the community along with being bereft financially. The initial stages of reporting the incident at the lower executive levels involves panchayats and other bodies who also in turn are part of the same syndicate. It is important to remember that the problem dealt here with involves age long customs and deep rooted believe system and cannot be right away out thrown by mere declarations of deterrence.

Secondly the bill mentions about the compensation to be provided to the

[36] *Prevention of Witch-Hunting Bill*, (2016) *available at* Chapter iv; http://164.100.47.4/BillsTexts/LSBillTexts/AsIntroduced/4572LS.pdf (last visited Dec 25, 2017).

victims. The compensation amount shall vary as per the events in the incidents occurred but if this means, it is to be paid by the abettor as per general principles of criminal justice, then the provision itself defeats its purpose. The abettor in such cases has been found to be an equal ignorant belonging from the same platoon without different financial viability, which implies the amount of compensation provided will be an effigy. Thirdly in cases like that of sample case-2 where the victim has been raped and threatened in the name of being a witch remains untouched. Such case of offences punishable with death sentence or life imprisonment has not been dealt with in this bill.

Conclusion

Therefore, it can be summed up to reach a conclusion that only superstition or belief cannot be held responsible for witch hunting. There are many underlying dormant factors that which contribute. What needs to be addressed is that in spite of having legislations there lies an accessibility difference between the authorities and the victims. Possibly passing of the national legislation in its nuanced form will be able to fill up this gap.[37] Actions, practices without any rational, breeds ill knowledge which eventually re appears unto the social dynamics as demons. Innocent lives have been lost only to degrading of the social set up contributed by much bad execution of the government. Witch hunting-related crime has many angles. More than the killings, the victims are subjected to abject humiliation, social ostracisation and torture. Incidents like severe beating, parading naked, feeding of excreta or chained to posts are common. The victims are mostly women, widows, issueless and unconventional ones who serve as healers or render services to the community. Lack of proper education, economic development, scientific temper and mass awareness programmes are the cause for superstitions which are violent, dangerous, destructive, harmful and inhuman. There is a need to change the mindset of the people which can help in eradicating superstitions.

[37] Mita Barman, Persecution of Women: Widows and Witches 171-172 (Indian Anthropological Society, 1st edn., 2002).

Responsibility to Protect and the Global South: A Critical Perspective

*Siddartha Misra**

Introduction

Responsibility, accountability and liability are phrases that reflect the efficacy of any system. In a law-governing society, these terms set the agenda of the discourse. Responsibility and accountability have some practical difficulty. In French, responsibility and accountability, mean the same. In fact, search of responsibility explores the growth of international law in an erudite manner. Whole history of humankind has registered unparallel growth with the advancement of idea of accountability. This is particularly true about the International Law as well. Responsibility has led major changes in the arenas of international law in all its discipline. Birth of some major areas of international law particular in Eurocentric centrality namely International Human Rights Law, International Criminal Law, Humanitarian law is marked by the presence of responsibility itself. Therefore, responsibility is the inner crux of International Law. However, at the political level, end of Second World War witnessed crisis management situation in the formation of many heeling, crisis management and agenda setters' institutions as Nuremberg and Tokyo Tribunals, United Nations and similar mechanisms. In many ways establishment of these institutions was motivated to fix the culpability of wrong doers and foster such ambience forums whereby nations do not stop dialogue. In the cold war era, intervention happened in the countries as conspiracy but never supported by the domain of law. However, after the end of cold war international law has moved towards new phraseology of norms. In this respect, democracy, human rights, transparency, accountability, good governance are emerging as grade points to judge the character of any state. In the territory Global North sounds superior due to its established political, economical, social and cultural aspects whereas Global South stands at the margin. It is further noted that international law is instrumental in the creation of image of good and bad sovereign. In this respect responsibility to protect R2P is designed as device to make as sanitizer for bad sovereign.

Doctrine of Responsibility to Protect is not a new concept but it has been spoken or reappeared as old wine in new bottles at different intervals. In its

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1 *See* the Security Council's Resolution on Libya, UN Doc S/RES/1970 (2011).

new role R2P appears to work in close proximity with ICC and both constitute expressions of international engagement seeking to respond to atrocity crimes.[1] The current debate on R2P is triggered not by incident but it has emerged with post-cold war era power relationships, particularly, with the establishment of ICC, intervention in Yugoslavia and establishment of Ad hoc Tribunals, given a background to exercise cerebral agendas. First time it has been codified officially as an idea in a 2001 report of the International Commission on Intervention and State Sovereignty (ICISS).[2] The Commission held that a 'modern understanding of the meaning of sovereignty' provides an approach that 'bridges the divide between intervention and sovereignty'.[3] It argues to make sovereign as functional unit and in case of atrocities International Community must be given voice and collective responsibility to intervene. Here now difficulty emerges that how to identify International Community.

Given the experience and on basis of practical wisdom one can safely say that International Community in International Law represents class character and Global North that has its own vested interests. They have access and monopoly on the production cycle of professionals, views and basic instrumentalities to implement. So in this context, it appears that R2P is cementing a space of perception building. The R2P seeks to control the choices of sovereign and rule book of sovereignty. In this process it expresses itself in the language of duty to protect others who are facing the situation of core international crimes. It seeks to create a space where governments fail to protect its citizens then; the international community will intervene to protect them. At the level of idealism, no one can deny this and it seems like moral principle to protect weaker and marginalized. It is true that many states in the Global South have state policy to do such acts that creates systemic pattern of exclusion and sufferings. However, Global West does not seem concerned about those points when it comes to arms dealing and friendly allies or opportunism is favored on any other consideration. Therefore, question arises whether R2P is a design for the dissenters of Global North. It is true that Libya, North Korea, Sudan, Syria and other nations have raised voices against western colonialism at different fora, and arguing this of course does not mean to support their acts of atrocities on their citizens.

Human Rights and R2P

The idea of sovereignty is the very kernel of the United Nations Charter. It is grounded and reiterated in International Law in a variety of doctrines, statutes, resolutions, declarations, case laws, movements, organizations and state foreign policies. Among them, the sovereign equality of states, non-intervention in domestic jurisdiction, freedom to create one's own political structure, and sovereign immunity are most important. The idea of sovereignty

2 International Commission on Intervention and State Sovereignty, *the Responsibility to Protect: Report of the InternationalCommission on Intervention and State Sover.eignty*, (Ottawa 2001).

3 *Id*., p.17.

and its related powers are basic currency in the society of states. In technical terms, it is associated with the legacy of the Peace of Westphalia of 1648, a legacy that has become a deûning and transforming feature of International Law from feudal to bourgeoisie order. In this context, the main question is whether state sovereignty and International Criminal Justice are two sides of the same coin. The answer to this question may unfold many conflicting points of International Criminal Law where the traditional notion of sovereignty is forced to reconfigure according to changing needs and they may be dominant emerging norms of International Law. International Criminal Justice System is based on the underlying assumption of institutionalization of International Community, which asserts itself to an extent where the state's immunity is challenged, and commitment to prosecute even heads of the states becomes the signature tune of new criminal order. R2P is layered in the language of human rights. It provides human sentiments upper hand than the doctrine not to intervene in other's countries. It proposes the authorization of 'action taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective'. The R2P embraces three specific responsibilities: the responsibility to prevent, the responsibility to react and the responsibility to rebuild. It is said that 'prevention is the single most important dimension of the R2P'. It seems that authority is central to the theme of the responsibility to protect. It says that there are three possible ways it must be done, either by UNGA, UNSC, or Regional Organizations. Thus, it empowers an institution like UNSC whose democratic credentials are repetitively being challenged. Although it has passed resolution in its favour.[4] Whereas in UNGA Global South proposed adversarial resolutions regarding R2P, it has certain qualifiers like right intention, reasonable prospects, proportional mean, last resort, responsibility to rebuild.

In this background, it is important to realize that though R2P is not a legal concept, yet it is moving fast towards achieving the goal of a legal norm. To date the UNSC has referred two situations (Darfur and Libya) to the ICC under the auspices of R2P.[5] One can say that the international protection (R2P) and prosecution (ICC) agendas are in fact "two sides of the same coin. It reinforces the mirror image of each other. Thus, it forms a fiduciary relationship whereby one seeks military intervention whereas another employs judicial intervention. In past, 'the doctrine of humanitarian intervention' formulated by the renowned Dutch scholar, Grotius, was legitimizing the intervention of states in the matters of state, which was believed to violate rights of its own citizens (Cakmak, 2006:4). However new updates make it more security oriented not for the state but for humans. It is said that state has primary obligation to protect its citizens but if it fails then International Community

[4] UN Doc. S/RES/1674, (SC Res.1674, 28th April, 2006).

[5] *See,* UNSC Res, UNSCOR, 2005, UN Doc S/RES/1593 (2005) (referring the situation in Darfur to the UNSC). UNSC Res UNSCOR, UN Doc S/RES/1970 (2011) (referring the situation in Libya to the ICC).

has to save such people. In this context, Orford says that there are two options, actions or inaction **(**Orford, 2003:444**).** Both seem as extreme measures in itself. It is to be noted that in the long traditions of positivists arguments States are considered as sacrosanct entity and covered with the layer of impunity. In this context, state acts have been considered something supplementary to maintain law and order in the society despite having internal dissent over many issues. States had free will to suppress it with brute force that many a times resulted in catastrophe. It is true that large scale mass crimes like genocide, war crimes, and crimes against humanity are committed by the own governments. In this context, natural law advocates to limit the sovereign made laws. It further reflects, in the word of Evans, the essence of the notion of sovereignty, in the Westphalian system that has governed international relations since the seventeenth century; has been to control the capacity to make authoritative decisions about the people and resources within the territory of the state. (Evans, 2004:82) In contrast to this, at least on paper, current international legal order propagates widely that the sovereign made laws are subject to rule of law and human rights. It cannot take life and liberty; instead, laws are made to ensure effective assertion and exercise of life and liberty to its maximum strength.

In this context, it is to be noted that Responsibility' has a bewildering array of meanings, each of which occupies a distinctive role in legal and moral reasoning (Coleman, and Shapiro, 2002:548). The meaning that is most strongly suggested by etymology is what might be termed 'responsibility as answerability' (Gardner, 2003:157). But when it comes to doctrine of R2P, it is too wider and many previous examples are in abundance to show its misuse. In 1931, one of the Asian colonizers Japan claimed to have invaded Manchuria for humanitarian reasons (Brown, 1933:100). Even Nazi used this moral position to protect German in other countries. Hitler writes just before launching his takeover of the Sudetenland, he wrote to British Prime Minister Chamberlain, about the ethnic Germans in Czechoslovakia who 'have been maltreated in the unworthiest manner, tortured, economically destroyed and, above all, prevented from realizing for themselves also the right of nations to self-determination'.[6] Recently in 2008, Russia used it to justify attacking Georgia and similarly France cited it after the cyclone in Myanmar, implying that humanitarian aid might have to be brought in by force if the regime persisted in stonewalling. Latest use of this doctrine was endorsed in Libya where the Security Council authorized the use of force against the Gaddafi regime.[7] On 17 March 2011, the Security Council adopted Resolution 1973 authorizing the use of force in Libya. Whereas momentum was made for the similar exercise for Syria, in this case two oppositions have emerged namely

[6] *See, Letter from Reich Chancellor Hitler to Prime Minister Chamberlain, The Crisis in Czechoslovakia, 24 April–13. October, 1938*, 44 International Conciliation 433 (1938).

[7] *See,* S.C. Res. 1973, U.N. Doc. S/RES/1973 (17th Mar, 2011).

Russia and China's vetoes and General Assembly support for peaceful and political solution.[8]

R2P: Tale of two perspectives – Norm or Doctrine

The International Commission on Intervention and State Sovereignty was founded by Gareth Evans and Mohamed Sahnoun under the authority of the Canadian Government and consisted of members from the United Nations General Assembly. The Responsibility to Protect, the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS), attempted to resolve the tension between the competing claims of sovereignty and human rights by building a new consensus around the principles that should govern the protection of endangered people. "The R2P" from 2001 the commission argued that states have the primary responsibility to protect their citizens, when they are unable or unwilling to do so, or when they deliberately terrorize their citizens, then "the principle of non-intervention yields to the international responsibility to protect''. The UN General Assembly at the 2005 World Summit adopted the principle of Responsibility to Protect. R2P seeks protection for the populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Each individual has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.

In this respect, process of codification itself seems to incorporate the features of positivism, which is in a way attempt towards positivism. Thus, commission has brought out five criteria of legitimacy for interventions, which are deemed to apply to "both the Security Council and UN member states,". These five criteria is nothing new in the International Law, in fact, it has been well-established principles. However, these criteria namely just cause, right intention, last resort, proportionality of means, and a reasonable prospect of success give leeway of subjectivity to enforcing bodies, which creates potential misuse of this doctrine. Thus stipulated the concept in two parts of its report. It elaborated the nexus between sovereignty and responsibility in the opening pages and subsequently developed the contours of the concept in the context of the "use of force," in a section entitled "Chapter VII of the Charter of the United Nations, internal threats and the R2P.'' Through these resolutions, the commission proposed dealing with this problem by recharacterizing sovereignty, that is, by conceiving of sovereignty as responsibility rather than control.

[8] Rick Gladstone, *General Assembly Votes to Condemn Syrian Leader*, (N.Y. Times, Feb 17th, 2012),A12.

Stahn traces the rise of the concept of R2P from an idea into an alleged emerging legal norm raises some suspicions from a positivist perspective. How can a concept that is labeled as a "new approach" and a "recharacterization" of sovereignty' in 2001 turn into an emerging legal norm within the course of four years, and into an organizing principle for peace and security in the UN system one year later? Orford propounded central theme of her article that legal texts about intervention have a function or effect as cultural products. Whether through arguments about the need to control state aggression and increasing disorder or through appeals to the need to protect human rights, democracy and humanitarianism, international lawyers paint a picture of world in which increased intervention by international organization is desirable. Orford says that in the wake of the World Summit, Western states began to refer to the responsibility to protect in policy statements, stressing the concept's relevance to questions of international order, development and security. In this meeting US delegates says that the US has a responsibility to protect in cases involving genocide, war crimes, ethnic cleansing and crimes against humanity (Orford, 2003:17).

Many critical responses to the development of the responsibility to protect concept have focused upon its potential to authorize unilateral police action or humanitarian intervention. For example, in an interactive dialogue that took place before the General Assembly debate on the R2P in July 2009, Noam Chomsky focused upon the danger that the doctrine of R2P could be misused by powerful states seeking to engage in military intervention. Whereas Robertson suggests that the world is entering a 'third age of human rights', that of human rights enforcement. His vision of this age of enforcement is a potent blend of faith in the power of media images of suffering to mobilise public sentiment or the 'indignant pity of the civilised world', and belief in the emergence of an international criminal justice system. According to Robertson, in future the basis of human rights enforcement will be a combination of judicial remedies such as ad hoc tribunals, domestic prosecutions for crimes against humanity and an ICC (Oxford, 2003:7).

Sovereign Equality and R2P: How it works

'Sovereignty is one mode of international governance without international government' (Hurd, 1999: 404). It imparts order, stability and predictability to what otherwise would be international anarchy. The international order is based on a system of sovereign states because this is seen as the most efficient means of organising the world in order to discharge the responsibility to the people of protecting their lives and livelihoods and promoting their well-being and freedoms. It is widely propounded now that if sovereignty becomes an obstacle to the realization of freedom, then it can, should and must be discarded. This is where divide of North South comes. The principle of state sovereignty was traditionally given a wide interpretation and subsumes major areas of a state's treatment of its own subjects. This window period of leisure and comfort was backed by colonialism and only available

to the colonizers. While adhering to the naturalist's faith in inalienable rights to individuals, right which they recognized as flowing from a superior being and which governments were obliged to observe.

Sovereign equality of states is a juridical concept. It gives normative content to the personality of the states in the international sphere that is howsoever small and economically insignificant any state is, when it comes to the International Law, states will be treated as par with big states. It enunciates to claim that small and weaker states are not the mere subject of international law but equal participant in the process of rule making, enforcing and adjudicating. Norm of non-intervention is enshrined in Article 2(7) of the UN Charter. A state is by virtue of its sovereignty is entitled to exercise exclusive and total jurisdiction within its territorial borders; other states have a corresponding duty not to intervene in its internal affair. In this context, ICC has itself posed challenges to the traditional notion of sovereignty. R2P has triggered the debate about the role and responsibility of the United Nations and the nature and limits of state sovereignty. In this context, Kofi Annan says, "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica? To gross and systematic violations of human rights that affect every precept of our common humanity.[9]

R2P seeks to do three principal things: change the conceptual language from 'humanitarian intervention' to 'responsibility to protect', pin the responsibility on state authorities at the national and the UNSC at the international level, and ensure that interventions, when they do take place, are done properly. However, in practice Global South has to bargain, negotiate and renegotiate for its existence in the current discourse of International Law. In practice, normative content seems contradictory. IMF and World Banks are specialized agencies of the UN but equality of its member states seem jeopardized by its own structures and modus operandi whereby Global North hold over financial capital that gives upper hand and provide power to manipulate its policies and operationality. In everyday political life of states, the Global South's vulnerability and fragility is particularly tangible. International relations in the 1990s, featuring the proliferation of failed states, terrorism, the targeting of civilians in conflict and the 'CNN effect' were said to have created a 'climate of heightened expectations for action' and less tolerance for the principle of non-intervention (Massingham, 2009:805). Due to this, large number of people across the Global North and South are suffering an unwarranted situation.

International law is used as a mechanism to control the global material wealth and legitimise wide range of inequality and in egalitarian structures of wealth distribution and control all across the world. At the same time it creates a structure and image of international civility where norms of Global North

[9] Report of the Secretary-General of the United Nations, *We the Peoples: The Role of the United Nations in the 21st Century Millenium* (Sept. 2000) 48.

seem as only legitimate way. In this context, one needs to revisit the concept of sovereignty in International Law. In recent years, in the words of Anna Orford, liberal International Law is increasingly appealed to as offering a bulwark both against the threats posed by terrorists, religious militants, failed states, environmental degradation and epidemics, and against the excesses of the measures taken by states in response to these perceived threats (Orford, 2009:1). International law is investing more time and energy on security question and flow of capital. In order to make this move efficiently it is going through unprecedented change where direct confrontation of Global North and Global South is evident in unprecedented manner.

Framework of United Nations and R2P

Since the inception of UN, sovereignty has been contested and challenged. Soviet lawyers were arguing for greater effectiveness and acceptance of sovereignty so much so they went to argue that state's consent is fundamental to the rule making therefore customary International Law is not applicable on the states unless states accept to do so. Whereas on the other hand western block has consistently and continuously maintained that the binding and effectiveness of customary International Law is not subject to the state consent (Akehurst, 1997:47). This understanding or positions have shaped the growth of International Law for longer period of time. In this matter General Assembly's resolutions asserted that the aspiration and lawful demands of Global South and that use of force and intervention is contrary to the principle of UN Charter.[10] Many ways situation created an atmosphere where space for internal conflict which may trigger widespread and systemic violence was left under the domain of UN but due to the veto it was not controlled.

In the South West African Cases[11] the ICJ held that humanitarian considerations alone do not constitute rules of law. In fact, the ICC had held earlier in the Corfu Channel Case that Albania was liable for the destruction of British lives and warships through failure to notify the presence of mines. It held that on the presence of mines, the obligation to notify was based, on certain general principles" inter alia, elementary consideration of humanity, even more exacting in peace than in war" (Brownlie, 1963:342). It follows that humanitarianism is a source of legal right. There is an evident divide between the global North and South. The Non aligned Movement with 113 members, the most representative group of countries outside the United Nations itself three times rejected 'the so-called "right of humanitarian intervention" after the Kosovo War in 1999 and the subsequent statements from UN Secretary-General Koû Annan (Thakur, 2000 245–59).

[10] *See,* United Nations, A/RES/25/2625, General Assembly, (Distr: General, 24 October 1970).
[11] I. C. J. Rep. 1966.

The hardest line against intervention and in defence of sovereignty was taken at the Round Table Discussion in Beijing on 14 June 2001.[12] The Chinese argued that humanitarianism is good, interventionism is bad, and 'humanitarian intervention' is 'tantamount to marrying evil to good'. In such a shotgun marriage, far from humanitarianism burnishing meddlesome interventions, it will itself be tarnished by interventionism. It is important to note that the democratic states have these special privileges: they are not bound by International Law, rather they make it. For scholars of International Law, this is a familiar argument: only civilized states have proper membership of the family of nations. Only they enjoy the sovereign rights necessary to act in the international system (Orford, 2008:395).

There is no formal link between the doctrine of responsibility to protect and the ICC. However incarnation of R2P can be traced with the simultaneous institutionalization of ICC. It was claimed as such that both have the similar purposes (to confront atrocity crimes through prevention, protection or prosecution, and were expected to work in tandem to temper international politics and to end impunity.[13] The Security Council made its first express reference to the concept in Resolution 1674 on the protection of civilians in armed conflict.[14] Later on similar but important instance Security Council while referring the matter of Libya to the ICC revoked this phraseology in its resolution.[15]

Responsibility to Protect and Identity of the State

The State as a juridical concept is separate from the State as a sociological concept. All sovereigns are equal is a juridical concept but whereas Third World or Global South is a sociological concept. It is based on shared experiences, memories, existing similar realities. In this regard sociological understanding of sovereignty employs material conditions to exercise juridical rights. In this regard, Alf Ross defines that sovereignty emerges as a concept or word without a meaning independent from a full description of the duties and rights, which the law ascribes to the State. Perhaps it seems acceptable that the rulebook of sovereignty is an empty vessel. It is the power, which determines and decides the legitimacy of Sovereignty. Therefore, it seems that it is ambiguous and open for interpretation. In the words of Hegel,

[12] Unattributed, 'Rapporteur's Report, *ICISS Round Table Consultation, Beijing, 14 June 2001.* The reports from all the ICISS regional discussions are *available at* www.iciss.gc.ca (last visited Jan 20, 2016).

[13] *Remarks to the UN Security Council by UN Deputy Secretary General Jan Eliasson, delivered on behalf of the Secretary General, 22 May 2014, available at* http://www.un.org/News/Press/docs/2014/dsgsm776.doc.htm , (last visited Jan 20, 2016).

[14] *See,* SC Res. 1674, para. 4 (28th Apr., 2006), *[reaffiming] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.*

[15] United Nations S/RES/1973 (2011) Security Council, *Reiterating the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians.*

as he writes in his magnum opus philosophy of rights, that sovereignty is highest power of self-determination. In this regard sovereign and its operationality are two different things powerful countries have say or decision making authority and aura in the current structure of International Law. It is important to look at social domain of power groups in these lines of H. L. A. Hart, that power is centralised, operates in a top-down fashion and is essentially repressive rather than productive (Hart, 1961:10). R2P norm attempts to shape concept of Sovereignty as Responsibility and argues that the state has an obligation 'to preserve life sustaining standards for its citizens'. Sovereign does not exist above the law but that the legitimacy of the sovereign is instead judged according to law. In this way it seeks to highlight that in case a sovereign is not following the mandate of law and due to which large-scale conflicts are happening then in that case breach of sovereignty shall be lawful. In this context, it is important to note that, end of cold war started new paradigm in International Law and International Relations and a pillar to establish a new order was laid. In this process, central theme of global society of states where conflict of one place was looked at the threat to another place but poverty of one place was not linked and analyzed with the prosperity of other place. This surgical methodology to examine problems is not incidental but it is a technique in itself. In this respect conflict and darker side represents Global South whereas prosperity represents Global North. It is true that binary in any analysis invites the tag of narrow and parochial outlook about the issues at hand. However, sometimes binaries are reality and overlapping threads are rare and may be too superficial to realize. R2P is one such instrument or normative tool that endeavors to fill legal vacuum of covert and overt of Global North. Since the end of the Cold War there has been a number of both UN approved and non UN approved humanitarian interventions. In the words of Simma, 'NATO's intervention in Yugoslavia which was not authorized by the group of states but indeed plan and executed by an organization which itself works on realism of making allies and enemies was act beyond the four wall of International Law but it was ethical act and done under moral persuasion of International Community' (Hehir, 2012:217). In this regard, we may or may not accept Simma's arguments about the humanitarian intervention in Yugoslavia, but indeed this ethical intervention has triggered discussions about the legality and legitimacy of humanitarian that took place in 1999. Not only amongst academics, but also representatives of Governments, Intergovernmental Organizations and Non-Governmental Organizations participated in this debate. It has been propagated that sovereignty is not absolute in an interdependent world. Rulebook of sovereignty must not overlook restoration of the rule of law, respect for human rights and justice. It was claimed by the General Assembly that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.[16] In this context it is further important to notice that as the Rome Statue gives power to referral and deferral to the UNSC which in a way endorses the weightful position of the UNSC in the domain of

[16] Rome Statute, preamble, para 6.

international criminal law. It is said that the members of the Security Council, particularly the Permanent five members hold an even heavier responsibility than other States to ensure the protection of civilians everywhere.

Conclusion

R2P seems multiple things to various groups. It can be looked as the provision of life supporting protection and assistance to populations at risk. It propagates and speaks for the people who are at the risk. However, this seems problematic to many Afro Asians nations. They view that the resilience of the opposition to the internationalisation of the human conscience lies in the fear that the lofty rhetoric of universal human rights claims merely masks the more mundane and familiar pursuit of national interests by different means. It does not challenge statehood and provokes militarism against such states, indeed its purpose is to control and prevent the regime for the culpability of core crimes. In fact, it does not talk to control of weapon and possible restrictions that may reduce the effectiveness of any such regime. Therefore, the International Community can ensure the life and dignity of the every individual. But in practice intervention doesn't seem to happen with the application of this doctrine but sounds more towards realism of international relations and balance of power. Friendly countries are nowhere talked about. Intervention in Libya is one such case where Gadaffi was quite vocal towards the dominance of North. Thus in practice it may be used as disciplining exercise and a weapon of deterrence not to speak directly against the structure of dominance. However as a matter of fact, R2P shall not be totally opposed. It is true that state's organized structure plays significant role in the atrocities. Hence controlling such regimes need some doctrinal space where International Community can make consensus based on objective facts. So that prompt and preventive action can save lives of millions.

However, current order of things appears more as part of the problem than solution. It shall not be ideological apparatus to use against opposing ideological regimes. Therefore, current discourse on the subject is consistently making attempts to undermine sovereign rights of the nations which basically speak for opposite to the Charter's idea of non intervention. ICC will be instrumental to implement R2P. Law is like language. It develops and evolves with the evolution of society. It strengthens with the strengthening of the society and finally it perishes with the death of the society. This proposition conceives law and society as mirror images of each other. However, International Law seems to be working in ways different from this. First, for the International Community to be called a 'society' seems a little too abstract. Furthermore, International Society or International Community is a divided entity.

A major binary exists between Global North and Global South. Critical legal scholars have also theorized the internal hierarchical and class character of law, where society cannot be viewed as a homogeneous unit and any attempt of unity escapes the internal layers of domination and power relations. In

this regard, it becomes important to reiterate that the application of laws differ from case to case. Law operates in a social context, where the black letter of law seems indeterminate. This study attempts to throw some light on how International Criminal Law is subsuming the character of the state. In this respect, it breaks all the privileges of the states that states are supposed to get. Fundamentally, it does not strike at the institution of the state but it forms a centralized state and creates satellite federal colonies. It is important to note that the discipline of law has been designed in a way where changes happen within the matrix of law itself. Therefore, a current change in International Law is entering through the gateway of the newly emerged body of International Criminal Law.

Norm creation is an old habit of international lawyers and jurists. In fact juridical exercises are used as weaponry in the state's arsenal. In the post-Cold War era this process has been expedited. It is important to mention that judicialisation of thought process and norm creation is not neutral to existing power structures. Thus, it seems that norms of the Global North appear in language to be universal but serve the interests of the Global North and add a layer for their own safeguard. R2P should be seen precisely against this background. From a high benchmark of these international institutions, third world countries might look like centers of nepotism, corruption, inefficiency, logjam, poor management and poor infrastructure. However, it becomes important to understand the social contexts of these countries before jumping to conclusions about their characteristics. Therefore, the concept of sovereignty is changing continuously and becoming subject to a vast body of International Law and Institutions, the ICC being one among them. It requires a particular set-up to try cases and for this a doctrinal space has been created which empowers International Organizations but states are still standing on the margins. Further demystification of this process will lead to the concentration of power in the hands of Global North where they have high representation and capacity to make laws for the International Organizations and give it the colour of universalism. Hence, sovereign functions have become challenging and have been reduced to manage functional goals.

Transgender's Rights and Judicial Benevolence

*Brajesh Kumar**

Introduction

From *Corbett*[1] to *SRA*[2] and thereafter, the judiciary can be said to have come a long way when it comes to transgenders' recognition as a separate gender. While it merely articulated the prevailing gender norms at the time in applying the 'Biological test' in *Corbett*, it went way beyond such norms when it evolved the 'Psychological test' in *SRA* to give a wider meaning to the term 'gender' which was not confined to 'male' and 'female' gender binaries. Such a revolutionary step brought LGBTs in contention for legal recognition and consequential rights infusing a new life in the LGBT movement. The following sections highlight the changing judicial parameters which completely changed the course of the debate on transgenders

Recognition of Transgenders: Changing Parameters

a. Biological test

*ReCorbett*v. *Corbett,*[3](UK) was the beginning of the transgender litigation in the Anglo-American world and its decision was also a significant and far-reaching one as far as legal recognition of transgenders for certain legal relationships like marriages was concerned. The petitioner, Arthur Corbett, had got married to the respondent April Ashley, a post-operative male-to-female (MTF) transsexual, who worked as a female model in the fashion industry, in 1960. But soon the problems started brewing between them, and Ashley decided to end the marriage. In response to Ashley's legal notice for alimony, Arthur filed for a decree of nullity of his marriage citing that there was no marriage at all in a legal sense as the former was a male, despite her sex-change surgery. Since there was no marriage, there should be no question of paying any alimony either.

Thus, the question to be decided was the exact legal status of the marriage between Ashley and Arthur. Nine medical experts gave evidence, identifying four factors as being integral to sex (although they accorded different weight

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1 *Corbett* v.*Corbett*, (1970) 2 ALL ER 33 CA

2 *Re Secretary, Department of Social Security and SRA*, (1992) 28 ALD 361.

to each factor). These factors were: chromosomes, genitals, gonads, and psychology. Taking these viewpoints into consideration, Lord Justice Ormrod decided the test to identify the sex of a person, albeit, strictly for marriage. He said that marriage depended on 'sex' and not on 'gender' as it was essentially 'a union of two sexes, namely, 'man' and 'woman' and the *natural* capacity for heterosexual intercourse was an essential element as that led to the creation of a family.[4]

Further, it was also held that sex was a biological matter which was determined at birth if a person's chromosomes, gonads, and genitals were congruent and a person's psychological view of their identity was related to gender and not sex. According to Lord Justice Ormrod, while genitals were vital to one's sex, only the genitals, one was born with, were considered. So, if a person had his/her genitals removed or reconstructed, this might affect his/her gender, but not the sex. Therefore, Ashley's sex remained 'male' despite her sex reassignment surgery and she only perceived herself as a 'female.[5]

The judgment was widely criticised for insisting on a biological interpretation of sex in family law without giving any logical reason for doing so.[6] But neither the criticism nor Justice Ormrod's unambiguous direction to limit this test for judging a person's gender for marriage only has deterred the courts in England and elsewhere to apply this test in subsequent cases even involving criminal matters.

For example,In *Re R* v. *Tan* (UK)[7], Gloria Greaves, a post-operative MTF transsexual, appealed against her conviction for living on the earnings of prostitution and her husband's conviction for living on the earnings of the prostitution of another man, on the ground that she was a woman. Although she had been living as a woman for 18 years and had undergone a sex-change operation, the court deemed her to be a man for the *Sexual Offences Act 1967* applying the *Corbett* test without any hesitation, whatsoever, on the ground that 'common sense and the desirability of certainty and consistency' demanded it.

In ReGoodwin v. *the United Kingdom,*[8] the court, however, gave up its rigid stance and took up a more flexible posture by conceding what a miserable life transsexuals were forced to live and how urgent it was to change this situation. In this case, the applicant, born as a male in 1937, was accordingly registered as being of the male sex. However, since early childhood, she loved to dress like a woman. In the 1960's she even underwent an unsuccessful "aversion therapy," a psychiatric treatment designed to make a patient give up an undesirable habit by associating it with unpleasant effects. Eventually, in

3 *Supra* n. 3.

4 *Id.,* para107.

5 *Id.,* paras 83, 105, 106.

6 S. Subramaniam, Human Rights: International Challenges 3, (Manas Publications, 1st edn.,1997).

7 (1983) QB 1053, 1064, *See also, W* v. *W* (1976) 2 SALR 308

8 *Christine Godwin* v. *the United Kingdom,* (2002) 35 EHRR 18.

1969, she was diagnosed as a transsexual. Although she dressed as a man for work till 1984, she had a gender re-assignment operation in 1990. Further, long before her surgery she had been married and had even been a 'father' of four children. To hide her earlier identity from her employer as well as to continue to avail of the pension and various other benefits that the government granted to either the males or the females she applied for a fresh National Insurance (NI) number from her post-surgery gender identity which was rejected by the authorities.

She complained of harassment and humiliation by her colleagues at her workplace. However, as she was deemed not to be a woman, her action for sex discrimination at work was unsuccessful. She was also denied a pension at 60, the age of entitlement for women in the UK, and thus had to continue paying National Insurance until the age of 65. On many occasions, she limited herself the advantages, which she might have been given had she shown her birth certificate.

She also claimed that she could not marry her partner, since Matrimonial Causes Act 1973[9] well-supported by judgments in *Corbett*[10] and R v Tan[11], barred her from that for it was established that sex was to be determined by the application of 'chromos, gonadal and genital tests,' i.e., biological criteria.

Before this case, the European Court of Human Rights (ECtHR) was somewhat reluctant to recognize an affirmative duty upon the United Kingdom towards legal recognition of the new sexual identity of transsexuals. The court had been inclined to permit an extensive margin of appreciation' to the responding state in its previous judgments. The reason for that was the absence of European consensus on that issue. However, this case changed the situation as the court departed from its precedent and stated that circumstances in which post-operative transsexuals live were not bearable anymore since they are 'in an intermediate zone as not quite one gender or the other.' The ECtHR also found no good reason 'for barring transsexuals from enjoying the right to marry.'

However, this judgment failed to make much impact as the *Corbett* principle had become such a well-settled principle in the Anglo-American legal world that it was continued to be followed even in the 21st century[12] and the best way to identify a person's sex remained the biological test.

The 'Biological test' articulated in *Corbett* and applied in several cases, including *Bellinger,*[13] subsequently means that sex was considered to be fixed at birth and immutable. According to Lord Rodger in *Bellinger*, this immutability was intended by Parliament, as evidenced in Section 11(c) of

[9] Matrimonial Causes Act 1973, s.11(b).
[10] *Corbett, supra* n. 3.
[11] *Supra* n. 9.
[12] See *Bellinger* v. *Bellinger* (2003) 2 AC 467 (HL).
[13] *Id*.

the Matrimonial CausesAct 1973 and its context.[14] But it must be noted that neither *Bellinger* nor *Corbett* made any attempt to analyze or articulate as to why a biological interpretation of sex was necessary for family law. If the ability to procreate were a requirement of both contracting parties to a marriage, then a biological test would understandably be necessary. But this was not the law in England or any other common law jurisdiction, including South Africa or various states of the United States.[15]

b. Anatomical and Psychological test

Apart from the biological test prescribed in *Corbett,* the courts have also relied on some other methods for recognizing transgenders for various legal relationships. Second in this line is taking note of analytical and psychological factors which is quite consistent with the approach taken by those opposing the *Corbett* test as 'apolitical and ahistorical'.[16]

This test was well articulated by the Appellate Division of the Superior Court of *New Jersey reMT* v. *JT*[17] which was a revolutionary approach as most other courts were still following *Corbett* (for example, *In Re Estate of Gardiner,*[18] and *Littleton*[19]). In this case, an MTF post-operative transsexual sought support and maintenance from her former husband, with whom she had lived for ten years, including two years of marriage. The husband in his response contended that, as the plaintiff was a male, their marriage was void. In contrast to *Corbett*, the couple had a significant relationship and had, indisputably, had intercourse over the period of their marriage. The Court held that sex for marriage could be determined by the congruence of anatomy and psychology (which in the case of the post-operative plaintiff were both females) and that as a consequence, there had been a valid marriage.

In New Zealand too, Justice Ellis, in *reAttorney-General* v. *Otahuhu Family Court,*[20] noted that once a transsexual person had undergone surgery, he or she was no longer able to operate in his or her original sex. It was held that there was no social advantage in the law for not recognizing the validity of the marriage of a transsexual in the sex of reassignment. The Court held that an adequate test was whether the person in question had undergone surgical and medical procedures that had effectively given the person the physical conformation of a person of specified sex.

Lockhart. J., *re Secretary, Department of Social Services* v. *SRA*,[21] observed that the development in surgical and medical techniques in the field of sexual

[14] *Id.,* Lord Roger para 490.
[15] Ken Plummer, Rights Work Constructing Lesbian, Gay and Sexual Rights in Late Modern Times 153 (Routledge,2006).
[16] *Id*.
[17] 335 A 2d 204 (NJ Super,1976).
[18] 42 P 3d 120 (Kan, 2002).
[19] 9 SW 3d 223 (Tex App, 1999).
[20] (1995) 1 NZLR 603.
[21] *Secretary, Department of Social Services* v. *SRA* (1993) 43 FCR 299.

reassignment, together with indications of changing social attitudes towards transsexuals, would indicate that generally they should not be regarded merely as a matter of chromosomes, which was purely a psychological question, one of self-perception, and partly a social question, how society perceived the individual.

Subsequently, in 2003, the Australian Family Court, without mentioning the aforementioned *MT* case, followed this approach *In Re Kevin*[22], wherein the plaintiff, a female by birth, perceived himself as a male from quite an early age and in 1995, he went for hormonal treatment followed by a mastectomy and later a total hysterectomy with bilateral oophorectomy. It is worth noting here that the surgery constituted 'sexual reassignment' within the meaning of the Birth, Deaths and Marriages Registration Act 1995[23] and that Kevin did not have surgery to construct a penis (phalloplasty).

Following surgery Kevin also got his Birth-Certificate changed according to his newly acquired gender. Thereafter, he married Jennifer. The main issue, in this case, was the validity of his marriage. In the lower court, Justice Chisholm, treating marriage as a social institution, therefore, took into account how the society, family, and friends perceived Kevin's gender and decided that at the date of marriage, Kevin was a man within the meaning of the Commonwealth Marriage Act, 1961. Affirming this decision, the Full Family Court held that the terms 'man' and 'woman' when used in legislation like the Marriage Act, 1961 had a contemporary meaning and included post-operative transsexuals who had undergone irreversible surgery. According to the court, a contrary approach would be discriminatory and against the Parliament's intentions.

However, this approach, too, has met with some criticism as it has been thought to overemphasize anatomy, which effectively sanctions the surgical 'mutilation' of transsexual bodies.[24] It has also been criticised for effectively leaving pre- or non-operative transsexuals unprotected because the focus on anatomy effectively distinguishes between postoperative and pre- and non-operative transsexuals.[25] Susan Bird finds such an approach fundamentally flawed at law and breaching Anti-Discrimination laws and International Human Rights.[26]

But such criticisms notwithstanding, this approach, also used by courts in interpreting social security legislation and criminal law[27], is more progressive

[22] (2003) 172 FLR 300. *Seealso*, *ReA.B.* v. *Western Australia* (2011) HCA 42; *Re JG* v. *PengarahJabatan Pendaftaran Negara*, (2006) 1 MLJ 90.

[23] Birth, Deaths and Marriages Registration Act 1995 (NSW),s 32A.

[24] *Hartin v Director of the Bureau of Records*, 347 NYS 2d 515, 518 (Sup Ct, 1973)

[25] Dean Spade, *Documenting Gender*, 59 Hastings Law Journal 731(2007).

[26] Susan Bird, *Re Kevin (Validity of marriage of transsexual*), 6 Southern Cross University Law Review 364 (2002).

[27] *Re Secretary, Department of Social Security and HH* (1991) 23 ALD 58; *Scafe* v. *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2008) AATA 104; *R* v. *Harris and McGuiness* (1988)17 NSWLR 158.

than that followed in *Corbett* as it admits that a person's sex may be interchangeable. It has also been praised for reflecting 'a compassionate and humane approach to the sensitivities of human sexuality balanced against the need for reasonable certainty.[28]

c. Psychological test

The aforesaid two tests are not exhaustive in themselves as the courts kept looking for new parameters keeping the contemporary social realities in mind to meet the ends of justice and thus came up with the 'Psychological test', which neither focuses on sex at birth (Biological sex) nor on the combination of existing physical and mental status (Anatomical and Psychological test, as discussed above in the preceding section, thus, eliminating the unreal distinction between pre/ non-operative and post-operative transsexuals, one of the criticisms of this test). Evolved by the Administrative Appeals Tribunal in *ReSecretary, Department of Social Security and SRA,*[29] the test rather ignores the anatomical aspect and regards 'psychological sex' as the most important factor, apart from the social and cultural identities, in determining the legal sex of a person. Regarding the Sex-Reassignment-Surgery (SRS), the Tribunal was of the view that although it could be taken as an indicator of psychological sex, it in itself was not determinative as such surgery did not affect a transgender person's psychological sex. In fact, the requirement of such an expensive surgery was found to be unduly onerous. Unfortunately, however, this approach did not find favor with the Federal Court and was over-ruled.[30]

Even though the test has found little or virtually no support from other courts, it was duly followed by the Indian Supreme Court in *NALSA.*[31]

The Judicial Trend in India

Long before the Supreme Court took up the transgenders cause in *NALSA*[32]in a most elaborative fashion, the High Courts had already felt and articulated the pains and sufferings of the community and had made attempts to ameliorate their sufferings, in whatever way they could, in the absence of clear-cut Constitutional and statutory provisions or the apex court's guidelines.[33]

In a much-celebrated judgment, seen mainly as a judgment reading down Section 377 of the Indian Penal Code, which penalizes even the consensual same-sex relations between adults and which profoundly affected and was resented by the whole LGBT community, the Delhi High Court, in *Re Naz*

[28] *Supra* n. 23, Justice Lockhart [325].

[29] (1992) 28 ALD 361.

[30] *Supra* n. 23.

[31] *National Legal Services Authority (NALSA)* v. *UOI.,* (2014) 5 SCC 438.

[32] *Id*.

[33] *In ReIllyas* v. *Badshah Alias Kamla*, AIR 1990 MP 334. *See also*, *ReJayalakshmi* v. *State of Tamil Nadu*, (2007) 4 LW 404 (MAD) (DB); *ReFaizan Siddiqui* v. *Sahastra Seema Bal*, (2011) 124 DRJ 542.

Foundation v. *NCT Delhi,*[34] declared the concerned Section as unconstitutional. Though the judgment may seem to be only reading down the Section 377, the fact is that it had taken up the transgender cause long before *NALSA* and that too with utmost sincerity and honesty quoting reports and judgments highlighting the sufferings and pains of this community and had also talked about various rights the society and the country owed to them as a fellow human being and a citizen of this nation.

According to Siddharth Narrain,[35] the decision, unlike some landmark decisions in both the US and South Africa which only refer to gays, was not limited to only homosexual persons and encompassed an understanding of sexuality which was broader and included what the court called LGBT persons. This again was historic as any other court has not used the inclusive term LGBT in any other part of the world.

The UNDP,[36] says that the *Naz* judgment removed the criminal law from the backs of LGBT persons and provided a legal basis to continue to combat discrimination against LGBT persons. Identification had traditionally been on the basis of sex within the binaries of male and female thus refusing to recognize hijras as women or as a third sex.[37]

Unfortunately, the decision was subsequently overruled by the apex court in *Suresh Kumar Koushal and Anr* v. *Naz Foundation and Ors*[38], popularly known as *NazII* judgment, on following grounds:

(i) S 377 merely defined the particular offense and prescribed punishment for the same which could be awarded if, in the trial, conducted per the provisions of the Code of Criminal Procedure and other statutes of the same family, the person was found guilty. Therefore, the High Court was not right in declaring Section 377 IPC *ultravires* Articles 14 and 15 of the Constitution.[39]

(ii) While reading down S 377 IPC, the Division Bench of the High Court overlooked that *a minuscule fraction* (emphasis added) of the country's population constitute lesbians, gays, bisexuals or transgenders[40] moreover, in the last more than 150 years, less than 200 persons have been prosecuted for committing an offense under Section 377 IPC, and this cannot be made a sound basis for declaring that section *ultravires* the provisions of Articles 14, 15 and 21 of the Constitution.

[34] (2009) 160 DLT 277.
[35] Siddharth Narrain, *Crystallizing Queer Politics: The Naz Foundation Case and its Implications for India's TransgenderCommunities*, 2 NUJS L. Rev 455 (2009).
[36] United Nations Development Programme (UNDP), India, *Legal Recognition of Gender Identity of Transgender People inIndia:Current Situation and Potential Options* (2012).
[37] *Id*.
[38] *Suresh Kumar Kaushal and Anr* v. *Naz Foundation* (2014) 1 SCC 1.
[39] *Id.,* para 42.
[40] *Id.,* para 43.

The court further observed that:

> In its anxiety to protect the *so-called rights of LGBT persons*[41] and to declare that Section 377 IPC violates the right to privacy, autonomy, and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative concerning the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.

In the end, the court left it for the legislature to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same. However, it is submitted that the High Court never suggested abrogating the whole provision from the Code holding it unconstitutional. Instead, it read only that part of the provision as unconstitutional which criminalized and punished consensual homosexual activities between two adults, that too, in private. Probably the apex court missed this point. It is needless to say that the court's decision saddened the LGBT community and gave their movement a hard blow.

However, in that very year, the same apex court was very live to transgenders' plights and through its observations, and directions emphasized that their sufferings must end now.

The journey from *NAZ II* [42] to *NALSA*[43] marks the shifting of standards by the Supreme Court itself. While in the former the court was not as gutsy as its subordinate court and was reluctant to go against the general mood of the society and hence passed the buck on the legislature, in the latter, it had no hesitation, whatsoever, to take up the cudgel for the sake of a suffering and neglected section of the society.

In *NALSA,*[44] the Court was faced with the demand of transgenders, through an NGO, National Legal Services Authority (NALSA), for a separate gender category as not falling in the existing binary gender-system had caused them immense deprivation of their constitutional rights despite being a citizen of this country. The Court took a serious note of this discrimination and came out with a just interpretation of the various constitutional provisions to bring transgenders in their ambit and to ameliorate their pains and sufferings.

In its well-researched 113-page judgment, the Court, speaking through K.S. Radhakrishnan and A.K. Sikri, JJ., discussed historical and jurisprudential aspects as well as current social and legal realities concerning the issue and observed how e*ach person's self-defined sexual orientation and gender identity was integral to their personality and was one of the most fundamental aspects of self-determination, dignity, and freedom and hence, no one shall be forced to undergo medical*

[41] *Id.,* para 52.
[42] *Supra* n. 40.
[43] *Supra* n. 33.
[44] *Id*.

procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of his or her gender identity.[45] Further, the court noted that everyone has the right to recognition everywhere *as a person* before the law. Persons of diverse sexual orientations and gender identities *shall* enjoy legal capacity in all aspects of life. It was emphasized that discrimination faced by this group in our society, is somewhat unimaginable and their rights have to be protected, irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role.

The court lamented the absence of suitable legislation protecting the rights of the members of the transgender community which made them face discrimination in various areas. Hence, it felt the necessity to follow the International Conventions, to which India is a party, and to give due respect to other non-binding International Conventions and principles.

Therefore, the court itself assumed the Constitutional authority to guard and protect the internationally acclaimed constitutional rights of this minority community and read all such international conventions, not inconsistent with the fundamental rights and in harmony with its spirit, into the constitutional provisions like Articles 14, 15, 19 and 21 to enlarge the meaning and content thereof and to promote the object of constitutional guarantee. In this way, the court declared the communityto be *entitled to enjoy economic, social, cultural and political rights without discrimination* because it found forms of discrimination on the ground of gender violative of fundamental freedoms and human rights.

Furthermore, it also held them entitled to dignity of life (as right to dignity has been recognized to be an essential part of the right to life and *accrues to all persons on account of being humans* (emphasis added) and recognition of one's gender identity lies at the heart of the fundamental right to dignity.), personal autonomy, right to privacy, etc. under Article 21. Legal recognition of gender identity was, therefore, treated by the court as a part of the right to dignity and freedom guaranteed under our Constitution. Terming self-determination of gender as an integral part of personal autonomy and self-expression which falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India, the court asked the *Hijras*/Eunuchs to be considered as "**Third Gender**," over and above binary genders in our Constitution[46] as it will enable the transgenders to enjoy the constitutionally guaranteed basic human rights which include Right to life and liberty with dignity, Right to Privacy and freedom of expression, Right to Education and Empowerment, Right against violence, Right against Exploitation and Right against Discrimination.

The court *refused to followthe "Biological test"* prescribed in the Corbett and rather *preferred the "Psychological test"*, which went by *the psyche of the person*

[45] *Id.*
[46] *Id.,* p. 73.

concerned and It noted the terms like "citizen", "person" or "sex" used in the aforementioned Articles to be *gender-neutral* which referred to human-beings irrespective of their gender identity including Hijras/Transgenders were not limited to male or female gender.[47]

Based on the observations above, the Hon'ble Court issued following instructions to the Central as well as the state governments on this issue:[48]

1. To treat *Hijras*/Eunuchs as "third gender" to safeguard their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.
2. To legally recognize the self-chosen gender of transgenders such as male, female or as a third gender.
3. To treat transgenders as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.
4. To operate separate HIV Sero-surveillance Centres since Hijras/ Transgenders face several sexual health issues.
5. To address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.
6. To take proper measures to provide medical care to transgenders in the hospitals and also provide them with separate public toilets and other facilities.
7. To take steps for framing various social welfare schemes for their betterment.
8. To take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and not treated as untouchables.
9. To take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

In *NALSA*, the court had to intervene to make the government come out with some specific policies aimed at bringing the sufferings of the transgender community to an end and include the community into the mainstream of life. As a follow-up, the Central Government introduced the Transgender Persons (Protection of Rights) Bill, 2016, in the Parliament, which referred it to the Parliamentary Committee, headed by Lok Sabha MP Ramesh Baish. The committee has submitted its Report to the House.

Conclusion

The judiciary across the globe has, thus, played a crucial role in taking the transgenders' movement closer to the fulfilment of its objective of getting an

[47] *Id.*
[48] *Id.,* p. 109.

independent identity and full citizenry rights for the transgenders. In the process, it kept changing parameters and evolved new tests, from the rigid "biological" to more flexible "psychological," to expand the semantic meaning of the term "gender" to bring trans-people in its fold. This judicial benevolence enabled trans-persons to ask for their due from the society and the government more vigorously. The debate now is not on 'Whether transgenders deserve what they are asking for' but on 'When and how will the transgenders get their due?'

In India, too, judgments like *NazI* [49] and *NALSA,*[50] follow the global trend and attempt to undo the injustices of the past. They not only force the legislature and the executive to take note of the changing times and treat all citizens alike irrespective of their gender or sexual orientation but also exhort the society to change its mindset towards the LGBT community, in general, and transgenders, in particular. Undoubtedly, in *NazII,*[51] the apex court missed a chance to create history by upholding the lower court's well-articulated judgment, which was also in keeping with laws in the most of the progressive and civilized societies, it made amends in *NALSA.*

[49] *Supra* n. 39.
[50] *Supra* n. 32.
[51] *Supra* n. 40.

The Refugee Regime Complex: A Comparative Study on Refugee Laws

*Prakash Sharma**

Introduction

In the long and arduous passage from the standards such as the 1951 Refugee Convention,[1] 1969 Organization of African Unity (OAU) Refugee Convention,[2] 1984 Cartagena Declaration on Refugees of Latin America[3] to the newest of all the Common European Asylum System (CEAS)—all have been dealing with refugee protection that evolved with the need of time.[4] The approaches of following the provisions laid down in these conventions by the State parties are varied, and have incorporated these provisions in their national laws of refugee protection.[5] At the same time we have witnessed recent developments on the part of the several Western and Pacific countries in helping States, which are the routes of refugee movement to Europe and elsewhere with resources so that the refugees could settle in those States and their further movement, can be restricted. This kind of operational measures on behalf of countries of the global south can also be termed as a mechanism of calculated kindness.[6] It is under this backdrop the present paper explores legal measures adopted by South Africa and Brazil to tackle refugee issues. The selection of States is based on the regional ground or more specifically on the global positioning within global south.

Global Refugee Crisis

The world is experiencing possibly one of its own kind of forcible migration at a rate that was perhaps somewhere akin to the refugee crisis of World War-II. Over the year's massive forcible movement of internally displaced persons are noticed—richly in developing countries. The international refugee protection system has been construed as offering human rights protection to a clear and distinct group of people who cannot or can no longer rely on their country of origin or habitual residence for protection. It must be noted that refugees are not stateless persons, they have nationality—the only thing refugees lack is the effective protection, especially from the seeking country, since their native country cannot provide the same. We have seen how recent events have awakened governments across Europe, North America, and Asia to the crisis—only to realize that not all have yet accepted responsibility for accepting refugees fleeing war, terror and abject poverty. The escape route on part of European Union of backing countries like Turkey, Lebanon and Jordan with more assistance, which is a one sided approach of tackling the issue won't bring any long term desired results.[7] The World needs an extending

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1 The United Nations Convention relating to the Status of Refugees, 1951 (hereinafter 1951 Convention), is the centerpiece of international refugee protection. The 1951 Convention consolidates previous international instruments relating to refugees and provides the most comprehensive codification of the rights of refugees at the international level. United Nations General Assembly resolution 429(V) of 14 December 1950, *available at* http://www.unhcr.org/refworld/docid/3b00f08a27.html (last visited March 12, 2017). The 1951 Convention has been subject to only one amendment in the form of a 1967 Protocol, which removed the geographic and temporal limits. The Protocol of 1967 is attached to United Nations General Assembly resolution 2198 (XXI) of 16 December 1967, *available at* http://www.unhcr.org/refworld/docid/3b00f1cc50.html (last visited March 22, 2017).

2 Organisation of African Unity Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, *available at* http://www.unhcr.org/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html (last visited April 22, 2017). For evaluating the extent and efficacy of OAU and African Union *see*, Marina Sharpe, *Organisation of African Unity and African union Engagement with Refugee Protection: 1963-2011*, 21(1) African Journal of International and Comparative Law 50-94 (2013).

3 The Cartagena Declaration on Refugees was adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama on November 22, 1984. The declaration is a non-binding agreement but has been incorporated in refugee law in various countries. Cartagena Declaration on Refugees of Latin America, 1984, *available at* http://www.unhcr.org/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html (last visited April 22, 2017). *See* also UNHCR, *The Refugee Situation in Latin America: Protection and Solutions Based on the Pragmatic Approach of the Cartagena Declaration on Refugees of 1984*, 18(1) International Journal of Refugee Law 252-270 (2006).

4 Since 1999 the European Union has been working to create a Common European Asylum System (CEAS) and improve the current legislative framework. For judicial analysis of CEAS, see European Asylum Support Office (EASO), *An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis* (2016), *available at* https://www.easo.europa.eu/sites/default/files/public/BZ0216138ENN.PDF (last visited April 24, 2017).

5 *See*, G. Loescher, Beyond Charity: International Cooperation and Global Refugee Crisis 59,60 (OUP, 1993). Also *see* Guy S. Goodwin-Gill, *The Politics of Refugee Protection*, in Helene Lambert (ed.), International Refugee Law 145-160 (Ashgate Publishing Limited, 2010); M. R. Marrus, The unwanted: European Refugees in the Twentieth Century 317-324 (OUP, 1985).

6 *See*, G. Loescher and J. Scanlan, Calculated Kindness 59 (The Free Press, 1986); K. Solomon, Refugess in the Cold War: Towards a New International Refugee Regime in the Early Post-War ERA53 (Lund University Press, 1991). *See* also, Robert E. Mazur, *The Political Economy of Refugee Creation in Southern Africa: Micro and Macro Issues in Sociological Perspective*, 2(4) Journal of Refugees Studies 441,461 (1989), author states "Countries in which the largest number of people have taken refuge are precisely those that have supported war and terrorism".

7 *See*, Patricia Tuitt, *The Modern Refugee in the Post Modern Europe*, in Satvinder S. Juss (ed.), The Ashgate Research Companion on Migration Law, Theory and Policy 25 (Routledge Publication, 2016).

support to adopt a global, cooperative resettlement strategy, and to build global funds vital for social protection, which instead of targeting governments targets people directly affected and brings them into the mainstream. The failure to demonstrate the solidarity that values human life is abhorrent and the growing xenophobia in the political realm is distressing. Fear canvased for the new arrivals threatening to take jobs without any serious plan to improve infrastructure, grow jobs and produce growth to build a better future and provide opportunities for all is short sighted. Every so called democratic country can do better to ensure safe haven for people at risk, especially when such conflict and displacement are result of their own greedy one sided politics of policies. Therefore it is also required to analyze the spirit of the refugee protection legislations of States, which are in operation for a considerable period of time and can be regarded as models in their region.

One thing is clear; a situation of war and unrest causes concerns not just for a particular region but also for the world as a whole.[8] Who are responsible for such crisis will be a difficult question to answer in just one chapter but a cue would be addressed so as to reach at some sort of conclusion. Meanwhile, has legal measures forming part of humanitarian laws were meant specifically for selective States or regions, is something, which will be addressed specifically in this paper, which would finally address our final question whether humanitarian laws are insufficient to tackle such a crisis? Presently the world as a whole is in the midst of an enormous task in providing security to people fleeing war, persecution and oppression. This will bring for any asylum system some major challenges, since the number of people who have or who will sought asylum would definitely increase dramatically in the near future—the concern for such influx at the moment is war but it can be anything in the near future. An effort is made to analyze the domestic laws of certain selective States viz. South Africa and Brazil— and thereby form an opinion as to the genuine efforts shaped by States with regards to the serious humanity concern.

Refugee Protection Laws in South Africa and Brazil

South Africa over the years has experienced refugee movement at a rate that was not expected by the authorities. Causes of refugee movement in South Africa were both micro (psychological, individual and familial), and macro (for example, social class, political, regional and global) in nature.[9] South Africa witnessed how issues of political economy shape the selection of specific targets in refugee-generating conflicts—having massive impacts on individuals, families and communities, which permit the transformation of the regional political economy. Due to its sociological and political economy

[8] *See,* Robert E. Mazur (1989), *Supra* n. 6, p. 463.

[9] T. Hart and C. M. Rogerson, *The Geography of International Refugee Movements in Southern Africa*, 64(2) South Africa Geographical Journal 125,135 (1982). *See* also J. Hathaway, A Reconsideration of the Underlying Premise of Refugee Law, 31(1) Harvard International Law Journal 129 (1991).

perspectives which are complementary, and essential ingredients in understanding processes of change in the refugee-related crises in Southern Africa, reveals its dynamic interaction between macro and micro level phenomena and their mutual transformation.[10] Historically the refugee problem is to be situated in the context of class practices and the class struggle in South Africa. This adds a multi-dimensional struggle not only because of the multiplicity of social ensembles (basically classes) that take part in it, but also because of the multiplicity of levels at which it is waged—economic, political and ideological, as well as national, regional and global.[11] However, the nodal point of the class struggle takes various forms in various countries and regions at specific historical moments. The moment of the global class struggle can be captured by a number of national and global processes.[12] South Africa has witnessed a complex conjuncture of the class struggle because of the intricate mix of class and racial factors involved. This class struggle is mirrored by a number of conditions directly generating population displacement and relocation such asapartheid, destabilization of neighbors, and liberation struggles.[13]

It is these conditions and their connection to the displacement and relocation of people in the region that the South African refugee protection law will be evaluated. It is generally understood that the aim of any refugee protection law is to create decent and orderly reception, provide safety and to mitigate sufferings. The Aliens Control Act, 1991 of South Africa in numerous aspects has failed to provide adequate guarantees to applicants.[14] Thereafter the entire process of refugee reforms got initiated and this led to the development of Refugees Act, 1998[15] and the Immigration Act, 2002[16] (which repealed the earlier Alien Control Act, 1991). South Africa's national refugee legislation incorporates the basic principles of refugee protection, including freedom of movement, the right to work, and access to basic social services. The South African government has made important strides in protecting people who have been compelled to leave their countries of origin as a result of well-founded fear of persecution, violence, or conflict. However there are questions with regard to the implementation the refugee protection legislation and

[10] *See,* Robert E. Mazur, *Refugees in Africa: The Role of Sociological Analysis and Praxis*, 36(2) Current Sociology 43,49 (1988). Also *see* Tiyanjana Maluwa, The Refugee Problem and the Quest for Peace and Security in Southern Africa, 7(4) International Journal of Refugee Law 653, 670 (1995).

[11] A. Richmond, *Sociological Theories of International Migration: The Case of Refugees*, 36(2) Current Sociology 7,21 (1988).

[12] *See,* Okechukwu Ibeanu, *Apartheid, Destabilization and Displacement: The Dynamics of the Refugee Crisis in Southern Africa*, 3(1) Journal of Refugees Studies 47-51 (1990). *See* also Obonye Jonas, *Reflections on the Refugee Protection Regime in Africa: Challenges and Prospects*, 14 University of Botswana Law Journal 71,76 (2012).

[13] Okechukwu Ibeanu (1990), *Id*., p. 53.

[14] Jonathan Klaaren and Chris Sprigman, *Refugee Status Determination Procedures in South African Law*, in Jeff Handmaker, Lee Anne de la Hunt and Jonathan Klaaren (eds.), Advancing Refugee Protection in South Africa 61 (Berghahn Books, 2007).

[15] Refugees Act, 1998 (No. 30 of 1998, South Africa).

[16] Immigration Act, 2002 (No. 13 of 2002, South Africa).

rigidity in several aspects.[17] South Africa is a party to both 1951 Refugee Convention and OAU Convention governing the specific aspects of refugee problems in Africa. The conflicts that accompanied the end of the colonial era in Africa led to a series of large-scale refugee movements. These population displacements prompted the drafting and adoption of not only the 1967 Refugee Protocol but also the OAU Convention governing the specific aspects of refugee problems in Africa.[18] The OAU Convention follows the refugee definition of the 1951 Refugee Convention, which includes some objective considerations especially for Africa from the international human rights instruments.[19] The results is that persons fleeing civil disturbances, widespread violence and war are also entitled to claim the status of refugee in States that are parties to the OAU Convention, regardless of whether they have a well founded fear of persecution.[20] The proposal to introduce refugee legislation in South Africa came in 1996, with the preparation of an initial draft refugee bill by the Department of Home Affairs. This was followed by the circulation of drafts, which received critical public comments, and thereafter with certain substantial changes involving public debates and meetings with civil societies, the draft received consensus of the national assembly on November 05, 1998.[21] Though the policy making process or legislative process may be sometimes controversial, but it is always recommended that approach must be continuing to focus on enhancing strategic partnerships and strengthening coordination in its main areas of intervention for better protection of refugees.[22]

Brazil granted ordinary migrant status to those refugees who arrived in Brazil during the World War-I and World War-II. Brazil's commitment to the protection of refugees begins in the early 1950s when it became party to the 1951 Refugee Convention.[23] Thereafter refugee protection policies emerged at

[17] Audie Klotz, Migration and National Identity in South Africa (1860-2010) 202-15 (Cambridge University Press, 2013). *See* also J. Garvey, *Toward a Reformulation of International Refugee Law*, 26(2) Harvard International Law Journal 483(1985).

[18] *See,* Human Rights Watch, Prohibition Persons, Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa 221 (Human Rights Watch, 1998). See also Jeff Handmaker, *No Easy Walk: Advancing Refugee Protection in South Africa*, 48(3) Africa Today 91-113 (2001).

[19] *See,* Alice Edwards, *Refugee Status Determination in Africa*, 14(2) African Journal of International and Comparative Law 204,205 (2006).

[20] *See,* Michael Kingsley Nyniah, *Reflections on the Institution of Asylum, Refugee Criteria, and Irregular Movements in Southern Africa*, 7(2) International Journal of Refugee Law 291-316 (1995).

[21] *See,* J. Handmaker, *Who Determines Policy? Promoting the Right of Asylum in South Africa*, 11(2) International Journal of Refugee Law 291 (1999).

[22] *See,* Jeff Handmaker, *No Easy Walk: Advancing Refugee Protection in South Africa*, 48(3) Indian University Press 91,92 (2001).

[23] Brazil ratified the 1951 Refugee Convention in 1960 and its 1967 Protocol in 1972 but legal and political reasons prevented non-European refugees from enjoying asylum in Brazil. Brazil is a party to both the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. *See,* Liliana Lyra Jubilut, *Refugee Law and Protection in Brazil: A Model in South America*, 19(1) Journal of Refugee Studies 22 (2006).

the end of the 1970s and Brazil with its constitutional guarantees to provide asylum to aliens backed with a federal law which regulates immigration issues in general, including asylum preserve human rights, cooperation among peoples for the progress of humanity, and granting political asylum.[24] A national council subordinate to the Ministry of Labor, which is in charge of coordinating immigration activities in the country, issues regulations establishing the requirements for obtaining refugee or asylum status.[25] In 1997, the Brazilian Refugee Act, 1997 was passed that defined the mechanisms for implementing the Refugee Status (through protection mechanism of the 1951 Refugee Convention and 1967 Protocol and incorporates the wider refugee definition contained in the 1984 Cartagena Declaration) in the country and created a national committee under the Ministry of Justice to deal with the refugee matters.[26] Drafted in close collaboration with United Nations High Commissioner for Refugees (UNHCR), the law started operation from July 1997. The Brazilian Refugee Act, 1997 is the first comprehensive national refugee law in South America. Under this authority, the committee issued a normative resolution detailing the procedures for the request and processing of refugee applications. Permanent residency and citizenship are available to holders of asylum and refugee status, provided that certain requirements are met.

As per the Brazil's commitments on resettlement policy, it is mentioned that it understands resettlement as a protection tool and durable solution, aiming at allowing refugees to integrate into Brazilian society and to achieve self-sufficiency as fast as possible.[27] The Brazilian resettlement program relies on a tripartite structure that involves government, civil society and UNHCR in specific roles in accordance with the macro agreement for the resettlement of refugees in Brazil, signed in 1999. The Brazilian Refugee Act, 1997 guarantees the basic documentation for refugees, including identity cards and work permits, freedom of movement and other civil rights. The government authorities, are mainly responsible for the provision of documentation and public services for refugees both at national and local levels with the exception of access to political rights, refugees benefit from equal conditions to nationals, accessing the same public policies available to Brazilians through an extensive network of different governmental offices.[28]

In the following sections of the paper, discussions on several provisions will be carried out. This includes procedure of formulating and adopting methods

[24] *See generally*, Jose H. Fischel De Andrade, *Refugee protection in Brazil (1921–2014): An Analytical Narrative of Changing Policies*, in David James Cantor, Luisa Feline Freier and Jean-Pierre Gauc (eds.), A Liberal Tide? Immigration and Asylum Law and Policy in Latin Ameerica 153-183 (University of London, 2015).

[25] Jose H. Fischel De Andrade, *Regional Policy Approaches and Harmonization: A Latin American Perspective*, 10(3) International Journal of Refugee Law 389-409(1998).

[26] The Refugee Act, 1997 (Law 9474/97 of 22 July, 1997).

[27] Liliana Lyra Jubilut (2006), *Supra* n. 23, p. 37

[28] Jose H. Fischel de Andrade and Adriana Marcolini, *Brazil's Refugee Act: model refugee law for Latin America?*, 12(13) Forces Migration Review 37 (2002).

of defining, determining refugee and policies; along with method of confronting max influx situations. Given that each State has its peculiarities, it is hoped that the framework and approaches outlined may contribute to a better understanding of the process by which global refugee policy is made and the factors that affect its ability to improve protection and solutions for refugees.

Refugee Definition, Exclusion and Cessation

Immigration law is ruled by the principle of sovereignty, where every state is free to design and implement its own immigration policies, while refugee law is characterized by various international obligations based on international human rights law. The matters concerning asylum seekers and refugees are outside the purview of immigration laws. An asylum seeker is also protected under the umbrella concept of a refugee even though they are not expressly included in the definition. Though at place the asylum seekers are protected by the law, however the legal position or status of asylum seeker is somehow unclear. This multiplicity of criteria used to determine who a refugee is, leads to multiple interpretation, causing an avalanche of changes to an individual's material and social situation.[29] The integrity of the legal regime underpinning refugee protection would be at risk if asylum policies were considered a sub-set of migration management strategies that are governed by security concerns, thus this pat of the paper will be concerned with refugee and laws governing them leaving the aspect of immigration.

The Refugees Act, 1998 of South Africa, establishes the institutions and procedures to offer refuge and protection to those who are facing persecution and instability in their home countries and the Immigration Act, 2002 deals with regulating, entry, stay and documentation of non-nationals. These two pieces of legislation differ in their scope and application. As a sovereign state, South Africa has the right to detain and deport those who violate its immigration laws[30]—a power which allows a state to govern and control its borders. On the other hand, the Refugees, 1998 is the primary piece of legislation that ensures the safety, well-being and dignity of asylum seekers and refugees. It provides for the reception into the country of asylum and regulates the application for and recognition of refugee status. For a person to qualify for refugee status in South Africa, he or she must conform to the definition of a refugee in terms of the Refugees Act, 1998. South Africa follows an individual refugee status determination procedure. Going by the definition, an asylum seeker is a person who has lodged or intends to lodge an asylum application and who is awaiting a decision on his or her asylum claim.[31] An asylum seeker can be qualified to be a refugee under the Refugees Act, 1998 if

[29] Daniel J. Steinbock, *The Refugee Definition as Law: Issues of Interpretation*, in Nicholson and Twomey (eds.), Refugee Rights and Dealities: Evolving International Concepts and Regimes 20 (Cambridge University Press, 1999).

[30] Section 3(1)(g), The Immigration Act, 2002. *See* also Michael Kingsley-Nyinah, *Reflection on the Institution of Asylum, Refugee Criteria and Irregular Movement in Southern Africa,* 7(2) International Journal of Refugee Law, 291,310 (1995).

[31] The Refugees Act, 1998, s.1.

that person fulfils certain conditions prescribed within the Act.[32]An asylum seeker will not be qualified for refugee status under the South African law if the person has committed any of the following acts such as international crime, any non-political crime which is punishable in South Africa, acts committed against the United Nation or OAU, or enjoys the protection of any other country.[33] A person ceases to qualify for refugee status if he or she avails himself or herself of the protection of the country of his or her nationality, or circumstances in connection with which he or she has been recognized as a refugee have ceased to exist and no other circumstances have arisen which justify his or her continued recognition as a refugee.[34]

The Brazilian Refugee Act, 1997 is specific and comprehensive mechanism for protection of human rights of refugees in Brazil.[35] In considering its association with the other South American countries, an appreciation is required to understand how domestic asylum and refuge remain two different and distinguished legal institutions in this part of the world.[36] In defining a refugee, the Act adopts the same criteria as the 1951 Refugee Convention however in some different wording and added human rights perspectives from the 1984 Cartagena Declaration.[37]With regard to the exclusion clauses, the Act adds that a person shall not be benefitted from the condition of a refugee if he or she enjoys protection from any agency of the United Nations except UNHCR, or as a resident of Brazil enjoys rights and obligations like a Brazilian national, or guilty of acts against the purposes and principles of the United Nations, or committed any serious non-political crime or international crime.[38] In this law the exclusion provision adds to the 1951 Refugee Convention the possibility of denying refuge to people who have committed terrorism or are involved in drug trafficking.[39] This could be regarded as an effort towards updating and specifying the original text of the 1951 Refugee Convention in so far as both terrorism and drug trafficking comes under the category of serious non-political crimes or acts contrary to the purposes and principles of the UN—an effort within the realm of international refugee law. The Act has cessation clause and the reasons for losing refugee status, which is largely dependent on the objective situation in the state of origin or residence of the

[32] *Id.*, s.3.

[33] *Id.*, s.4.

[34] *Id.*, s.5. However, the provision related to cessation contains an exception proviso, section 5(2), The Refugees Act, 1998. This again is a copy of the exception from the 1951 Convention and confirms the potential need for continued refugee protection for some refugees.

[35] Liliana Lyra Jubilut (2006), *supra* n. 23, p.27. The harmonious concurrence of these two institutions in South American continent can be explained by the fact that the states, while desiring closer integration with the international community by incorporating international regulations on refuge, wanted and needed to maintain their tradition of granting protection to persecuted people who are either outside the definition of a refugee according to the 1951 Convention or to whom granting refuge was not a wise political move. *Id.*, p.29.

[36] Jose H. Fischel De Andrade (2015), *supra* n. 28, p.154.

[37] The Brazilian Refugee Act, 1997, art.1.

[38] *Id.*, art 3.

[39] *Id.*, art 3 (III).

refugee.[40] Such a situation is subject to any changes or improvements so that the need for protection disappears. Further, any misconduct (gross violation of International law) on the part of the refugee could lead to loss of refugee status. Any ordinary criminal offences are not listed in the Act as an exclusion clause, as is the case in most national legislations in the South American states.[41]

Procedure and Determining Authorities

In South Africa, an application for refugee status has to be submitted to a refugee reception officer (RRO) at any refugee reception office as per the law.[42] The RRO is bound to accept the application and in case of necessity he will assist the applicant to comply with the requirements of application.[43] The RRO will have to forward the application to the refugee status determination officer after necessary enquiry as he deems fit.[44] At the same time, the RRO will be issuing an asylum seeker permit to the applicant for allowing him to temporarily reside in South Africa, and time to time will extend the permit till any decision is reached.[45] After receiving the application from the RRO, the refugee status determination officer (RSDO) may ask for further information either from the forwarding officer or from the UNHCR representative to reach at a decision.[46] The RSDO will be conducting a hearing of the applicant and may grant asylum.[47] In some cases the RSDO may refer any question of law related to the application to the standing committee for their determination.[48] The RSDO may also reject the application if he finds that the application is manifestly unfounded, abusive or fraudulent.[49]

The Refugees Act, 1998 of South Africa provides for establishing of refugee reception offices.[50] In every refugee reception office there must be one RRO and one RSDO functioning under this Act.[51] Both these officers will have experience and knowledge in dealing with refugee matters and they will be the officers of the department. In the hierarchical setup above the refugee reception office, there will be an independent standing committee consists of

[40] *Id*., arts 38,39.
[41] Liliana Lyra Jubilut (2006), *Supra* n. 23, pp. 33-34. The Act has a provision, which is in tune with the concept of the rule of law under which an exclusion clause can only be applied when the person asking for refugee status has actually committed an act and not when there are serious reasons for considering that the person has done so.
[42] The Refugee Act, 1998, s. 21(1); For critique *see*, Roni Amit, *No Refuge: Flawed Status* Determination and the Failures of South Africa's *Refugee System to Provide Protection*, 23(3) International Journal of Refugee Law 458-488 (2011).
[43] The Refugees Act 1998, ss. 21(2) (a), 21(2) (b), 21(3) .
[44] *Id*., ss. 21(2) (c), 21(2) (d).
[45] *Id*., ss. 22(1), 22 (3).
[46] *Id*., ss. 24 (1).
[47] *Id*., ss. 24 (3) (a).
[48] *Id*., s. 24 (3) (d).
[49] *Id*., ss. 24 (3) (b), 24 (3) (c).
[50] *Id*., s. 8 (1).
[51] *Id*., s. 8 (2).

a chairperson and such other members as determined by the Minister.[52] The standing committee is primarily responsible for formulating and implementing the procedures under this Act and other acts such as supervise the work of the refugee reception offices, review and monitor the decisions of the RSDO, decide any question of law referred by the RSDO, liaise with the Minister and the representatives of UNHCR or non-governmental organizations, etc.[53] The Refugees Act, 1998 also provides for establishing an independent refugee appeal board (RAB) consists of one Chairperson and two other members appointed by the Minister.[54] The RAB is empowered under this Act to make its own rules of practice and procedure, and determine questions of law referred to the Board, determine any appeal against rejection and advise the Minister on matters related to the implementation of the Act.[55] The power of reviewing the decisions of the RSDO, in the case of rejection of application of asylum on the grounds of manifestly unfounded, abusive and fraudulent, has been given to the standing committee.[56] At the same time, the standing committee is empowered to decide on any question of law referred to it by the RSDO and the standing committee will prepare a directive in this matter which is binding for the RSDO.[57] The standing committee upon hearing and collection of information as required will confirm or set-aside any order made by the RSDO and inform about its decision as prescribed by rules.[58] The power of deciding appeal against the order of the RSDO on the ground of rejection of asylum application as unfounded rests on the refugee appeal committee.[59] The appeal board after hearing of the appeal application and upon collection of required information as deemed necessary by it, will confirm or set-aside or substitute any order made by the RSDO.[60]

As far as Brazil is concerned, the Brazilian Refugee Act, 1997 assures the possibility of making a request for refuge to any immigration authority, and there is bar to deport someone who has asked for refuge until the end of the refugee status determination procedure.[61] The Act establishes national committee for refugees (CONARE) as the organ responsible for refugee status determination. In addition to its responsibility for first instance decisions on refugee status, CONARE is charged with guiding public policies to make protection, assistance and legal aid to refugees effective.[62] This body is also responsible for the elaboration of normative instructions to clarify any aspect

[52] *Id*., ss. 9,10.
[53] *Id*., s. 11.
[54] *Id*., s.12.
[55] *Id*., s. 14.
[56] *Id*., ss. 25 (1), 24 (3)(b).
[57] *Id*., ss. 25 (3) (b), 24(3) (d), 25(5).
[58] *Id*., ss. 25(3), 25(4).
[59] *Id*., ss. 26(1), 24(3)(c).
[60] *Id*., ss. 26(2), 26 (3).
[61] The Refugee Act, 1997, art 7.
[62] *Id*., arts. 24, 25 and 11. For a better understanding of the functioning of CONARE; *see*, Catherine Tinker and Laura M. Sartoretto, *New Trend in Migratory and Refugee Law in Brazil: The Expanded Refugee Definition*, 3(3) Panorama of Brazilian Law 145 (2015).

of the Act. The Act also establishes that an irregular entry does not prejudice the possibility of asking for refugee status.[63] Further, any criminal and administrative procedures arising from an illegal or irregular entry into Brazil that could result in the deportation or expulsion of the refugee are adjourned until the end of the determination of refugee status and terminated in the event of a positive answer to the request for refugee status.[64] A refugee applicant has to be present before the authority to which he or she will submit the formal application.[65] The refugee will get information about the commencement of proceedings and in case of necessity will get assistance from interpreter and UNHCR.[66] After the receipt of the application from the refugee applicant the federal police of Brazil will issue a pass in favor of the applicant and his or her family members to stay in Brazil legally.[67] On the basis of this pass the refugee applicant will be able to apply for employment card from the ministry of labor for engaging in paid employment. The pass given by the federal police will be valid till a decision on refugee status is taken.[68]

To make a determination on the application for refugee status in Brazil, the Act provides for establishing a national committee for refugees (NCR) under the control and supervision of ministry of justice.[69] The NCR is empowered to take decision on any asylum application at the first instanceand take any other steps necessary under this act to protect the refugees.[70] The committee will be constituted with seven representatives each one from Ministry of Justice, Ministry of Foreign Affairs, Ministry of Labor, Ministry of Health, Ministry of Education and Sports, federal police department and Non-governmental organization involved in refugee protection in Brazil.[71] The UNHCR shall be invited to be part of the meeting of the NCR with a right to make dialogue but without any right to vote. As soon as the NCR comes to a decision on the application for asylum, the decision will be communicated to the federal police department and the applicant.[72] If the decision is in favor of the applicant the federal police will follow the formal process of providing refugee identity card and complete the process of signing some documents on obligation as refugee.[73] In case the decision is not in favor of the applicant, the applicant has the right to appeal before the Minister of State of justice within fifteen days of the communication of the order.[74] The decision of the Minister of State of justice is final and there cannot be any appeal against the

[63] The Refugee Act, 1997, art.8.
[64] *Id.*, art. 10.
[65] *Id.*, art.17.
[66] *Id.*, art.18.
[67] *Id.*, art. 21.
[68] *Id.*, arts. 21.
[69] *Id.*, art.11.
[70] *Id.*, art.12.
[71] *Id.*, art.14.
[72] *Id.*, art. 26, 27.
[73] *Id.*, art. 28.
[74] *Id.*, art. 29.

determination done.[75] After rejection of the appeal, the decision will be communicated to the NCR and federal police for further administrative processing. However the refugee applicant shall not be sent back to any country where his or her life, physical integrity and liberty will be at risk.

Rights Granted to Refugees

There is a general prohibition of refusal of entry, expulsion, extradition or return to other country for refugees in the Refugees Act, 1998.[76] It is not an absolute prohibition but from the point of protection standard when the national law of one State contains such provision it shows that the spirit of the legislation and its impact on the civil society at large.[77] There is also restriction for starting proceedings in case of unlawful entry or presence into South Africa if the person concerned applies for refugee status.[78] This is the biggest guarantee for a refugee who is entering a country without any travel document. Refugees are entitled to a written document with regard to the status, identity document and travel document as per the law.[79] Basic education and medical facilities are also guaranteed to the refugees under the law, which will be at par with the citizens of the country.[80] Refugees are also granted with the right to seek employment, and immigration card (permanent residence) after continuous stay of five years in South Africa.[81] With regard to removal of refugees from South Africa is allowed only in cases of maintaining national security and public order, and such order of removal has to be signed by the Minister after consideration given to national laws and international human rights.[82] At the same time, the refugee will be given reasonable time to get approval from the country where he or she wants to be removed.[83] Having said this it is argued that the main needs of a refugees in South Africa are limited to get access to documentation, a fair and functioning asylum system, basic social services, occasional emergency assistance for the most vulnerable,

[75] *Id.*, art.31.
[76] The Refugees Act, 1998, s.2 : "Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where - (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country." *See* Obeng Mireku, *South African Refugee Protection System: An Analysis of Refugee Status, Rights and Duties*, 35(3) Law and Politics in Africa, Asia and Latin America 399,410 (2002).
[77] Jeff Handmaker, *Advocating Accountability: The (Re)forming of a Refugee Rights Discourse in South Africa*, 25 Netherlands Quarterly of Human Rights 53,68 (2007).
[78] The Refugees Act 1998, s. 21 (4).
[79] *Id.*, ss. 27(a), 27(d), 27 (e), 30, 31.
[80] *Id.*, s. 27 (g).
[81] *Id.*, ss. 27 (f), 27(c).
[82] *Id.*, ss. 28 (1), 28 (2).
[83] *Id.*, s. 28 (5).

including shelter and food, social integration in case of prolonged stay. The South African refugee legislation is silent in the matters of shelter and food in the initial days of arrival, however the possibility of getting immigration permit after five years of stay is the biggest achievement of this legislation. The rights of refugees under the Refugees Act, 1998 also contains provisions related to restrictions on detention for more than thirty days,[84] provisions of special assistance for unaccompanied children and mentally disables persons,[85] and provisions for depends of a refugee to apply for status and continue with the status even after divorce or death of the head of the refugee family.[86]

The provisions of the Brazilian Refugee Act, 1997 are innovative in their extension of benefits to a refugee, where it allows the family of the refugee in Brazil to receive refugee status.[87] Besides broadening the classic definition of a refugee to include gross violations of human rights as a legitimate reason for granting refuge.[88] This inclusion demonstrates human solidarity, a consciousness of Brazil's international responsibility and a comprehension of the bonds of International Refugee Law and International Human Rights Law.[89] However, with continued influx of refugees and forced migrants the government authorities adopt new methods of addressing these concerns.[90] An ad-hoc complementary protection system to address such an emergency situation and protect migrants who arrive is adopted on the grounds of humanitarian visa instrument, which covers forced migrants who do not fulfill the necessary requirements of the 1951 Refugee Convention.[91] However this approach lacks consistency and binding force, besides it relies heavily on the discretionary power of administrative bodies. This act also exposed states and international organizations preferences in granting weaker subsidiary protection rather than recognition of full refugee status for individuals. The mechanism of complementary systems though limited within the municipal limits of the State has a potential of enlarging the narrow content of 1951 Refugee Convention, a possible measure of introducing new grounds for protection, which takes into account human rights instruments as well as humanitarian law in order to protect more people from violations of human rights and generalized violence.

[84] *Id*., s. 29.
[85] *Id*., s.32.
[86] *Id*., s. 33.
[87] The Refugee Act, 1997, art.2.
[88] *Id*., art.1 (III), which is in tune with the definition of refugee status adopted in the Cartagena Declaration, 1984.
[89] *Id*., art. 48,which stipulates that refugee law has to be interpreted in keeping with the Universal Declaration of Human Rights, the 1951 UN Convention and its 1967 Protocol, as well as any international Human Rights documents to which Brazil is committed.
[90] Catherine Tinker and Laura Madrid Sartoretto (2015), *supra* n. 62, p.144.
[91] Catherine Tinker and Laura Madrid Sartoretto (2015), *supra* n. 62, p. 157. *See also*, David. James Cantor and Stefania Eugenia Barrichello, *The Inter-American Human Rights System: A New Model for Integrating Refugee and Complementary Protection?*, 17(5-6) The International Journal of Human Rights 690 (2013).

Once a temporary haven for asylum seekers, Brazil, became a refugee receiving country with developments from the democratic process and human rights approach including the drafting of a plan on Human Rights that Brazil has undergone since its emergence from dictatorship in the mid 1980s. The Brazilian Refugee Act, 1997 is a modern and coherent legal instrument, in harmony both with the practice carried out by the national authorities and with international and regional norms. The Act's resettlement provisions are the basis of a new phase in refugee protectionin Brazil. Many hope that it will serve as a starting point for harmonizing policies and legal instruments for refugee protection throughout Latin America.[92] The Act contemplates news initiatives in the form of a voluntary character of resettlement and the need for planning, coordination and determination of responsibilities.[93] Besides the Act forbids the extradition of refugees and applicants for refugee status pending a decision on their cases with the exception of cases where national security or a threat to public order are involved, in that case the refugee or applicant will not be sent to the country of their origin or residence or to a place where life, liberty or welfare may be at peril. Several other documents such as refugee identity card, labor card and travel document will be available to the refuges in Brazil under the law.[94]

Mass Influx Situation

An important contribution of the South African refugee protection law is the incorporation of provisions dealing with mass influx situation.[95] The development of this mass influx situation provisions came with the understanding that the normal individual refugee status determination system fails to comply with the work load and the State concerned is facing huge influx of persons who in most likely be qualify for refugee status. The Refugee Act, 1998 provides that the Minister may grant refugee status to any group or category of persons who are already in the territory of South Africa unconditionally or with such conditions as required.[96] The Minister may also seek consultation with UNHCR and the local administration to finalize the temporary reception conditions for these large-scale asylum seekers.[97] However, in Brazil, the status of refugee determination is developed for examination of claims on an individual basis.[98] This has been satisfactory given that the number of asylum seekers in Brazil is not relatively large,

[92] *See,* Liliana Lyra Jubilut and Silvia Menicucci deOliveira Selmi Apolinario, *Refugee Status Determination in Brazil: A Tripartite Enterprise*, 25(2) Canadian Journal on Refugees 35 (2008).
[93] The Refugee Act, 1997, arts. 45, 46.
[94] *Id*., art. 5.
[95] Jeff Handmaker (2001), *supra* n. 18, p. 102.
[96] The Refugees Act 1998, s. 35 (1).
[97] *Id*., s.35 (2).
[98] Cesar Augusto A. Silva, *Challenges of Brazilian institutions for a policy for refugees in a contemporary context: National Committee for Refugees and Federal Police, available at*seer.upf.br/index.php/rjd/article/download/5715/3718 (last visited December 27, 2017).

however the situation changed dramatically following Syrian crisis.[99] It is suggested to create prevention mechanisms in order to avoid a humanitarian crisis in such a situation.

Conclusion

A careful reading of domestic law provisions of both the nation States, reflects that the definition of refugee is not in accordance with the needs of people all over the world who are fleeing from respective countries and pursuing humanitarian protection. It is reflective as to how by and large; governments have failed to deal with the waves of refugee movement. It is often gathered that countries instead of acknowledging the skills and productivity of the refugees, wants to focus much on increasing funding for refugee needs and social protections in host nations. The determination of *sui-juris* people to construct their own new future despite hardships and trauma should not be underrated. Therefore, a need for common contribution to reach for a collective agreement on an action plan that will firstly ensure peace and prosperity in host nations, and secondly to develop a common strategy to resettle the people who are forced to flee to neighboring countries, by recognizing the rights of refugees to be part of a formal economy with requisite labor, social, political and cultural rights, including the freedom to associate, and enact measures to make these rights reality. The comparative study done in the present manuscript on South Africa and Brazil reflects how these respective States have taken up the responsibility of protection and at the same time ensured national interest. Refugees are provided with a well-established system, awarding several essential rights that represents the humanitarian role of the concerned countries.

[99] In 2015, Brazil approved the extension of special visa for two more years to Syrian immigrants and to the people affected by the conflict in the region, *available at* http://agenciabrasil.ebc.com.br/en/direitos-humanos/noticia/2015-09/brazil-extends-more-two-years-visas-syrian-refugees (last visited December 27, 2017).

From *De Minimis* to Access to Education- The Changing Dimensions of Copyright Law

*Tanvi Sehgal**

Introduction

Copyright and its development has often been affected by two divergent views, one who considers it a private property of the owner who has put in his skill and effort to create a work and the other which considers it as a public policy issue. Once a work has been created by an author he has exclusive rights bestowed upon him by copyright law in controlling the use and exploitation of the work so that he may gain from the potential markets. A user who thus intends to use a copyrighted work must first obtain authorization from the author and pay the appropriate remuneration.

On the other hand, those who consider it as a public policy issue highlight the importance of public welfare in accessing the copyrighted work. They believe that most of the works created are borrowed from some other existing work and that absolute monopolization is not a right way to encourage authors. Therefore copyright laws were made to maintain this balance between the creation of works and their access to the public at large. While the efforts of the authors are rewarded by granting certain exclusive rights to them for the exploitation and use of their work, the interests of the public are safeguarded by including certain exceptions within the law itself which allow the use of such works without prior authorization.

Fair dealing provisions under Section 52 of the Indian Copyright Act enlists some situations wherein an unauthorized user of copyrighted work does not amount to its infringement. A broad and meaningful interpretation of these provisions enables ready access to copyrighted works without entangling oneself in legal disputes.

Of late the Indian Courts have widened the scope of public access to copyrighted works by not only rightly interpreting the provisions of fair dealing but also by applying the common law principles to copyright law to

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prevent copyright litigations over trivial issues. The judiciary has thus played a proactive role in negating copyright claims of authors and tilting the balance more in favour of access of works to the public. The recent application of the *de minimis* principle in the *Yashraj Films case* and the *DU photocopy case* are striking examples of this progress. It is this pertinent role played by the Indian Judiciary in carving the contours of copyright law which would be dealt with in this article.

New Defence to Copyright Infringements: *De Minimis*

In *India Tv Independent News Service* v. *Yashraj Films Pvt. Ltd* [1] A Division Bench of Justice Pradeep Nandrajog and Justice Manmohan Singh have given a path-breaking judgment by applying the *de minimis rule* to copyright law for the first time in India. In this case two appeals[2] were clubbed together since they dealt with almost similar situations. What is significant about this case is the application of a common law principle to copyright law thereby making a progressive step while adjudicating matters of trivial importance. It has often been noticed that the while the violation of copyright is minute and mundane its repercussions are severe for, the defendant is made to toil over an omission he felt was insignificant. These are instances when what seems to be taken from the other (owner of work) is so less that it does not seem to devoid him of any benefit that may accrue.

They are cases which do not even fall within the realm of fair dealing as the prerequisite to apply the provisions of fair dealing is the claim that an infringement of copyright has taken place which if not for the fair dealing provision would have proved the authenticity of the such a claim.

Facts of the Case

The defendants in the first case used the first line of the hit song from the movie "Bunty Aur Babli" "Kajra Re Kajra Re Tere Kaale Kaale Naina" in an advertisement broadcasted during a TV programme. The advertisement was one with a social message against pollution and only a three seconds audio recording has been physically lifted. In the second case during a chat show INDIA BEATS, a budding singer, on the threshold of fame, in between the conversation with the host of the show sang nine stanzas, either in full or in part, from songs which had made the young artist famous. While the artist sang these songs, clippings from the cinematographic film concerned were displayed with intervals in the background. The learned Single Judge had found this to be objectionable and had, therefore, restrained the defendants from doing so during the pendency of the two suits.

The learned Single Judge had stated that other than with the permission of the owner of a copyrightable work, it is only Section 52 of the Copyright Act 1957 which privileges the use of copyrightable works. The said section does

[1] FAO(OS) 583/2011) decided on August 21, 2012.
[2] (OS) No.2283/2006 and CS(OS) No.1706/2006.

not include derivative copyrightable works; thus he concluded that a derivative copyrightable work such as a sound recording could not be appropriated, even in the minutest part by any person for whatsoever purpose[3].

In an appeal before the Division Bench of Justice Pradeep Nandrajog and Justice Manmohan Singh, they endorsed the four well-known factors that have been used in the United States of America, for determining fair use in India. The four elements being (i) the purpose and the character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (iv) the effect of the use upon the potential market for or value of the copyrighted work. They further equated the fair dealing principles and fair use principles of USA. The DB also desired the development of exception or applicability of legal maxim *de minimis non-curat lex* as the principle would supply the necessary fillip and would bridge the gap for what is wanting in India.

De Minimis and Copyright Law

The Division Bench observed that as compared to other areas of the law, minor violations of copyright are maximum. Mundane activities such as clicking a picture of a sculpture or the waiters and the waitresses singing "Happy Birthday To You at a child's birthday party are quick examples of the frequency with which minor violation of copyright takes place every day and almost everywhere. Such violations have been taking place in the past as well but back then a legal dispute was not found to be worth the effort, and that is the reason that we do not see many case laws on the subject till the early 90s of the 20th century.

Considering the frequent number of minor violations of copyright law one of the prominent solutions to such an infringement lay in the application of the legal maxim "*de minimis non-curat lex*" often shortened to "*de minimis*," a legal maxim commonly used to privilege minor violation in the area of the law. This rule could be translated to as: (i) The law does not concern itself with trifles; (ii) The law doth not regard trifles; and (iii) The law cares not for small things. To put it simply the maxim means that legislation will not resolve petty or unimportant disputes.

Analysis of Application of *De Minimis* Rule in Copyright Law by Division Bench

Thus, in this case, the Division Bench of Justice Pradeep Nandrajog and Justice Manmohan Singh took judicial notice of the compulsive need to apply the

[3] Since this case was decided before the 2012 amendment, therefore, the provisions of section 52 were not applied to derivative works like sound recording.

legal maxim of *de minimis non-curat lex*, to such minute violations of copyright.

It then went on to explain what qualified as a trifle and when in particular the maxim could be applied. It said: "Applying *de minimis* as an adjective and giving it the meaning: trifling, unimportant or insufficient, Courts have held that trifling, unimportant or insufficient violations would be treated as minor legal violations and hence would either be non-actionable or would be a good defence to an action for violation of a legal right".

Three different paths are discernible in various judicial pronouncements in the field of the Copyright Law with respect to the application of de minimis; only one of which conforms to the path of de minimis in other areas of law. The first path evolved by the Courts concerning the use of de minimis is in the substantial similarity analysis; an integral part of a copyright violation claim. The second path developed by the Courts is in the fair use analysis. The third path is the same as trodden by the Courts in the other areas of the law, i.e., merely applying de minimis where the violation is found to be trifling, unimportant or insufficient.

It is trite that the pre-requisite to copyright infringement is demonstrable copying of the copyrighted work. But since not all copying is infringement, there must be substantial similarity between the two works. Courts have identified two types of significant similarities: (i) Comprehensive non-literal similarity; where Courts have strived to determine the "fundamental essence of the structure, and it being copied, even where specific expression is not copied. (ii) Fragmented literal similarity, in which bits of specified expressions are copied, but the overall structure is not. It is in the latter that Courts have employed de minimis; holding that substantial similarity is present only if the amount of literal expression copied is more than de minimis. Thus, de minimis used in these cases is simply the opposite of "substantial similarity, i.e., to say that the use is de minimis is to say that the alleged infringing work is not substantially similar to the original

It had been brought to notice by the learned counsel of the respondents who had referred to the treatise by Prof. Nimmer: NIMMER ON COPYRIGHT wherein Prof. Nimmer had concluded that de minimis is not a viable copyright infringement defense. The said conclusion had perhaps been arrived at by Prof. Nimmer regarding the various paths attempted to be walked upon by Courts while applying de minimis in the Copyright Law and reaching different destinations to convince Professor Nimmer to conclude that de minimis is not a viable copyright infringement defense.

However the division bench in the present case while defying the claim of the counsel for defendant stated that, the lack of consistency in the judicial opinions was no ground to deny the use of the maxim of *de minimis* to copyright infringement for a particular approach may be criticized, and a specific method may be opined to be the best, but one cannot consider lack of consistency to be a ground to hold that de minimis is not a viable copyright

infringement defence.

It was observed that the Rule of Law loses its meaning if it does not run close to the Rule of Life. Trivial prima facie violations of copyright are commonplace three features of the Copyright Law are primarily responsible for this. "First, any type of work that is fixed and contains even a modicum of creativity is copyrightable. Second, copyright attaches to these works automatically without the need for registration. Third, the statutory rights of copyright owners are wide. Thus, every photograph taken by a tourist which includes an advertisement or an artwork would technically be a copyright violation. Even singing Happy Birthday at a restaurant would be a copyright violation". Thus but not for the provisions of fair use, all these people would be violating the law. Moreover, new technologies have increased the importance of amateur creative production and mixed and matched creativity. Creativity thus needs to be encouraged in the interest of the society.

Advantages of *De Minimis* in Copyright

Three significant advantages of the use of *de minimis*, in the field of Copyright Law, were listed. "Firstly, the Fair Use concept would be a bad theoretical fit for trivial violations. Secondly, *de minimis* analysis is much easier. Thirdly, a *de minimis* determination is the least time consuming, and needless to state it is in the interest of the parties as also the society that litigation reaches its destination in the shortest possible time".

The court listed the five commonly considered factors while applying the de minimis rule which are: (i) the size and type of the harm, (ii) the cost of adjudication, (iii) the purpose of the violated legal obligation, (iv) the effect on the legal rights of third parties, and (v) the intent of the wrongdoer.

Application of *De minimis* to the Television Advertisement and Chat Show

Reverting to the facts and the TV advertisement Sab Golmaal Hai, it was noted that what was physically lifted from the sound recording was merely first five words with the musical score at the backdrop from a popular song of the movie Bunty Aur Babli. The court then applied the well-known five factors mentioned above considered by Courts in applying de minimis. The size of the harm was the use of mere five words from a song having five stanzas. The song was used in a consumer awareness advertisement showing a Kirana shopowner regretting his act of defrauding his customers by selling adulterated and counterfeit products. The alleged wrongdoer intended to educate the public, and such an advertisement could not have been of any financial gain to the advertiser.

Although the five words from the song appear conspicuously and prominently at the beginning of the advertisement, the impact of what follows in the ad with the dialogues and expressions is so powerful that an ordinary viewer

would remember the advertisement for its social and moral reasons and not the song used. Incidentally, on the subject of the cost of adjudication, when the learned counsel for the defendant was asked as to what his clients would have charged if the advertisers had approached them, he said that his clients would have probably charged around '10,000/-. This would be too trivial a sum vis-a-vis the social cost of adjudication.

Thus by applying the five well-known factors commonly considered by Courts in applying de minimis, the court was prima satisfied, that the infraction was trivial and attracted the defense of de minimis.

As regards the second case dealing with the interview of Vasundhara Das was concerned it was observed that she was the performer who lent her voice for all those songs sung by her. Although she was paid for the same, that would by no means end all her rights concerning her performance. For if a performer was to give a chat show or an interview, her life and achievements would surely be the main areas of discussion and such a debate would be incomplete without her having sung a few lines from her most famous numbers.

The court stated that "The law about privilege, privacy, and libel would guide us that for public figures even their personal affairs could be a matter of public interest and as against common citizens, weaker defenses are available to public figures and celebrities concerning their personal affairs. In other words, a discussion or an information or a talk in which public has an interest in which a celebrity participates would entitle the celebrity, if she happens to be a performer, while speaking about herself, her life, her friends, her passion, her successes and failures, to refer to the milestones achieved by her in her life: the heights to which she rose and/or the pits/depths she fell. We cannot separate from the life of the performer her performances and if in the natural setting of a chat show she were to sing more than a wee bit, but not substantially the full songs, as long as the singing duration is limited to a minute or so at a time, it would be a case of de minimis use and hence the appropriation of the lyrics would not constitute an actionable violation of the copyright in the sound recording".

Further, the court cautioned that if the programme had very little chat and a significant part of it consisted of the performer singing, it may be a different situation as it could then be maintained that the show was broadcasted with the intention of showing its viewers specific sound recordings under the garb of a chat show. Thus, the facts of each chat show, its theme, its setting and the participation by the live audience at the show were all factors which had to be kept in mind. The court was reminded of a quote from a US Supreme Court decision in *Harper & Row Publishers Inc v. National Express*[4]:-

[4] 471 US 539.

"Perhaps no more precise guide can be stated than Joseph McDonald's clever paraphrase of the Golden Rule: Take not from others to such an extent and in such a manner that you would be resentful if they so took from you. This equitable Rule of Reason permits Courts to avoid rigid application of the Copyright Statute when, on occasion, it would stifle the very creativity which the law is designed to foster."

The chat show was of 45 minutes duration, out of which Vasundhra Das sang, at different intervals of the chat show, only nine songs and the total time consumed in the singing was less than 10 minutes. By applying the five principles of de minimis, it could be concluded that the intention was not to appropriate something belonging to the other rather it was to inform the viewers as to how Vasundhara Das was introduced into music and what milestones she had achieved in her life. Its viewers would not remember the programme for the songs sung by Vasundhara Das but would recognize it as one encapsulating the life journey of Vasundhara Das.

Changes Brought in by the 2012 (Amendment) Act

Before concluding the decision, the court also mentioned the changes that have been brought about by the Copyright Amendment Act 2012, to section 52 of the Copyright Act. Post the amendment the defense of fair dealing is now available even to derivative copyrightable works.[5] However, this would not change the position concerning the application of the de minimis principle in appropriate cases due to its various advantages.

Access to Education Widened- The DU Photocopy Case

The two decisions of the Delhi High court in *The Chancellor, Masters & Scholars of The University of Oxford & Ors.* v. *Rameshwari Photocopy Services & Anr*[6] have foregrounded the language of access as a central normative principle underlying copyright. It has widened the fair dealing provision related to educational instruction and has laid down a new test to judge fairness with respect to the different clauses of Section 52 barring clause (a) which expressly mentions the fair dealing limitation. The two decisions of the Delhi High Court (Single Judge and Division Bench) collectively constitute a significant contribution to the jurisprudence of access, which will, in the long run, serve as a benchmark both in India and beyond.

Facts of the case

The suit was instituted before the Delhi High Court in August 2012 by three publishers, Oxford, Cambridge, and Taylor & Francis Group, for a permanent

[5] Earlier the fair dealing provision was only available to literary, dramatic, musical or artistic work. Post the 2012 amendment the clause has been substituted with the words "any work" thereby allowing the fair dealing provisions to apply with equal force on derivative works.

[6] 2016 (68) PTC 386 (Del) (Decision of Single Judge Justice Endlaw) and affirmed in relevant parts on appeal in 2017 (69) PTC 123 (Del) (Decision of division bench comprising of Nandrajog and Khanna JJ).

injunction against infringement of copyright in their publications by the University of Delhi and a photocopy shop operating in the University premises. The plaintiffs alleged that defendants had been photocopying substantial excerpts from their publications which consisted of a part of their syllabus and sold unauthorized compilations of the same in the form of course packs- thus infringing the copyright in them. The defendants, on the other hand, contested that their use was fair under Sections 52(1)(a)[7], 52(1)(h)[8] and 52(1)(i)[9].

Single Judge Decision- Justice Rajiv Sahai Endlaw

The court recognized that copyright is a statutory right and according to the provisions of the copyright act, photocopying original literary work is an exclusive right[10] of the owner of the copyright and that the making of such copies would undoubtedly be an infringement under Section 51 of the Act, unless the same fall as an exception under the fair dealing provisions enlisted in Section 52, of the Act.

Having recognized the exclusive rights of the owner of copyright under Section 14 of the Act to issue copies of the work to the public, the Court then went ahead to discuss the provisions of fair dealing under Section 52, which allow fair use of copyrighted work under certain circumstances. The court further decided to give an expansive interpretation to section 52 equating it with the broad approach which is adopted while interpreting the exclusive rights of an owner of the copyright.

On September 16, 2016, Justice Rajiv Sahai Endlaw dismissed the entire suit of the plaintiff. It held that the impugned acts of defendant fell within the ambit of Section 52(1)(i) of the Act which permits the reproduction of works by a teacher or student in the course of instruction.

The exception of Section 52(i) to extend to an Institution and its Students

The question before the court was whether the said provision was restricted to an individual teacher and student or whether it extended to an institution and its students. The court unequivocally held that it cannot be so limited especially when considering the societal realities. The education system in India has long been institutionalized, and thus law should not be interpreted in such a fashion that it does not reflect the realities of the education system.

Course of Instruction not confined to mean a Lecture

The second main contention was concerning the interpretation of the term *"course of instruction."* The plaintiffs contended that this term must be confined to lectures and tutorials wherein the teacher is directly interacting with the

[7] Fair use of any work for private or personal use including research.

[8] The publication in a collection intended for the instructional use of short passages.

[9] The reproduction of any work by a teacher or a pupil in the course of instruction.

[10] *See,* the Copyright Act, 1957, s.14

students and while doing so is using the copyrighted material. The court disagreed with this contention of the plaintiffs stating that the legislature intentionally used the term instruction instead of lecture and thus such a narrow interpretation cannot be given to the term instruction.

Common Objective of the University

The court noted that a student of the University, when issued a book from the library and copied it either by hand or by a photocopying machine for personal use, was protected under the fair dealing provision. Therefore it was absurd to state that if the University did the same act as a result of its resource constraints, then the act of the University would amount to infringement. Hence, the court stated, "*When the effect of the action is the same, the difference in the mode of action cannot make a difference to make one an offense.*"

Similarly, the court also noted that if a student took photographs of pages of a textbook from the DU library on his cellphone and then proceeded to print the same, it would be protected under fair dealing as it is merely an advancement in technology of coping by hand or photocopying.

Having discussed this, Justice Endlaw further went on to explain that, "*Copyright, especially in literary works, is not an inevitable, divine or natural right that confers on authors the absolute ownership of their creations. It is designed rather stimulate activity and progress in arts for the intellectual enrichment of the public. Copyright is intended to increase and not to impede the harvest of knowledge.*"

Decision of the Division Bench

On October 5, 2016, an appeal was filed against the judgment before the Division Bench. On December 9, 2016, the Division Bench decided the appeal by interpreting Section 52(1)(i) of the Act as permitting photocopying of works for preparing course packs irrespective of the quantity as long as the intended purpose is used for educational instruction. Some of the critical observations of the Division Bench which helped it reach its decision have been discussed after this.

The Idea of "Fairness" under Section 52(1)(i)

The court began by noting that since Section 52(1)(i) does not have an express fair use limitation, only the general principle of fair use can be read into it. It is pertinent to mention that there is clear distinction between the terms 'fair use' and 'fair dealing.' The former a concept more applicable in the USA is not subject to any express limitations. In other words, anything and everything can be pardoned under the fair use clause provided it fulfills the criteria of fair use. The courts in the USA ascertain whether a use is fair or not based on four factors. These four factors are:

(i) ***Purpose and character of the use-*** This factor determines whether the material used is used to create something new or is merely copied

verbatim into another work. In other words, whether the original work taken has been transformed into a new expression by adding some new insights, aesthetics, etc. In a parody, for example, the parodist changes the original work by holding it up to ridicule.

(ii) ***Nature of work***- If the dissemination of information or facts benefits the general public, then there is, in general, a more leeway to copy from factual works such as biographies than from fictional works such as novels, plays, etc. Moreover, the fair use of published work has a stronger case than of an unpublished work for the right to control the first expression of work lies with the author of such a work.

(iii) ***The amount and substantiality of the work taken***- In general terms, the lesser the copying, the stronger the claim of fair use, however even a small portion if copied can at times tarnish the claim of fair use if the portion taken consists of the heart of the work. This rule of less is more is not necessarily true in parody cases. A parodist is permitted to borrow quite a bit, even the heart of the original work, to conjure up the original work. That's because, as the Supreme Court has acknowledged in the case of *Campbell v. Acuff-Rose Music*[11], "the heart is also what most readily conjures up the original for parody, and it is the heart at which the parody aims."

(iv) ***The effect of the use upon the potential market-*** Fair use is also tested on the ground whether such use deprives the copyright owner of income or undermines a new or potential market for the copyrighted work. Depriving the copyright owner of his profits is very likely to trigger a lawsuit even if one is not directly competing with the original work. For instance in the case of *Rogers v. Koons*[12]An artist made wooden sculptures imitating copyrighted photographs without the permission of the owner of those photographs. The artist earned several dollars selling those sculptures. When the photographer sued him, the artist claimed his work as fair use of the photographs as the photographer would have never considered making sculptures from his photographs. However, the court disagreed stating that it did not matter whether the photographer considered making sculptures or not, what mattered instead was that a potential market for sculptures of the photographs did exist.

In India, on the other hand, the term used is 'fair dealing' which perhaps is not case sensitive. The instances of fair dealing are only those as are specifically mentioned under section 52 of the Act. Thus, the only limitation that was to be read in this provision concerning fairness was the intended purpose of use, i.e., education, thereby negating any quantitative or qualitative limitation. The court, therefore, rejected the application of the four factors usually used

[11] 510 U.S. 569 (1994).
[12] 960 F.2d 301 (2d Cir. 1992).

to determine fair use as applied in the US and other jurisdictions. The relevant paragraph of the judgment read as follows:

"In the context of teaching and use of copyright material, the fairness in use can be determined on the touchstone of 'extent justified for education.' In other words, the utilization of the copyrighted work would be fair use to the extent justified for education. It would have no concern with the extent of the material used, both qualitative and quantitative. The reason being to utilize means to make or render useful. To put it differently, so much of the copyrighted work can be fairly used which is necessary to effectuate the purpose of the use, i.e., make the learner understand what is intended to be understood."

Impact of Course Packs on Market of Publisher

The court rejected the argument of the publishers that unauthorized making and distribution of course packs has caused or is likely to cause an adverse impact on the market of their books. It observed that a student is not a potential customer of the multiple books used in the course packs and that in the absence of such material in the course packs would result in him accessing the library for the same. In fact, on the other hand, good quality of education would expand the scope of use of such books and increase the number of readers.

Meaning given to terms 'Reproduction', 'Teacher' and 'Student.'

Relying upon Section 13(2) of the General Clauses Act, 1897 the court held that the word 'reproduction' meaning 'making a copy of' also included its plural, i.e., making copies of. Similarly, it held that the word student and teacher also included students and teachers. In this aspect, it is pertinent to mention even the view of the Single Bench in this case which held that the word teacher should not be interpreted to mean a single teacher but also includes educational institutions as a whole. Further, the University on whose behalf the teachers are working is also included.

Course of Instruction to Include the Entire Process of Education in a Semester

While the Single judge opined that the term 'instruction' in Section 52(1)(i) was not limited to lecture in a classroom but also something which refers to what the teacher tells the students to do in the course of teaching, the Division Bench further expanded the meaning of this term. In its view, the phrase 'in the course of instruction' would mean the entire process or programme of education in a semester and not the method of teaching in a classroom alone. The court acknowledged that teaching does not involve straightforward lecturing by the teacher and taking of notes by the students in the school but an interactive discussion based in the pre-reads etc. by the students that is regulated by the teacher.

Distribution of Course Pack does not Amount to Publication

The court rejected the issuing of course packs to amount to publication for lack of profit motive on the part of the defendants. It refrained from taking the stand of the Single judge who opined that distribution of course packs to students did not amount to publication instead it stated that even a targeted audience could amount to the public.

Making of Course Packs by Educational Institutions

The Single Bench had observed that once it is found that the making of course pack does not constitute infringement, it is of no consequence whether the University is doing so by use of a machine installed inside its library or outside, whether it owns that machine or not. The Division Bench also refused to agree with the argument of the publishers that Section 52(1)(i) was not applicable to educational institutions rather to individual teachers alone. It refused to find any institutional sanction for photocopying in this case as the role of Delhi University in this case in only limited to laying the curriculum, and it is the teachers who decide on the copyrighted works to be included in the course packs. The court also rejected the argument that the students or teachers can only make a photocopy for section 52(1)(i). It rightly observed, "common sense tells us that neither the teacher nor the pupils are expected to purchase photocopiers and photocopy the literary work to be used during instruction in the classroom." It also made a note of the fact that the photocopier, in this case, was not making any profit apart from the one he customarily made by photocopying.

No License to be obtained from IRRO[13]

The court rejected the argument of the plaintiffs that the only way to maintain a balance between the educational needs of the students and the publishers was to direct the universities to obtain licenses from IRRO (Indian Reprographic Rights Organization) for reproducing the relevant extracts for them.

It is pertinent to mention here that this lawsuit was not one deciding upon the economic damages suffered by publishers rather it was an avarice attempt made by the publishers to cash on an additional source of revenue. A party to this effort was also the IRRO which went around warning Universities of dire consequences had they not paid up. In fact, IRRO also filed an appeal before the Division Bench of the Supreme Court[14] But it refused to admit the

[13] A copyright society that jointly represents the rights of owners of literary works and issues annual licenses to make certain uses of them.

[14] *Indian Reprographic Rights Organization* v. *Rameshwari Photocopy Service & Ors.* CC Nos 9194/2017 (May 9, 2017) (Gogoi and Sinha JJ).

appeal since the original petitioners had withdrawn and IRRO was merely an intervener.[15]

Impact of Judgement and Golden Gate Opened by it

This landmark judgment permitting unauthorized preparation and distribution of course packs to students if the works contained in it are necessary for giving effect to educational instruction was much sought after especially in a country like India where students suffer from less access to foreign authors due to lack of sources. Such course packs can provide a plethora of readings to the students which not only advances their interest in them but also gives them a birds-eye view of what they read by delivering different opinions from across the nation. It is a matter of common knowledge that books of foreign authors are costly and most of the times the latest editions are not available. Even if available in the library, there are merely one or two copies of it which are insufficient for all students to read. This kind of an unaffordability and scarcity are both met by course packs which avail the best of authors that a teacher wishes her students to read at minimal cost.

Moreover, it can be safely said that academic publications are peripheral to the Indian Copyright Act, which is instead mainly concerned with "mass market, high value" intellectual property such as films or popular music. Education which may rightly fall as a public good rationalizes the exemptions that are provided under fair dealing for academic publications and their educational use under the Act. Academic publishers who cater more to institutional, rather than individual buyers will continue to do so, and would thus not stand to lose a significant portion of the healthy profits they make due to "one room photocopy shops" serving Indian Universities[16].

Broader Interpretation to Section 52

Apart from the educational benefit that this decision has provided to the students, it has also widened the interpretation to Section 52 of the Act. This provision has been added as an exemption to unauthorized use of copyrighted work for specific listed purposes. It acts as a balance between the interests of the owner of copyrighted work in protecting his work from a non-permitted user on the one hand and the more significant benefits of the society to promote creativity and access to works on the other hand. Therefore it becomes

[15] On January 23, 2017, a group of 122 students which mainly comprised of alumni and academicians from Oxford University sent an open letter to Delegates of Oxford University Press (OUP) urging them to refrain from filing an appeal in the Supreme Court. Finally, on March 9, 2017, the plaintiffs withdrew the suit. In a joint statement, Oxford University Press, Cambridge University Press and Taylor and Francis acknowledged the importance of course packs for education and stated that rather than continuing the legal battle they would "work closely with academic institutions, teachers, and students to understand and address their needs."

[16] Satish Deshpande, *Copy-wrongs and the Invisible Subsidy*, The Indian Express, (October 7, 2016).

pertinent to appropriately interpret this provision so that it can fulfill the purpose with which it has been added to the Act. The above decision of the High Court has not only clarified the scope of Section 52(1)(i) but has also served as a guiding light for the interpretation of other clauses of Section 52 which unlike clause (a) do not lay down a fair dealing standard.

The judgment makes it amply clear that only a general fair use principle is to be read to all these clauses, which requires fairness to be judged solely on the touchstone of the purpose which the said provision provides. In other words, only those limitations of fair use are to be read in the other clauses of Section 52 which either are explicit in the provision itself or are made to fulfil the use or purpose of the provision. Thus any quantitative or qualitative limitation or any of the other factors as applied in the US and other jurisdictions are not be imposed on any clause of Section 52 other than clause (a) where the fair dealing limitation has been expressly mentioned. It is pertinent that a broad interpretation is given to the fair dealing provisions to balance the interests of the society with those of the rights of copyright owners under section 14 of the Act. According to a narrow interpretation or testing, the provisions (of section 52) upon the limitations imposed by the four factors of fair use would deprive us of the very basis of the provision which the legislature intended, i.e., the benefit to the public at large. This more significant interest which the fair dealing principle endeavours to fulfil should be lost sight of while satisfying small claims of stalwarts who have many other means to make their ends meet.

Criticism of the Judgement

While many hail the decision of the High Court, some scholars and academicians have decided with a pinch of salt. For them, section 52(1)(i) is not an exemption for educational purposes but rather a determining, controlling norm in the name of 'access to education.'

It is pertinent to mention the views of Professor Krishna Kumar ex-chairperson of NCERT in this regard in whose opinion "It needs considerable myopia to celebrate the recent verdict of the Delhi High Court upholding the legal validity of photocopying as a means to promote knowledge and learning"[17]. He observed that the idea that photocopied material can substitute books needs to be examined on several scores. A student who has studied from photocopied course packs cannot enjoy revisiting a text later in student life as the ink used by laser printers begin fading within a year or two. Moreover, course packs promote an exam-centric culture of education which is far from creating a fascination for knowledge. He also makes a note of the diving profits of publishers for publishing as an industry is among the worst hit by global recession and budget cuts in education. Ifs its measly profits are further nibbled away by photocopying, the losses will have to be shared by all, including authors, teachers, and students.

[17] Krishna Kumar, *Shortcut to Scholarship*, The Indian Express,(October 11, 2016).

He further observed the growing width of the social spectrum from where students presently belong. Many of whom have been deprived in their past of quality education and good access to libraries. Giving them a fading pile of A-4 sized sheets compiled in a course pack instead of a well-bound book would only aggravate the injustice suffered by them throughout their early years of education.

In this context, it could be however said that for publishers, students are not their market. If this were the case, the prices of the books would have been much affordable to provide broader access to students. It is a matter of common knowledge that many of the legal and social sciences books are extremely expensive and their latest editions are often not available in India. Publishers rather than reducing their prices were in content with dumping their old publications in India.

Also, contrary to popular belief this ruling by the High Court by no means provides a carte blanche for full-text copying. Instead, the only issue before the judge was whether the reproduction of excerpts from books to create and disseminating course packs is legal. The judge ruled that the law was clear on this point and it exempted coursepack copying.

Lastly if the decisions in the DU photocopy case are an example of how the law can and indeed must respond to the real-world challenges of access to learning materials in developing countries, one is encouraged to speculate about their role as precedents in future disputes that are bound to arise over access to portions or full text versions of journal articles and electronic books[18]. This is particularly significant as the market for online journals is often tightly controlled by a handful of global players who price their services so exorbitantly high that even the wealthiest universities complain of them being unaffordable.

For any nation to develop the free flow of creative ideas is imperative. The notion gains more weight when the expressions of such ideas fulfil an educational purpose of a developing nation. The key to progress lies in the availability and access to material both national and international. In a country like ours where lack of sources and social backwardness pose as impediments to equal access of knowledge, any stringent statutory provisions would further weaken the already bleak chances of higher education. Thus it can be rightly said that this decision of the High Court has been made in the right direction and is sure the break the shackles of any other existing or fore coming obstacles to free access to knowledge or educational instruction.

[18] Lawrence Liang, *Paternal and defiant access: copyright and the politics of access to knowledge in the Delhi university photocopy case*, 1 Indian Law Review 51 (2017).

Similar Approach Adopted by Canada and USA

In a decision[19] delivered this year, by the Supreme Court of Canada it was held that the use of course packs by students falls within the definition of 'private study or research.' Further, the term 'private' does not mean studying in isolation but also includes studying in a classroom with other classmates and a teacher. The Court also determined that 'instruction' (found in India under section 52(1) (i) and 'research and private study' (found in section 52(1)(a)) were for a unified purpose, i.e., of the copier to facilitate research and private study of a student.

Similarly in the USA, in the decision of *Cambridge University Press* v. *Becker,*[20] it was held that making of course packs without permission of the owners is permitted subject to a fair use threshold of 10%. This is important because, in the present Delhi University copyright dispute, a majority of the reproduction was under 10%.

Moreover, the production of course packs in India, although seems to be an unregulated practice is however systematic in its approach as the license agreement between Rameshwari Photocopy Service and Delhi University prescribes that such photocopying is for bonafide use of the students and faculty members only. The photocopy shop is merely an extension of Delhi University and Ratan Tata Library and is even located within the University campus. They receive instructions from the Department on what exactly is to be copied, based on the reading lists made available by professors and are also barred from undertaking any outside job. There is a formalized license agreement with rules and guidelines including the price that must be charged.

Conclusion

Thus from the above-decided cases, it can be inferred that the Indian Courts have been striding in the right direction by making way for developments in copyright law which are at par with the international standards. It is in line with the public-oriented spirit that the Indian Courts have overlooked trivial copyright trespasses to fulfil the broader objective of reducing the cost of adjudication and time of the contending parties. They have brought forth the idea that trivial copyright infringements if accorded recognition would prevent even the mundane activities like singing a birthday song in public.

Lastly keeping in mind the limited sources available for education, the court has permitted unauthorized use of copyrighted material provided they fulfil the purpose of educational instruction. This may at once seem a broad initiative on the part of the court, but it does have an implicit limitation to itself, i.e., fulfilling the educational purpose. Thus anything which is beyond the realms of scholarly instruction imparted by a teacher or gaining knowledge during education by a pupil is frowned upon. This ensures access

[19] *Alberta (Education)* v. *Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37.
[20] 863F.Supp. 2d 1190 (2012).

to foreign authors at low cost in the form of course packs without fearing any copyright infringement.

It is crucial that the law of society evolves and changes with changing times for, only then can it fulfil its purpose. The Indian Courts by time and again pronouncing path-breaking decisions, evolving new principles and discarding the obsolete ones have proved their efficiency in pacing well with the changing times.

Contingent Fee as Access to Justice

*Prashant Narang**

Introduction

> "Not a penny unless we win". "We don't get paid unless and until you get paid". "No fee, unless we recover for you". "Pay nothing unless we win". "No recovery, no fee".

The above one liners commonly inspire many foreign law firms to work on contingent fee basis. In contrast, in India, the Bar Council of India (BCI) rule prohibits contingent fee arrangements. The relevant rule provides that 'an advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof.'[1]

While an economic analysis of the rule would favour lifting the restriction on contingent fee as discussed below, the efficacy of the ban on contingent fee in India in practice is also not unquestionable. 'Professional misconduct for charging a contingent fee' cases are too few.[2] It indicates either high compliance or poor enforcement. Existing literature supports the latter.[3] A survey of a sample of litigants in Tis Hazari Court in Delhi as discussed in the later part of paper, finds a high percentage of plaintiffs opting for contingent fee arrangements with their lawyers.

Rule 20 remains constitutionally unchallenged, there is no empirical study favouring it and the economics literature despises the ban on contingent fee – a private bargain in self-interest. Should policymakers need an empirical proof to remove the ban borrowed from the colonial notions of professional ethics?

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1 Rule 20, Section II, Duty to the client, Chapter-II, Standards of Professional Conduct and Etiquette, Part VI, Bar Council of India Rules, 1975 (as amended in 2009).

2 *Most. Muni Kuwar and Ors.* v. *the State of Bihar and ors.* 2016 SCC Online Pat 2540; *P. Venkatadi Sastri* v. *Sardar Kesara Singh* 1975 SCC Online AP 92; *Rajendra Pai* v. *Alex Fernandes and Ors.* (2002) 4 SCC 212; *B. Sunitha* v. *The State of Telangana & anr.* Crim. Appeal 2068 of 2017, decided on 5 Dec. 2017

3 T.C.A. Anant, *Competition and Professional Services*, in Pradeep S. Mehta (ed.) A Fundamental Competition Policy for India 259, 263 (New Delhi, Academic Foundation, 2006); A. Subramanil, *Paying Off Lawyers Tougher than Accident for Kin*, Times of India (July 19, 2015) *available at* http://timesofindia.indiatimes.com/city/chennai/Paying-off-lawyers-tougher-than-accident-for-kin/articleshow/48129185.cms (last accessed June 26, 2017).

The idea dates back to the thirteenth century when the rulers in England did not want the public to be litigious.[4] Rulers prohibited any litigation assistance particularly financial, for a consideration of a future share in the pecuniary outcome by a *non-party*. A non-party may be a disinterested party, but not lawyers. Such a rule intended to curb corruption amongst clerks of justices, royal officials and sheriffs. Later, courts came up with another concern, that a share in damages can cause excessive litigation. It led to the codification of prohibition on a contingent fee.

Excessive litigation was an issue in the thirteenth century England, access to justice is a concern in the twenty first century India. Contingent fee improves the access to legal services. It makes a high-end lawyer equally accessible to all including an underprivileged client[5]. It is a cost spreading solution like legal aid. Legal aid is funded by tax payers. In case of contingent fee, a lawyer can pool multiple claims and diversify his risks.[6] A recent Delhi based empirical study indicates that a majority of beneficiaries opt for legal aid out of compulsion. The study also claims that almost 90 percent senior judicial officers prefer appointing experienced lawyers as an *amicuscuriae*in a case over involving legal aid counsel in serious crimes such as rape and murder to protect the interest of accused if she cannot afford a lawyer.[7] The reasons are obvious – legal aid in its current form does not address information asymmetry, it only solves affordability. The study favours for more monitoring and control over the empanelled lawyers. Without aligning the incentives of empanelled lawyers, it is quite unlikely that tight control and stringent supervision would work. Contingent fee aligns the interests of the lawyer and the client in such a way that what is beneficial for one is also for the other. In the absence of such a system, the clients may not be able to instruct the lawyer on every step. She may not be able to know whether lawyer's strategy and actions are for her good or bad. Legal service is a specialised service or a credence good i.e., it is difficult for a lay person to ascertain the utility gain or loss even after consuming the service). It is particularly so in the case of one time litigants. Big corporations, insurance agencies and government agencies are repeat players and may have well informed in-house counsels to deal with law firms and instruct them[8]. Without the choice of contingent fee, a litigant might feel

4 Robin C.A.White, *Contingent Fee: A Supplement to Legal Aid?*, 41 Modern Law Rev. 286, 288 (1978); Adrian Yeo, *Access to Justice: A Case for Contingency Fees in Singapore*, 16 Singapore Academy of Law J. 76, 83 (2004).

5 Adrian Yeo, *Id.* 5 p. 103; Alexandar Tabarrok and Eric Helland, Two Cheers for Contingent Fees 3, 7(Washington DC: The AEI Press, 2005).

6 Anthony J. Duggan,*Consumer Access to Justice in Common Law Countries: A Survey of the Issues from a Law and Economics Perspective*, in Charles Rickett and Thomas Telfer (ed.) International Perspectives on Consumer's Access to Justice, 52, 54 (Cambridge University Press, 2003).

7 *Cited in* Abhinav Garg, *Little Faith in 'Free' Counsel, Crores Go Down the Drain*, Times of India (March 22, 2017).

8 James D. Dana, Jr. and Kathryn E. Spier, *Expertise and Contingent fees: The Role of Asymmetric Information in Attorney Compensation*, 9 Journal of Law, Economics & Org. 349, 351 (1993).

9 *Id.*, p. 350.

insecure, uncertain and suspicious of her lawyer. Contingent fee is a response to the information asymmetry in the market that otherwise would have resulted in distrust between a client and the lawyer.[9] A prohibition on contingent fee imposes per appearance, hourly fee or fixed fee on those clients who have no idea about the merit of their case and makes them vulnerable.[10] If a lawyer is paid per appearance, it would be in his interest to maximise the number of appearances. A lawyer billing by hour is likely to invest number of hours more than necessary.[11] In both such cases, a lawyer would be reluctant to see his client entering into a settlement instead of pursuing the litigation even if the client is better off settling the dispute.

Legal aid covers women, economically weaker sections (poor/ below poverty line), the socially underprivileged sections and senior citizens. Contingent fee can make many more options available to the beneficiaries. The biggest beneficiary of contingent fee would be the middle-class men who otherwise would be limited to lawyers they can afford. It is not disputed that contingent fee can bring more cases to consumer forums and motor accident claim tribunals. More suits would mean more deterrence among potential injurers.[12]

Is the contingent fee arrangement a perfect solution? No. One, in the context of product liability cases, the resulting high degree of care may lead to expensive products due to enhanced costs of production, potential costs of compensation and litigation. Two, prohibitionists argue that the contingent fee also may pose conflict of interest, particularly in case of settlement. A litigant would be keen to go for trial where as her lawyer would see less costs- quick gains from settlement.[13] Three, if the claim amount is too small, the lawyer's share in the gain would not be lucrative enough.

True, it is not perfect, so are not other fee arrangements. Even if the increased tort cases makes the products more expensive, banning the contingent fee or capping it would be worse.[14] Litigants with hourly fee arrangements (or per appearance fee) tend to file frivolous litigation, prolong litigation and cause delay. Other fee arrangements are not more equitable than contingent fee arrangement.[15]

It is an established fact that Europe once strictly against contingent fee system on a policy level has allowed a conditional fee (no win, no fee; not linked to percentage

[10] Francisco Cabrillo & Sean Fitzpatrick, The Economics of Courts and Litigation165 (Edward Elgar, 2008).
[11] A. Mitchell Polinsky & Daniel L. Rubinfeld,*Aligning the Interests of Lawyers and Clients*, 5 American Law and Economics Rev.165, 166 (2003).
[12] Daniel L. Rubinfeld & Suzanne Scotchmer. *Contingent Fees for Attorneys: An Economic Analysis*, 24(3) RAND Journal of Economics 343-356 (1993).
[13] Cabrillo & Fitzpatrick, *Supra* n.10, p. 168.
[14] Tabarrok & Helland, *Supra* n. 5, p. 3.
[15] Elihu Inselbuch, *Contingent Fee and Tort Reform: A Reassessment and Reality Check*, 64 Law and Contemporary Problems 175, 180 (2011).

of award) in many countries with various regulations.[16] Netherlands allows the attorneys and clients to fix different rates for winning and losing the case. Only Germany and Italy (and India too) forbid contingency fee agreements.[17] In Mali though contingent fee is prohibited, such arrangements are in popular practice and it is perfecting its way even in contrasting jurisdictions like that of Greece, Japan, Poland and Chile.[18]

Contingent Fee in India: Is it Prevalent?

As mentioned above, existing literature such as, T.C.A. Anantin his work on competition in legal service sector assumes the prevalence of contingent fee based on informal reports,[19] and a news story by A. Subramanil provides anecdotal evidence about it.[20]

To test this hypothesis, we chose to conduct a study in Tis Hazari district court in Delhi, based on geographical convenience. Tis Hazari is one of the oldest and largest court complexes in New Delhi. Ideally, cases involving pecuniary damages would attract contingent fee arrangements. The interviewer was to stand outside the Motor Accident Claims Tribunal and interview litigants coming out of the court room. Mostly litigants would walk out with their lawyers and stand and discuss with them to understand the proceeding. The interviewer would wait patiently for the lawyer to go on their way before approaching a litigant. The survey was a face-to-face interview. The sample chosen was subject to convenience since the lone observer could not manage to approach all the litigants coming out in one day; also many litigants refused to talk or share information and in some cases, they left the court complex with their lawyers. We had aimed to collect 50 responses. The interviewer managed to gather data for 53 litigants over 10 days.

The questionnaire required respondents to give information on demographic details (name, age and sex), type of case, plaintiff/defendant, type of damages and amount sought, monthly income, nature of case, awareness of legal aid services, method of selection of lawyer, fee arrangement, fee amount and ratings on the fee arrangement and the lawyer. Since the study was carried right outside the MACT, most cases (49 out of 53) were related to accident or accident-related insurance claims, rest were related to either cheque bounce, property, rent or electricity bill, also involving pecuniary claims. For the question on fee arrangement, a respondent could choose among fixed fee, contingent fee, composite fee (per appearance/ fixed fee cum contingent fee), per appearance or other. For our purpose, we treat contingent and composite fee in the same category and similarly, put fixed fee and per appearance together in the other category. A respondent

[16] Winnad Emons, *Conditional versus Contingent Fees*, 59 Oxford Economics Papers 89 (2007).
[17] Ugo Mattei, *Access to Justice - A Renewed Global Issue*, EJCL, General Report, 16 (2007).
[18] *Id.*, p. 10.
[19] Anant, *Supra* n. 3, p. 263.
[20] Subramanil, *Supra* n. 3.

could rate her satisfaction with the fee arrangement on a scale of 1-5 (5 as best) and similarly review the lawyer on a scale of 1-5. Another question asks for feedback on regular appearance, client updating and accessibility - whether the lawyer appears before the Court on each date, updates the client on developments after proceedings and is accessible to the client when the client needs him, in yes/ no format. In addition, we took additional comments from the respondents regarding the legal services they were availing. More than 75 per cent of the litigants have a monthly salary less than Rupees 75,000. 31 of 53 respondents (58 per cent) were plaintiffs in cases and 22 (42 per cent) were defendants.

Finding I: Legal Aid Awareness

Only five out of 53 respondents (9.5 per cent) were aware of legal aid services and all of them have a monthly income greater than Rs. 75,000. 17 out of 48 legally unaware respondents had monthly income less than Rs. 25,000. There were only two female respondents and both were unaware of legal aid.

	<25,000	25,001-50,000	50-,001-75,000	75,001-100,000	>100,000	Total
Aware of legal aid	-	-	2	1	2	5
Unaware	17	18	9	4	-	48
						53

Table 1

Classification of Litigants based on Legal Aid Awareness and Monthly Income

Finding II: Fee Arrangement

From the overall sample, 27 out of 53 respondents or 51 per cent of respondents had a composite fee arrangement with their lawyers. Composite fee arrangements are a combination of fixed fee/ per appearance and contingent fees. Out of these 27 litigants, only two were defendants, and 25 were plaintiffs.

24 out of 53 had a fixed fee arrangement with their lawyer, in which they paid a one-time fee when they hired the lawyer for litigation. Three of them paid the fixed fee in instalments but it was not linked to appearance. Two litigants had fixed fee cum per appearance arrangement.

	Composite	Fixed/ Per-appearance	Total
Plaintiff	25	6	31
Defendant	2	20	22
	27	26	53

Table 2

Litigants – Plaintiffs and Defendants: Co-opting Fee Arrangements

Finding III and Finding IV: Litigant's Ratings on the Fee Arrangement and the Lawyer

Litigants who chose composite fee arrangement rated their fee arrangement as 4.44 (average) and gave 4.51 (average) to their lawyers. In case of fixed fee/ per appearance, plaintiffs are more dissatisfied than defendants and rate the fee arrangement as 3.8 and lawyer as 3.3. Please note that these were two separate questions but their results are tabulated together to give better clarity.

	Rating (out of five)	Fee Arrangement	Lawyer
Composite		4.4	4.5
Fixed / Per appearance	Defendant	4	3.65
	Plaintiff	3.8	3.3

Table 3

Litigants' Ratings of the Fee Arrangement and the Lawyer

Finding V: Litigant's Feedback on the Lawyer's Performance

Four litigants marked "NO" on all three categories: regular appearance, client updating and accessibility for their lawyers. Three of them are fixed fee litigants (two out of these three are high income litigants: Rs. 50,000 and Rs. 75,000 per month respectively) and only one of them is a composite fee paying litigant.

Out of the 22 litigants who checked "YES" on all three parameters, 16 were composite fee paying litigants and only 6 out of 22 were fixed fee paying litigants.

(In per cent)	Regular appearance		Client update		Accessibility	
	Yes	No	Yes	No	Yes	No
Litigant - Composite fee	92.6	7.4	63.0	37.0	85.2	14.8
Litigants - Fixed fee	84.6	15.4	23.1	76.9	46.2	53.8

Table 4

Litigants' Feedback on Specific Parameters

More than 76 per cent fixed fee paying litigants are not happy with their lawyers when it comes to regular updates. 63 per cent composite fee paying litigants get updates from their lawyers. For accessibility as well, the numbers show deep contrast in the feedback – 85 per cent of composite fee paying litigants as compared to 46 per cent fixed fee paying clients find their lawyers accessible.

Six out of 17 legally unaware low income respondents (< Rs. 25,000) were plaintiffs and five out of six had chosen for composite fee arrangement. All five of them had rated the fee arrangement as five out of five and gave 4.2 to the lawyer.

Limitations

The sample size is small. Post-filtration, it leaves us with only five low-income (< Rs. 25,000) plaintiffs who opted for composite fee arrangements. With a large sample, one could then look at correlation between, say fee arrangement and litigant's feedback on the lawyer.

Secondly, while trying to keep the number of questions to a minimum, we missed questions on: (a) education and source of income that could have indicated background and awareness level; (b) vehicle ownership as a proxy for status since some might have understated their incomes; (c) identifying the eligibility for legal aid - caste, disability, employment (labour), BPL card; and (d) whether it is their first litigation or they are experienced litigants.

Third, question number ten (rating the lawyer) and question nine as well could have been sequenced after detailed feedback asked in question 11. Currently, the respondents rate their lawyer before thinking about the specific parameters. The parameters are not exhaustive or based on any previous study.

Conclusion

Bar Council of India prohibits contingent fee arrangements between litigants and lawyers, based on British notions of professional ethics. US allows contingent fee, so do many European and Asian countries in some form or the other. There is strong logic found in existing literature concerning law and economics that favour the theory and practice of contingent fee. Importantly, there are no empirical studies justifying a ban on contingent fee.

To substantiate further, first, contingent fee does exist in practice. At least, this was what was found in the court where the survey was conducted in New Delhi. Second, a high percentage of plaintiffs chose contingent fee arrangements. Third, plaintiffs who chose contingent fee arrangements in the sample were much more satisfied with their lawyers than others.

A ban on it might place the otherwise consensual unofficial agreement outside the scope of legal enforcement leaving the weaker party vulnerable.[21]

Despite pumping in crores of rupees, the legal aid system is not delivering the impact as it should have. Meanwhile, here is contingent fee arrangement that is already working well. Litigants prefer it and lawyers like it. In this scenario, the prohibitionists' arguments against contingent fee sound hollow. The policy makers, taking cue from the advanced jurisdictions, should legalise contingent fee arrangement in India.

Annexure
Questionnaire

I. Name, Age, Sex:
II. Type of case:
III. Plaintiff/ Defendant:
IV. Type of damages and amount:
V. Monthly income:
VI. Information on legal aid services: Aware, used | Unaware | Aware, not used | Other
VII. How did you select your lawyer?
    a. Word of Mouth
    b. Low Fees
    c. Acquaintance/ relative
    d. Reference / recommended
    e. Other (Please Specify)

[21] Anant, *Supra* n. 3, p. 263.

VIII. Fee arrangement:

Per appearance | Contingent | Composite (per appearance/ fixed + contingent) | Fixed | Other

IX. Rating on the fee arrangement (1-5; 5 highest):

X. Rating of the lawyer (1-5; 5 highest):

XI. Feedback about the lawyer (Yes/ No):
   a. Regular appearance:
   b. Client updation:
   c. Accessible:

Contours of the Limits to State Intervention: Some Ideas

*Sunanda Bharti**

Introduction

With capitalism grew the power of the State. Individuals with severely individualistic tendencies, interested only in aggressively pursuing their selfish interests managed to extract ideals of equality and liberty for themselves but lost mutual trust in the bargain.[1] Since State was seemingly neutral, trust was reposed in it. Now that State governs our existence and decides the limits to those sonorously grand rights that it once bestowed on us. In short, it not only has the power to decide what rights one should have, but also how and the extent to which those rights can be exercised. Notions of right and wrong no longer remain a matter between you and your conscience but a subject over which the State can display its overweening authority and presence.

Why sometimes State should Enforce Morality

Not that intervention by the State is always problematic and antithetical to individual autonomy. Sometimes, it is necessary. Two situations come easily to mind. First, where responsibilities once considered moral are not being discharged voluntarily and secondly when Volksgeist does not reflect the correct ideology-its correctness or otherwise being gauged as per universal trends of thought and action.

As man became prone to and a victim of right centred thinking, he conveniently forgot to discharge responsibilities, unless someone was up there ready to bludgeon him with his rights and title deeds. The morality that was once innate to his existence dissipated and law created morality was the only form which had the power to shake his conscience and motivate him to act.[2]

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1 Bhikhu Parekh, *The Modern Conception of Rights and its Marxist Critique* in Upendra Baxi (ed.), The Right to be Human (Lancer International Centre, 1987) 1-22: A group of equal, self-interested, self-assertive, otherwise unrelated and mutually suspicious group of individuals, necessarily requires the modern state to hold them together.

2 *Id.*, Order in modern society is articulated in terms of a system of rights and obligations created by the Law. Law created or civil morality is the primary and dominant form of morality in it...

State, with Law as its weapon to guide individual behaviour had to take up the task of making him act in the morally ideal fashion. The Parents and Senior Citizens Act, 2007 is an easy example here. It is because the morally depraved or indifferent youth was unwilling to take care of his parents and abandonment was on the rise that State was compelled to take the reins of correcting morality in its own hands and elevate positive morality to positive law. Parents hence got the right to demand maintenance and roof on head; consequently, and only then, the children were 'obliged to obey', to take from Hart.[3]

The famous 'popular consciousness' or 'spirit of the nation' need not always be on the right path. It is then that Law has to take the initiative to correct societal ideology through influential and/or coercive means. The Sati Prohibition Act 1829, The Child Marriage Restraint Act 1978, the Dowry Prohibition Act 1961 were brought forth long before the social conditions were ripe to receive them. Had the State waited for the society to reform itself, it would have been a long and insidious process of undue delays and miscarriage of justice.[4]

The above two situations are perhaps the most compelling reasons on why State should enforce morality. However, it is up to us, how much intervention we are willing to concede in favour of the State. At any rate it should not become systemic; it should not permeate into everyday lives to such an extent that there remains no divide between public and private and that the nature of the State itself changes from that of a welfare state to a police state.

To give a few examples, while the State can decide that I should not be drinking and driving; it cannot decide for me whether I should be drinking at all. While it can declare that abortion is not permitted on flimsy grounds, it cannot say that abortion is totally prohibited and that one would have to compulsorily carry the pregnancy to term. While it can ***advise*** that surrogacy be undertaken only for altruistic purposes; the State should not claim for itself the authority to dictate that one cannot at all take money for the transaction. The question why the State should not commit such Hara Kiri is because there are limits to what the Law can achieve for the State—*any* State.

Lon Fuller in his most famous and influential work-'Morality of Law' has given 8 Principles of Legality, one of which says that 'Laws must not require the impossible.' It is here however, that the proverbial 'catch situation' manifests itself. What is considered impossible today may become a possibility tomorrow because social norms change.

3 HLA Hart, The Concept of Law (1961) 79-99. The idea of Obligation as given by Hart.

4 *Id.*, pp. 79-99.The courses of conduct once thought optional become first habitual or usual, and then obligatory.

Tricky Path of Defining Limits to State Intervention

Harm Principle

In the previous example, what that morally depraved individual does behind the closed doors of his house, whether he takes excessive alcohol, watches porn, smokes or engages in debauchery should not be interfered with by the State, unless their effects spill into the public realm and cause harm to others. If upon drinking alcohol, he turns abusive towards the wife, creates nuisance in neighbourhood, engages in paedophilic activities or becomes a substance abuser *etc*, is where and when the State should properly step in. This is the ***Harm Principle*** of Mill in the simplest of forms which is aligned with the idea of a minimalistic State.[5]

Should the regulation always come from the State and not 'Self' is a question that enters the realm of natural law philosophers. Sometimes, regulation comes as a mixture of the State and Self (conscience) effect. For instance the offence of 'Murder'—it is not prohibited. It has consequences; which deter people from murdering each other at will. However, had that deterrent punishment not been there, it is not that everyone would have started murdering each other to get their way. This abstinence is thus not only because of the 'fear' of law but also respect for it or perhaps indifference or default action. In other words, one may be brought up in a fashion that is conducive to achieving the results State seeks to achieve through law or one may develop an attitude that is aligned with State intention.

Whatever may be the reason, one of the responsibilities of a welfare state is also to ensure that there are conditions present and maintained in any society that the cultural and moral fabric of the nation does not experience a decay. There are two issues here—1) who would decide what is moral or otherwise; and 2) who would measure whether it is indeed a 'decay' of morality that the society is experiencing and on what basis would one conclude that?

The author submits that what is moral and amoral has to be decided by the invisible societal forces that are at work in almost every social/legal order. The State has to act as a facilitator at the best and not the deciding authority of what is the proper domain of morality. The task before the State is not to decide the domain but to create conditions that are conducive for the voluntary exercise of morally ideal or perhaps morally optimal behaviour.

[5] John Stuart Mill, Utilitarianism, on Liberty (Everyman Paperbacks, 1993). The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good, whether physical or moral, is not a sufficient warrant.
The author clarifies that complete inaction on part of the State is not the idea being promoted. The suggestion rather is that the State should not actively engage itself in typically moral issues, unless lack of choice compels it to intervene.

Common Morality and not Past as Reference

While doing the above, the State can pick important cues from what is happening around the world, public opinion inside and out of the nation state, and the ideals guaranteed in the Constitution which must be protected at all costs and such other determinants of 'common morality'.[6]

The underlying premise of common morality is that most human beings, by their very nature have the capacity to intuit what is morally right and what is wrong. These are universally shared insights and hence tend to be common across legal and social systems. The fact that common morality exists for real is reflected in many aspects of any civil society. For instance, killing of human beings is generally perceived as blameworthy and not praiseworthy across the globe by all civil societies. This essential requirement may be articulated differently in different cultures—for some it may manifest as sacredness of life, for others a right to life and for yet others a duty not to kill and so on.[7] What is relevant is that there is something that may be referred to as common morality which needs to be consulted with by the State before tinkering with moral issues. At any cost the reference point should not be the past. Because if it is, then women liberty, child marriage prohibition, live-in relationships, rights of transgender—all may appear amoral.

Offense Principle

To ensure that what is moral remains within the confines of legality and does not venture into criminality is another parameter and also a *sine-qua-non* of any basis of State intervention. It should ensure that 'Rule of Law' is in place to prevent and pre-empt things from going out of hands. This means that while what the morally depraved man does within the confines of his house might largely be a matter between him and his conscience; he cannot be allowed to engage in paedophilia, bestiality, incest, etc. for these are essentially criminal acts. This can be termed as the '***Offense Principle***'. In almost all such cases, not only criminality but also immorality of the action is sufficient to activate the coercive action of the State.

Inter- country Public Opinion

It is absolutely necessary to assess if the public is desirous of a regulation on a certain matter or not.[8] As put by Feinberg, 'It can be morally legitimate to prohibit conduct on the ground that it is inherently immoral even though it causes neither harm nor offense to the actor or to others'.[9] A caution that has

[6] Robert M Veatch, *Is there a Common Morality*, 13(3) Kennedy Institute of Ethics Journal 189 (2003).

[7] Some cultures may endorse exceptions to this general rule and some may not.

[8] *See generally,* Wolfenden Report 1957. There is an area of private morality which is none of laws business.

[9] Joel Feinberg, Harm to Others, The Moral Limits of the Criminal 27 (Oxford University Press, 1984).

to be exercised by the State, however, while decoding the public opinion is that it should essentially be coming from the 'public' –as reflected by the shared values of a cohesive society and not some vested interests. Detection of distortions is another task before the State here. We are a democracy which is very different from rule by majority. It is essential hence that what is branded as public does not end up being interests of some self-acclaimed *Dharma Rakshaks* acting as public mouthpiece.

In the Indian context it can be said that for any law to be able to survive must be wholesome for the community and pleasing to the Deity. If it runs counter to either of these touchstones, it is bound to misfire and be read as transgression on part of the State.

Devlin-Hart Tussle and Conclusion

A mention here must be made of the legendary Devlin-Hart tussle. The historical context in which the Devlin- Hart debate emerged was the release of the Report of the Committee on Homosexual Offenses and Prostitution- popularly known as the Wolfenden Report after its chairman.

Lord Devlin, an English High Court judge being against homosexuality reacted to the Wolfenden Report,[10] that recommended the legalisation of homosexual behaviour between consenting adults in private. The Report concluded that there 'must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business'.[11] Devlin's main point was to argue against this. He was of the opinion that a society had every right to protect itself from practices that threatened its existence and take the recourse of legal prohibition to bring that to effect. 'For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.'[12]

In a way, Devlin was correct. There is indeed an area that every civil society would try its best to insulate from State interference. Any venture into that domain would be easily dubbed as undue interference and a trespass. This, in my opinion is particularly true of India. Even if one is critical about the idea, one is bound to accept that in a multi-cultural and multi-ethnic society like India having diverse moral codes, one would always have some aspects which are held dear by the society; into which it would not (as against should not) tolerate any interference.[13] In this situation, it makes sense to accept that

[10] Patrick Devlin, The Enforcement of Morals (1965), p. 2, *also* quoting Wolfendon Report (1957), para 13.

[11] *Supra* n.8, para 61.

[12] *Supra* n.10. p.10.

[13] It is because of this tendency that prostitution has not been legalized in India till date as well as the Khap Panchayats are still widely accepted despite the SC declaring them as illegal way back in 2011.

there are certain domains of morality that need to be insulated from State interference while legislating.

What Devlin perhaps failed to recognise is that these domains keep shifting as per the changing trends of thought and with the passage of time. This was highlighted by Hart. Hart was just a step ahead of Devlin and hence the author sees no conflict between the two. What yesterday was a taboo might just become acceptable today for whatever reasons like commercial nature of surrogacy, sperm, egg, and organ donation or trade or may even become a way of life like the wide social acceptability to widow remarriages, venturing of women outside of the kitchen for employment.

It is here because of the shifting nature of emphasis that a society places on a particular act or moral value that it becomes difficult for the State to articulate in precise terms the limits within which it can or should act. Consensus is hard to achieve and disagreements are widespread and intractable. So, while one might be repulsed at the idea of beef eating, honour killings, dress codes for women, public display of affection by men/women alike, renting of wombs and trade of sperms and organs, there would always be others venting out the other view. In such matters, finding well defined limits to what the State can achieve is an elusive task and unproductive too.

The same thought is echoed by Hart in a different version when he hints that since societal ideology is never static, no existing coterie of moral policies can assign to themselves the authority to freeze or set in stone the prevalent moral status as the best for all times to come—it can at best be declared as best or functional only for the time being—only for that time till the societal ideology does not change. It is better to let these matters resolve by themselves, unless state intervention becomes necessary or urgent because of the Harm or Offence Principle mentioned above or pressures of Common Morality.

Also, enforcement of a certain policy may be desirous but may be debilitatingly expensive for the State. It may lead to diversion of important resources away from the other pursuable goals of the welfare state. Hence, the State should limit itself to what it can reasonably achieve at any given point of time. Being over-ambitious is not going to serve any purpose.

Evolution of Status of Women in Indian Society

*Alok Sharma**

Introduction

The status of women is one of the indices through which level of civilization is calculated of any age. The social status of women symbolizes the social spirit of that era and their legal status represents the thought and feeling of that community regarding them at that time.[1] Their status implies their position in society when compared to men in terms of their rights, privileges, their access to power and authority, their roles in home and society etc.

Women count for almost fifty percent of the total population and comprise a significant social group. Their gender peculiarities select them for discrete role in child bearing and rearing and are preferably suited to nurturing, caring and sustaining others. Therefore, women are rightly described as the center of the institution of family. Even in Hindu religion, many Goddesses were created to inculcate respect for women as these Goddesses were equal to male Gods in their potential and capabilities as wealth symbolizing with *Lakshmi,* knowledge symbolizes *Saraswati* and power symbolizes *Shakti*. Even *God Shiva* becomes influential only when joined with *Goddess Shakti – Parvati,* the idea being that man is incomplete in his potential until he is associated with woman,[2] therefore, *Ardhanareeshwar*, where *God Shiva* is half-man and half-woman was vastly worshipped.

However, to determine the status of women in Indian society is not only difficult but also complex. It is apparent from history that progress of their status in India has been a constant process of many ups and downs. It is believed that from identical status with men in ancient times through the lowest status in medieval times to efforts of promotion of equal rights by many reformers in modern India, the status of women in India has gone through many phases and is not static. Presently, women who were once respected, loved, treasured and worshiped are tortured, humiliated, ridiculed,

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1 Woman Worker, *Status of Woman in Indian Society*, in K. Uma Devi (ed.) Women's Equality in India – A Myth or Reality? 15 (Discovery Publishing House, 2000).

2 V.K. Dewan, Law Relating to Offences Against Women 34 (Orient Law House, New Delhi, 1996).

cursed, beaten up, exploited, subjugated or killed. In the present paper, the efforts have been done to trace the evolution of the status of women in Indian society with all its variations.

The Status of Women in Ancient India

Almost throughout classic literature on the status of women there is roughly a consistent opinion among great scholars and historians that in ancient time during the age of *Vedas,* 2500 - 1500 B. C., a woman's status was equivalent to that of a man in all fields of life. However, some others hold the divergent views as literature on Indian history abounds in contradictory and conflicting opinions about the worth, nature and importance of women. As per one school of thought, a woman brings prosperity when properly treated and respected however, the other school believes that the best way to reach God is to avoid women.[3] But it appears that originally Hindu society had a flexible social structure.

The *Vedic* literature is divided into two broad categories, the first category includes the *Vedas*[4] and the early *Brahmanas*, the *Shruti*[5] and the second category includes *Smritis*[6] that were compiled later and not as revered as the *Vedas*, but based on it, have a derivative authority. Though it is difficult to specify the exact time as to when the deterioration in women's status started, but gradual changes appeared during age of *Brahamanas* and *Upanishads*, 1500 B.C. to 500 B.C., to age of *Smritis, Epics* and *Puranas*, 500 B.C. to 500 A.D. and in later commentaries, 500 A.D.to 1800 A.D., the status had deteriorated noticeably.[7]

In *Vedic* period womanhood was glorified, therefore, woman was esteemed and given due importance in society. It is believed that they enjoyed equal status with men, independence in action and a reasonable amount of freedom. The institution of family was governed according to the *Vedic Dharma* and its injunctions where man as husband had some responsibilities towards his wife[8] and no inferior role was assigned to women in pre-marital and post-marital life. At home, generally mother was mistress of house running all affairs though, the *Vedic Samhitas* refer to women participate in agriculture and other crafts. They were In-Charges of household funds and farm laborers.

3 K. Gill, Hindu Women's Right to Property in India 17 (Deep and Deep Publications, New Delhi, 1986).

4 '*Veda*' is derived from *'Ved'* means to know. These *Vedas* are *Rigveda, Yajurveda, Samaveda* and *Atharvveda.*

5 It is believed that *Shruti,* 'that which is heard,'are of divine origin and recited by God and directly heard from God himself.

6 *Smriti* means 'what has been remembered.' It is believed that the ancient *rishis* based upon their memory of the divine revelations explained the *Vedas.*

7 Pooja Thomas, *Status and Position of Women in Ancient India, available at* http://www.slideshare.net/poojamthomas/status-and-position-of-women-in-ancient-india, (last visited July 13, 2012).

8 A. Mahajan, *Sources of Family Tension in Ancient India,* in Sushma Sood (ed.) Violence Against Women 120 (Arihant Publishers, Jaipur, 1990).

However, there is no scientific basis for this belief and that is why status of women in early *Vedic period* is always debatable. While there has been almost consistent tendency to idealize position of women in *Vedic* period, but it is possible that reality may be different as there are passages in the *Vedas*[9] which show that *Aryans* did not always have the highest opinion of women. It is observed that women had neither property, as she had only *stridhan* which was limited to her jewelry and gifts only, nor the right of inheritance, as only unmarried daughter could inherit property of father. The society was patriarchal and even most of the deities that were worshiped were male to indicate male domination. Though the early *Vedic* period was relatively non-discriminatory there were no indications to show that women occupied the highest positions of authority and prestige.

In *Vedic* period, social stratification was done on the basis of gender and interestingly a woman's role has been described differently in all four *Vedas*, what is said in *Yajur Veda* varies from what is said in *Sama Veda* and *Atharva Veda* and moreover, there are discrepancies in the same *Veda* between chapters and verses that cause a lot of confusion.[10] The status of women was better during *Rig Vedic* period despite having preference for son and it started declining during *Yajur Vedic* period and its degradation was complete by the time the *Atharva Veda* was written as it deplores the birth of daughters.

It can be observed that equality in status and position with men that women enjoyed during the *Vedic* period especially *Rig Vedic period* was short-lived. Later, society did not treat her with the same respect and she had lost her revered status and position. The only relief in that scenario was that the lower orders of the society that constituted nearly eighty percent of population did not impose many restrictions on their women. Therefore, it can be clearly inferred that generally liberal attitudes and practices pertaining to women were existed.

In the post-*Vedic* period, i.e. from 1500 BC to 500 AD, position of women changed in all spheres of life. *Brahmanical* rituals not only removed polluting aspects of natural birth but also made it inferior to second birth by the rite of *Upanayana*. This ideology not only put massive social pressure on women to give birth but also viewed menstruation and childbirth as polluting so completely alienated women from others. So, women were restricted to domestic space only as vessels for procreation having limitations therefore, feminine uniqueness was treated as totally distinct from masculine identity. Thus, in *Brahmanical* texts, where the feminine element coexisted with masculine ones as in *Rig Veda* period, slowly usurped by male and treated feminine category

[9] *Verse 17 of Rig Veda 8.33*, says: "*The mind of woman brooks no discipline, Her intellect hath little weight. (R.V.8.33.17.); With women, there can be no lasting friendship; hearts of hyenas are hearts of women. (R.V.10.95.15).*" Preeti Misra, Domestic Violence against Women, Legal Control and Judicial Response 5 (Deep & Deep Publications Pvt. Ltd., New Delhi, 2007).

[10] Roma Mukherjee, Women, Law and Free Legal Aid in India 85 (Deep and Deep Publication, 1999).

as separate, discrete and lower.[11] They created hierarchies and manipulated social behavior to dominate and control women.[12]

During 500 BC to 500 AD that can be considered as the period of early *Smiritis*, *Epics* of *Ramayana* and *Mahabharata* and early *Puranas*, women's position distorted considerably. Male law-givers curtailed women's freedom, society became polygamous and polyandry disappeared except in some rare cases like *Draupadi's* in *Mahabharata*. Marriage became compulsory for women and complete devotion to husband their only duty.[13] Even *Sita* was asked to give proof of her chastity and despite *agnipriksha* (the purity test) being given as to the satisfaction of her husband, later underwent pains of being separated from him without any rhyme or reason.

In this era, codification of *Dharma-Shastras*[14] was started in which women were equated with *sudras* and denied the right to study the *Vedas*, to utter *Vedic mantras* and to perform *Vedic rites*. *Manu, Yajnavalkaya, Vishnu, Narada,* and *Parasa* were the prominent writers who codified the *Shastras* out of which *Laws of Manu* influenced women's status considerably however, negatively for countless successive generations. Their status suffered a set-back when various restrictions were imposed on their rights and privileges by *Manu* in *Manu Smriti* (200 BC). He assigned subordinate status to them thereby their position was reduced to being slaves of men that continues even today. *Manu* for the first time legally assigned woman her definite place in society but his laws reflect conflicts between valuation of women as spiritual entity and as unit in society.[15] On the one hand, *Manu* praised women and gave them the highest place in society[16] and on the other hand, he mentioned some rigorous denunciations of womanhood.[17] He made no distinction on the basis of sex for

[11] Jaya Tyagi, Engendering the Early Household: Brahmanical Precepts in Early Grhyasutras 52 (Orient Black Swan Publication, 1st ed., 2008).

[12] *Id.,* pp. 52-53.

[13] *Supra* n. 2, p. 32.

[14] The Rules of Right Conduct.

[15] Purdah Das, The Status of Indian Women 27 - 28 (Vanguard Press, New York, 1932).

[16] "*Fathers, brothers, husbands and brothers-in-law who wish for great good fortune should revere these women and adorn them. (3.55); The deities delight in places where women are revered, but where women are not revered all rites are fruitless (3.56); Where the women of the family are miserable, the family is soon destroyed, but it always thrives where the women are not miserable. (3.57); Homes that are cursed by women of the family who have not been treated with due reverence are completely destroyed, as if struck down by witchcraft. (3.58); Therefore, men who wish to prosper should always revere these women with ornaments, clothes and food at celebrations and festivals. (3.59); There is unwavering good fortune in a family where the husband is always satisfied by the wife, and the wife by the husband. (3.60.).*" Quoted from Wendy Doniger and Brian K. Smith, Chapter 3, *Verses 55 – 60,* The Laws of Manu 48 - 49 (Penguin Books, India, 2014).

[17] "*Good looks do not matter to them, nor do they care about youth; 'A man!' they say, and enjoy sex with him, whether he is good looking or ugly. (9.14); By running after men like whores, by their fickle minds, and by their natural lack of affection these women are unfaithful to their husbands even when they are zealously guarded here. (9.15); The bed and the seat, jewellery, lust, anger, crookedness, a malicious nature, and bad conduct are what Manu assigned to women.*

infliction of punishment[18] and also permitted child marriage for a girl even at the age of eight.[19]

The idea of woman's dependency continued in *Purans* and *Epics* viz., the *Ramayana* and the *Mahabharata.* These epics depict prevalence of intra-family exploitations and conflicts like *Lord Rama* abdicated throne and went in exile due to his step mother, *Kekai; Parasurama* murdered his mother, *Renuka,* at his father, *Zamadagni's* command; *Draupadi* was publicly humiliated by *Kauravas;* and *Ahalya* was turned into stone by her husband, *Rishi Gautam.* Further, the *Ramayana* remarks: "*the husband is the God and master of the wife.*" *(Ayodhya Kand, 24.26-27).*[20] These epics depict son as hope of family.

Further in *Mauryan* period, the *brahamanical* literature did not treat women well and assigned them a subordinate status in society. Travelers like *Megasthenes* wrote about growing malpractice of polygamy; keeping women as palace guards, king's bodyguards and his spies; prohibition of widow remarriage; and prevalence of *Sati*. Then *Kautilya* had written '*Arthashastra*' that prescribed conduct of diverse people. According to him, a man as husband had some responsibilities towards his wife to act as a provider and to cohabit with her failing which he would be punished *(B.II, Ch.1, S. 48)*. Further, he also accepted husband's right to beat "*his wife of refractive nature either with a bamboo bark or with a rope or with a palm of hand on her hips.*" *(B.III, Ch. 3, S. 155)*.[21] Due to this suppressed condition of women, reformers and emperors e.g. *Ashoka* worked and fought for rights and wellbeing of women. Emperor *Ashoka* appointed a special group of *mahamattyas* to look for the wellbeing of women and due to his efforts, the condition of women considerably improved. Therefore, the position of women though inferior was not that much bad.

In the later periods e.g. *Gupta* period, status of women was awful. Women and property were equally treated therefore, women could be given away or loaned as like any item of property. It was archetypal attitude of patriarchal society and therefore, *Brahmanical* law did not bestow any proprietary rights to women. The *stridhana* was of a very limited character. This position took strong roots in that period and later. The *Purdah pratha* was prevalent in high caste families only and was not a general custom.

(9.17); But a woman who is unfaithful to her husband is an object of reproach in this world; (then) she is reborn in the womb of a jackal and is tormented by the diseases (born) of (her) evil. (9.30 and also *5.164); A woman's mouth is always unpolluted… (5.130)." Id.,* Chapter 9, *Verses 14, 15, 17,* p. 198, *Verse* 30, p. 200 and Chapter 5, *Verses 130* and *164*, pp. 113and 116 respectively.

18 "*The King should have women… chastised with a whip, a bamboo cane, a rope, and so forth (9.230)." Id.,* Chapter 9, *Verse 230,* p. 223.

19 "*A thirty-years-old man should marry a twelve-year-old girl who charms his heart, and a man of twenty-four an eight-year-old girl; and if duty is threatened, (he should marry) in haste. (9.94)." Id.,* Chapter 9, *Verse 94,* p. 208.

20 *Supra* n. 8, p. 120. Also in *Mahabharata*, there is a passage, "*The husband is the wife's god, he is her sole refuge."* In *Shukra Niti* this position is taken for granted: "*who does not worship the husband who is the giver of everything?"* Amarjit Mahajan and Madhurima, Family Violence and Abuse in India 4 (Deep and Deep Publications, New Delhi, 1995).

21 *Supra* n. 8, pp. 120-121.

Therefore, the myth that ancient Indian family was centre of harmony and affection only and the wife was treated as an equal partner in marital relationships is exploded. At that time, marital relationship was marked by unevenness as wife had no rights and privileges but only responsibilities. She had even no right to protest her mental, physical and sexual exploitation. Hence there was no mutual love and affection. It can rightly be concluded that marital relations in ancient India were discernible by exploitation, assault, subjugation, denial of freedom and marital violence.[22]

The Status of Women in Medieval India

From 500 A.D. to 1800 A.D. the position of women was further degraded during the medieval period when *Sati pratha,* Child marriage, *Purdah pratha* and prohibition on Widow Remarriages became part of social life in most of the parts in India. The crucial period during that the Indian women's education and training came to a halt and their position deteriorated further is 13th century A.D. when India was invaded by invaders coming from Arabia (11th century), Turkey (12th century), and Persia. These Muslim invasions in Indian subcontinent brought complete subordination of females as they stopped moving out of their houses because of fear of being exploited and compelled to observe *purdah*. The custom of women's seclusion was prevalent especially among upper classes of those areas where influence of Muslim was predominant.[23] The *purdah pratha* was invented to protect women but had a restrictive effect due to which the social life of women narrowed down.[24]

The child marriage was prevalent so Hindu daughters were married before age of 9 or 10 and even in some castes girls were married before they could learn to talk.[25] The legal position of Hindu women regarding inheritance was unsatisfactory. Due to early marriage girls were deprived of education. All these social circumstances led to more deterioration in the position of daughters.[26] From 12th century A.D. onwards practice of tonsuring of widows was prevalent only among many high castes. However, this cruel practice is dying out but it is still practiced by some orthodox sects of *Brahmins* in South India.[27] Once widow remarriage was prohibited, society wanted to make the widow unattractive as no man could ever want to marry her thus, she was tonsured, made to wear white clothes only, forbidden to wear any jewel, had to sleep on bare floor and partake frugal meal cooked by herself only once a day. This deprived her of good health and looks, therefore, even if she wanted to remarry no man came to marry her.[28] Widows had to follow strict rules and restrictions thus many preferred *Sati* to their tiresome life. *Sati* practice had become compulsory and widow had to burn herself with dead body of

22 *Supra* n. 20, p. 6.

23 Anjani Kant, Women and The Law 52-55 (APH Publishers, 1997).

24 *Supra* n. 3, p. 34.

25 Rekha Misra, Women in Mughal India 132 (Oriental Publishers, Delhi, 1957).

26 *Infra* n. 35, p. 213.

27 *Id.*, p. 214.

28 *Id*.

her husband even under compulsion. Henry Maine opines that superstitious belief and *Brahmanical* dislike of women enjoying property even as a tenant for life in respect of her husband's property had led to *Sati pratha*.[29] Some *Mughal* Emperors viz., *Akbar, Jahangir* and *Aurangajeb* tried and issued orders to prohibit *Sati pratha* but it in vain.[30]

Among the *Rajputs* and the *Marathas*, the *Jauhar*[31] was practiced. In South India, *Devadasis*[32] i.e. temple women were sexually exploited. Polygamy was highly prevalent especially among *Kshatriya* rulers. Female infanticide was practiced. Muslim women were restricted to *Zenana* areas.[33] Women were being oppressed in feudal social order and patriarchal families. They lost right of education and could worship only through priest. The *dowry* system became prevalent from about 13th to 14th Century A.D. especially in Rajasthan. Women neither had any political status nor place in the administration. The legal status of Muslim women was also pathetic.[34]

The medieval period led not only to disintegration of women's physical, mental and social life, but also lowering down of her rights in educational, religious, social, and economic fields. In Indian history, the 18th century was the nastiest period of all-round decline. Political crumble following disruption of Mughal Empire and mayhem due to advent of different European powers, united with fossilized customs, tradition, irrational bigotry and superstition, ruined the country. Women were absolutely and compellingly subjugated to male supremacy physically and intellectually.[35] Therefore, it can rightly be inferred that the status of women reached at the nadir during this period.

The *Bhakti* (devotion) movements tried to improve status of women and reprimanded some forms of oppression. *Bhakti* and related rituals do not need services of any priest to approach any deity therefore, women have direct access to gods and to salvation. However, men were considered to be legitimate religious specialists.[36] *Mirabai*, *Akka Mahadevi*, *Lal Ded* and *Rami Janabai*, saint-

[29] Henry Maine, Early History of Institution 335 (John Murray, London, 1934).

[30] *Supra* n. 1, p. 19.

[31] *Jauhar* refers to the practice of the voluntary immolation of all the wives and daughters of defeated warriors, to avoid capture and consequent molestation by the enemy. The practice was followed by the wives of defeated Rajput rulers, who are known to place a high premium on honour.

[32] *Devadasi* is a religious practice in some parts of southern India, in which women are "married" to a deity or temple. The ritual was well established by the 10th century A.D. In the later period, the illegitimate sexual exploitation of the devadasis became a norm in some parts of India.

[33] Wikipedia, the free encyclopedia, *Women in India available at* http://en.wikipedia.org/wiki/Women_in_India, (last visited Sept. 13, 2012).

[34] *Supra* n. 1, p. 19.

[35] N.V. Jagannatha Rao and Godavari D. Patil, *Changing Role and Status of the Indian Woman through the Ages,* in J.P. Singh (ed.) The Indian Woman, Myth and Reality 215-216 (Gyan Publishing House, New Delhi, 1996).

[36] Susan S. Wadley, *Women and the Hindu Tradition,* in Doranne Jacobson and Susan S. Wadley (ed.) Women in India, Two Perspectives 113 & 123 (Manohar Publishers, New Delhi, 1992).

poetesses were very important *Bhakti movement* figures. *Mahanubhav, Varkari* and many others were *Bhakti* sects within Hinduism to openly promoted social justice and equality between women and men.[37]

The Status of Women in Colonial India

In latter half of 18th century, with downfall of Mughal Empire and advent of British period, women's status had dropped to the lowest level ever. Though British adopted 'non-interference' policy towards personal matters of women even then the behavior, attitude and living pattern of society changed drastically because of education and western influence on socio-cultural life of India.

British were first rulers who unified country as a whole and were quite liberal in their thinking. They assumed that coherent and rational thinking must be basis of all customs and institutions and which not so based on reason must be done away with. Hence, during British period Indian society faced significant modifications. The British Government worked slowly but succeeded in providing an alternate way to live for those who required change, by introducing new social system, economy, state structure, educational system and by passing new social legislations.

Raja Rammohan Roy's efforts resulted in abolition of *Sati pratha* under Governor-General William Bentinck on December, 14, 1829. *Ishwar Chandra Vidyasagar*'s struggle for the improvement in condition of widows resulted in Widow Remarriage Act, 1856.[38] In 1824, Christian Missionaries started the first school for girls in Bombay. Peary Charan Sarkar, member of Young Bengal set up in 1847 first free school for girls in Barasat, India, which was named as Kalikrishna Girls' High School later on. In 1849, *Ishwar Chandra Vidyasagar* started another school for girls at Calcutta which later became Bethuen College.[39] *Chandramukhi Basu, Anandi Gopal Joshi* and *Kadambini Ganguly* were few earliest Indian women to get educational degrees. Women acquired a new social status due to passing of new social legislation, the Civil Indian Marriage Act III, 1872.

Besides governmental activities, in 1917, *Mrs. Annie Besant* tried to promote women's education through the Indian Association. In the same year, the first women's delegation met Secretary of State to demand their political rights, supported by Indian National Congress. In 1920, Federation of University of Women was established and in 1925 National Council of Women started. In 1927, All India Women's Education Conference was held in Pune where problems of early marriages discussed and significance of women's education stressed. In 1929, Child Marriage Restraint Act i.e. *Sarda Act* was passed, stipulating fourteen as minimum age of marriage for girl through efforts of *Mahomed Jinnah.* Though *Mahatma Gandhi* himself married when he was thirteen,

[37] *Supra* n. 33.

[38] *Id*.

[39] *Supra* n. 2, p. 34.

he urged people to shun child marriages and requested young men to marry child widows.[40]

The familial and social position of woman also improved due to female education and raise in marriageable age. To advance legal status of widow, Hindu Women's Right to Property Act, 1937 was enacted. The Hindu Women's Right of Separate Residence & Maintenance Act, 1946 was enacted that enabled Hindu wives to assert maintenance even without being judicially separated under certain circumstance.[41] The rule of gender equality has been fundamental to Indian thinking for over 150 years. The Fundamental Rights Resolution of Indian National Congress in 1931 accepted gender equality as a guiding principle.[42] The Government of India Act, 1935 also provided franchise and civil services for women.

The familial, social and legal position of women was significantly improved during British period. While only a small section of women took benefit of these measures and privileges, but their commencement was indeed noteworthy. The struggle for independence in India subsumed struggle for women's rights. The female freedom fighters raised issues about women's role in politics, society and their right to property. But women constantly occupied an inferior status as Indian society being male subjugated placed women in subsidiary positions.

The Status of Women after Independence

The 20th century brought about vibrant changes and new concepts that affected the status of women giving them brand new dignity and importance. It is interesting to note that there were nearly 13 females in the Constituent Assembly that framed the Constitution of India which has brought Indian women into a new era clad with all rights and privileges.[43] The Constitution of India dually acknowledged women's contribution and participation in freedom movement by incorporating provisions[44] that not only grant them equality and protection but also empowers the State to adopt for them affirmative measures.[45] It further imposes a fundamental duty[46] on all to uphold women's dignity. By virtue of the Constitution, many Acts have been enacted for their benefit and to raise their status. The Hindu Marriage Act, 1955, Hindu Adoption and Maintenance Act, 1956, Hindu Minority and Guardianship Act, 1956, Hindu Succession Act, 1956, Dowry Prohibition Act, 1961, Maternity Benefit Act, 1961, Medical Termination of Pregnancy Act, 1961, Equal Remuneration Act, 1976, Protection of Women from Domestic

[40] *Supra* n. 33.
[41] *Supra* n. 1, p. 19.
[42] Country Report 1995, *Fourth World Conference on Women, Beijing* (p. 159).
[43] *Supra* n. 1, p. 20.
[44] Arts. 14, 15, 16, 39(d), 42, 325 and 326.
[45] Art. 15(3).
[46] Art. 51(A) (e).

Violence Act, 2005 and Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 are some of them.

The Indian legislations have stabilized women's status by conferring same rights, privileges and opportunities like men. They have promoted women's emancipation largely by making them economically free that helped them in becoming independent. Besides them, by virtue of the Directive Principles of State Policy each State has initiated women's welfare programmes. The Central as well as State Governments has shown keen interest in improving their legal, social, educational and cultural status. There is scarcely any field today where women have not entered that helps them in achieving real equality and emerging as socially and economically independent persons.[47] Being a welfare state, a deep concern with women's status and recognition that the nation's progress is integrally linked with women's advancement have underpinned planning and polity in India since independence.[48]

In 1952, the Community Development Programme was introduced that set up Community Development Blocks including various activities for women's advancement at Block level. The hunt for an organizational structure to synchronize efforts towards equality and for social development had commenced with the establishment of Central Social Welfare Board in 1953 at the national level and State Social Welfare Advisory Boards at the State level. They had to work in alliance with voluntary agencies for women's advancement to meet their needs for education, health, awareness, and income generation. Programmes were deliberate to prepare young women for headship in the community with opportunities for education and proficiency development through 'Condensed courses of education.' The Central Social Welfare Board financially supported the setting up and expansion of large number of voluntary organizations in India.

Despite these efforts, the status of women did not improve to the expected level. Therefore, a women's movement emerged in 1970s that rallied around the issue of violence on women in urban areas and on increasing poverty, unemployment, and discrimination of women agricultural workers in rural areas. It raised significant questions on wide range of issues relating to reflections of patriarchal institutions in public programmes and policies, agriculture, land reforms, issues relating to labour/wages, rural development, health, education, gender relations, violence, inequalities, portrayal of women etc. It led to a wonderful feature in Indian society by developing the symbiotic and mutually complementary relationship among women's movement, Government, and Non-Governmental organizations over the years.

The movement constantly interacts with and influences Government action and public opinion. Further in reply to the United Nations request Indian Government appointed a Committee on the Status of Women in India in 1971

[47] *Supra* n. 27, p. 221.
[48] *Supra* n. 42.

to scrutinize all questions relating to women's rights and status in the milieu of changing social and economic conditions in India. In its report "Towards Equality," it highlighted the low status of women in diverse spheres of human enlargement and made several important recommendations while stressing the need for special transitory measure to convert de-jure equality guaranteed by Indian Constitution and authorized edifice into de-facto equality.[49]

The First United Nations World Conference on Women was held at Mexico in December 1975 which led to adoption of a 'National Plan of Action for Women' in 1976. A significant upshot of these developments was a swing in viewing women as objects of welfare policies in social sector to concerning them as critical groups for improvement. This upshot was reflected in the Sixth Five Year Plan (1980-85) which enclosed, for the first time in Indian planning history, a Chapter on "Women and Development." This Plan conceived of multi-pronged tactic as essential for women's development – "a) employment and economic independence; b) education; c) access to health care and family planning; d) support services to meet the practical gender needs of women and e) the creation of an enabling policy, institutional and legal environment."[50]

Over the five-year plans, a large number of schemes have been formulated by different ministries to support women in terms of skill development, income and awareness generation. Government's all efforts have been aimed at mainstreaming of women into national development process by uplifting their overall status – social, economic, political and legal. The impact of diverse development plans, programmes and policies has brought about noticeable upgrading in this regard.[51] However, lack of harmonization and holistic approach to gender issues joined with poor implementation has failed to fetch the desired results or realization of goals. Government of India also prepared 'National Perspective Plan for Women (1988-2000)' in 1988.[52]

The wonderful achievements of that period had been 73rd and 74th Constitutional Amendments (1993) that reserved minimum 1/3 seats for women in all local bodies both in rural and urban areas and also preserved 1/3 of all posts of Chairpersons for them. Government of India declared 2001 as

[49] *Id.*, p. 160.
[50] *Id.*
[51] *Id.*
[52] It also commissioned a comprehensive study on condition of women in self-employment and in informal sector. The consequential report, '*Shram Shakti*' (1988), described their pitiable condition in the informal sector describing their awfully vulnerable discriminatory working conditions across diverse occupations and their daily exposure to health hazards. It suggested that women need more access to resources, mainly credit and social services. The National Education Policy, 1986 emphasized on girl child and on the issue of women's education. A distinct Department of Women and Child Development was created in 1985 under Ministry of Human Resource Development. The National Commission for Women was set up in 1992 followed by the State Commissions for Women that have been networking with agencies vigorously concerned with gender issues.

'Year of Women's Empowerment' (*Swashakti*) and also passed 'National Policy for the Empowerment of Women' in the same year. It has launched a mission *'Beti Bachao, Beti Padhao'* in January, 2015 to improve the continuously declining child sex ratio[53] in the country. As per the Census 2011[54], the latest child sex ratio is 914 females per 1000 males, *the lowest ever*. However, sex ratio as per the Census 2011[55] is 940 females per 1000 males which is a *slightly upward* trend from previous Census 2001 when it was 933 females per 1000 males, therefore, a lot has to be done in this area.

'The Millennium Declaration' adopted by General Assembly of United Nations in September 2000 reaffirmed its promise to right to development, gender equality and security etc. 'The Millennium Declaration' adopted eight development goals including 'Promote Gender Equality and Empower Women' as 'Goal 3.' India being a member nation has to submit her report. 2014 Report[56] refers the Census 2011 results which show that the all India literacy rate has surged forward from 64.83% in 2001 to 74.04% in 2011. During 2001 - 2011, the male literacy rate has increased from 75.3% to 80.9% and female literacy rate has increased from 53.7% to 65.46%.[57] It is a significant rise in past ten years.

The Indian women have many achievements to their credit. *Smt. Pratibha Devisingh Patil* was first woman to hold the office of President of Republic of India. *Smt. Indira Gandhi* was the world's longest serving woman Prime Minister who served for an aggregate period of fifteen years. *Smt. Meira Kumar* was and *Smt. Sumitra Mahajan* is previous and present Speaker of the *Lok Sabha* respectively. *Smt. Sushma Swaraj* was Leader of the Opposition in the *Lok Sabha*. We also have women Judges in the Supreme Court and the various High Courts. Presently, there are a number of women Cabinet Ministers holding very important portfolios in the Indian Government.

For the first time, a lady officer, *Pooja Thakur* had commanded the guard of honour for the U. S. President, *Barak Obama*in 2015. Also for the first time, all-women contingent of Army, Navy and Air Force had marched past on the 66th Republic Day and the parade was led by a lady officer, Captain *Divya Ajith* including other women officers, e.g. Lady Officers *Priya, Sneha Shekhawat* and *Sheveta Kapoor* leading various troops. The Indian women have excelled in the fields of higher learning, such as, science and technology, engineering, nuclear physics, computer sciences, medical sciences, administration, management,

[53] Child sex ratio was 983 females in 1951, 976 females in 1961, 964 females in 1971, 962 females in 1981, 945 females in 1991 and 927 females in 2001 per 1000 males.
[54] The Indian Population Census 2011, *available at* www.census2011.co.in (last visited Jan 24, 2016).
[55] *Id*.
[56] Millennium Development Goals India Country Report 2014, (Ministry of Statistics and Programme Implementation, Government of India) *available at* www.mospi.nic.in, www.in.undp.org/content/dam/india/docs/MDG%20-%20India%20Report%202014.pdf (last visited Aug 24, 2015).
[57] *Id.*, p. 42.

art, humanities and what not. They now participate in all activities such as education, sports, politics, media, art and culture, service sectors etc. They have in many ways proved equal to men and have won several laurels.

Grave Areas of Concern in Contemporary India

Such achievements, albeit, women still encompass the largest section of underprivileged population in all spheres of life. Gender discrimination is one of the most all-pervading forms of deprivation. First of all, taking birth for her is difficult due to prevalence of feticide and infanticide then since birth she has been treated as inferior sex and is made to feel less significant than a male child. She gets lesser attention in nutrition, education and health care the reason being she has been looked upon as *parayadhan* that means movable property belonging to another. As she grows older she is trained to serve her kith and kin and yield her individuality. She is expected to learn to deny herself of good food to nourish her brothers, to effort in kitchen when she must have been in school. They are made to believe that they are dependent on men in their whole lives, their fathers, brothers, husband and sons whom they are obligatory to serve and whose annoyance would lead to their social boycott.

Violence against women, domestic as well as societal, continues unabated. After marriage, they are told that they must stay in their marital homes till their death. Instead of being appreciated and cared for, women in their marital homes are made to struggle, serve and satisfy their husbands and in-laws and while doing it if she does anything wrong she invokes their rage and is maltreated. They are the sufferers of domestic violence, deserted/ abandoned by their husbands and forced to live in their parental house and generally they do not get any help from police. The observance of polygamy in some religious and socio-economic groups is a different type of violence that women from these groups have to deal with. Notwithstanding the special protections specified for them under Indian Constitution, they continue to be shamed, ill-treated, tormented and deprived of the basic right to live a life with dignity and respect within their marital family.[58]

The issue of violence cannot be viewed in segregation from women's status in society and is strongly connected with power politics. Violence has a strong socioeconomic and educational facet. Women continue to work in trivial employments and their contribution being largely undetectable. The Millennium Development Report[59] also depicts that in India, rate of change over time regarding women's share in wage employment in non-agricultural sector is sluggish. In 2011-12, the 68th round National Sample Survey results[60]

[58] Lawyers Collective Women's Rights Initiative XIV, XV, Domestic Violence and Law, Report of Colloquium on Justice for Women - Empowerment Through Law (Butterworths, New Delhi, 2000).

[59] *Supra* n. 56.

[60] National Sample Survey Office Survey Reports, *Employment and Unemployment and Household Consumer Expenditure,* (NSS 68th Round, July 2011 – June 2012) *available at* mospi.nic.in/Mospi-New/Site/inner.aspx?Status=3&menu_id=31 (last visited Jan 22, 2016).

had projected the percentage share of females in wage employment in non-agricultural sector as 19.3% with their share in rural and urban areas as 19.9% and 18.7% correspondingly. In 2009-10, it was 18.6%, 19.6% and 17.7% correspondingly.[61] The existing social structure of gender largely relegates women to the indoor sphere. "Reproduction and responsibilities of nurturance, management of a fragile environment, and low paid or unpaid but heavy work responsibilities in agriculture, animal husbandry and other traditional sectors create a syndrome of gender stereotypes, marginalization, alienation and deprivation."[62]

Mostly, women continue to be barred from decision-making processes. The barring pervades all levels, *viz.*, government, corporate, societal and household. Such elimination *ipso facto* excludes their participation in overall development process. Lack of excess to societal entitlements exacerbates poverty. Anxiety with survival strategies in such conditions become a major preoccupation. Institutionalized subordination in society, low self esteem, ignorance of laws, and menace of violence creates a ferocious intergenerational cycle of deficiency and deprivation. Lack of education, information, and training aggravates this situation. Women are thereby barred not simply from political, social, and economic power but from knowledge power as well.[63] As per United Nations Development Programme, Human Development Reports, 2015[64] India's Rank is 130, her Human Development Index is 0.609, Gender Development Index is 0.795 and her Gender Inequality Index is 0.563 showing medium human development however, better than the previous year.

Crimes against women have existed perpetually with time and placeshowing an upward trend. As per Crime in India-2015 report,[65] "a total of 3,27,394 cases of crime against women (both under various sections of IPC and Special and Local Laws) were reported in the country during the year 2015 as compared to 3,37,922 in the year 2014, thus showing a decline of 3.1% during the year 2015 and an increase by 43.2% over the year 2011.[66] These crimes have continuously increased in reporting during 2011 - 2014 with 2,28,650 cases in 2011, 2,44,270 cases 2012 and 3,09,546 cases in the year 2013 and 3,37,922 in 2014.[67] The rate of crime[68] committed against women was 53.9 in 2015 at the national level.[69]"

[61] *Supra* n. 56, p. 53.

[62] *Supra* n. 42, p. 161.

[63] *Id*.

[64] United Nations Development Programme, *Human Development Reports, 2015, available at* hdr.undp.org/en (last visited Feb 26, 2016).

[65] National Crime Records Bureau of India, *Crime in India, 2015 available at* http://ncrb.nic.in/StatPublications/CII/CII2015/chapters/Chapter%205-15.11.16.pdf (last visited July 16, 2017).

[66] *Id.,* p. 83.

[67] *Id.,* p. 83.

[68] Rate of Crime against Women means number of crimes against women per one lakh population of Women.

[69] *Supra* n. 65, p. 83.

Regrettably, the social legislations and diverse socioeconomic development plans do not protect women from discrimination. In most of the Indian families, women neither own any property in their own names nor get a share in parental property due to feeble enforcement of laws rather some land and property laws discriminate against women. The enactment of special laws is unable to protect women against violence that is on increase and moreover, most of the laws have been extensively misused to their detriment like Medical Termination of Pregnancy Act, 1961 gives freedom to woman to terminate pregnancy but it has been misused for female foeticide. Notwithstanding the enactment of laws relating to dowry, rape, violence against women, the ground reality is rather distressing.

The status of women in society is to be considered as to what extent women have been assimilated in the country's developmental programmes and their impact on them. Development means total development including development in the political, social, cultural, economic and other dimensions of human life as also the physical, moral, cultural, and intellectual growth of the human being. Therefore, women's development should not only be viewed as a subject in social development but also be seen as an indispensable component in every dimension of development.[70] The changes occurring in society due to improvement of technology have solved less but created more problems for women, the major reason being the pattern of progress has been superimposed on pre-existing system with societal structures sternly in disfavor of women. Despite this enduring renaissance of feminism and hectic assignment of socio-economic emancipation of women, the existing juristic orientations, societal distortions and legislative deficiencies kept Indian women in impoverishment of body, mind, and soul, resulted in her containment and subordination.[71]

Conclusion

The above noted brief historical account explodes the myth that family in ancient India was the center of harmony and warmth only and the wife was treated as an equal partner in the marital relationships. In ancient India, the marital relationship was marked by asymmetry because when we look at their roles and responsibilities wife had no rights and privileges but had only responsibilities. The husband occupied a dominant position and was treated as the lord therefore, in a better position to abuse his powers over his wife/wives. She had even no right to complaint against her mental, physical and sexual exploitation and abuse. Hence the question of development of mutual love and affection did not arise. It can rightly be concluded that marital relations in ancient India were not that cordial as supposed to be.

[70] World Conference of the United Nations - Decade for Women (Copenhagen, July, 1980).

[71] *Supra* n. 1, p. 16.

The medieval period led not only to degeneration of women's physical, mental and social life, but her rights in educational, social, religious and economic fields were also lowered gradually. In the history of India, the 18th century was the worst period of all-round decline. It was the darkest period so far as women were concerned. Political decay following the disruption of the Mughal Empire and disorder due to the advent of various European powers, combined with fossilized customs, tradition, superstition and irrational bigotry, ruined the nation. Women were totally and forcefully subjugated to male superiority physically and intellectually.[72] So the women were not treated equally and were subjected to exploitation, assault, oppression, denial of freedom and conjugal violence.

The position of few women was greatly improved during the British period however, only a small section of women took advantage of these measures and privileges given and common women suffered. Although it is accepted that the struggle for independence in India also included the struggle for women's rights like their right to property. The female freedom fighters raised questions about women's role in politics and society and discussed many issues. Women's organizations emerged as part of the social reform and nationalist movement. Some of them turned into welfare and charity organizations while some others functioned within a liberal feminist (rights) -framework.

The status of women in society is to be studied as to what extent woman has been assimilated in the nation's developmental programmes and the extent of the impact of developmental policies on woman. Development means total development including development in the political, economic, social, cultural and other dimensions of human life as also the physical, moral, intellectual and cultural growth of the human person. Women's development should not only be viewed as an issue in social development but should be seen as an essential component in every dimension of development.[73]

The changes taking place in society due to development of technology and especially the input of modern technology for accelerating growth have solved less and created more problems for women. The major reason why development has brought little or no benefits for women is that the pattern of development has been superimposed on a pre-existing system with social structures severely in disfavor of women. The development planning itself male biased has not been conducive to the creation of much needed ideological and institutional change. Despite this continuing resurgence of feminism and hectic task of socio-economic emancipation of women, the contemporary juristic orientations, legislative deficiencies and societal distortions kept Indian women in impoverishment of body, mind and soul, resulted in her suppression and subordination.[74]

[72] *Supra* n. 35, pp. 215-216.

[73] *Supra* n. 70.

[74] *Supra* n. 1, p. 16.

India has come a long way since her Independence. The democratic framework, multi-part political system and freedom of speech and association have encouraged free and honest discussion on policies and programmes between government and community. The achievements are momentous and reflect efforts made in all areas.[75] But it can be seen that many disabilities that women suffered in past even persists in our society today. They persist to be subject to diverse forms of class, caste and gender oppression. They are subjected to all forms of violence and atrocities inside and outside the family and are subjected to suppression, deprivations and exploitation by men. They are starved of equal rights in marital, familial, social, educational, economic and political fields and assigned a subordinate status.[76]. Their status in today's time is pathetic. They as a class occupy a secondary position in all walks of life and are exclusively at the mercy of the male society. They are maltreated, misused and oppressed, physically, mentally, sexually and economically for various reasons.

Thus, when compared to men's position, Indian women always occupied a status, inferior to men, be it in matters of rights or privileges because Indian society being male dominated always placed women in subordinate positions. She has always been looked down however; her legal status was not static but was of fluctuating fortunes as at times she was kept on a high pedestal with respectabilities and sometimes she was degraded and dragged to the lowest ebb. In this context, Sir Henry Maine observed, *"Of all the chapters of the law, the most important is that which is concerned with the status of females."*[77] The deep entrenched patriarchal values, societal and religious traditions continue to strengthen this subordinate status of Indian women. The need of hour is to smash the stereotypes and shibboleths of past and shift towards new generation of male and female working collectively to construct better world for all of us and posterity.

[75] *Supra* n. 42, pp. 159, 162.
[76] *Supra* n. 35, p. 203.
[77] Maine, Sir Henry, ANCIENT LAW 112 (J.M. Dent & Sons Ltd., 1936).

Innoventive Industries Limited v. *ICICI Bank Limited*

Ankeeta Gupta*

Introduction

On August 31st, 2017, the Supreme Court of India through Justices Sanjay Kishan Kaul and Rohinton Nariman delivered the first most extensive judgement analysing the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the IBC" or "the Code") in the case of *Innoventive Industries Limited* v. *ICICI Bank Limited*. The Hon'ble Court decided to cash upon the opportunity of having being presented with the first ever petition challenging the provisions of the Code to provide uniformity of interpretation to the department as well as the public about the IBC and to enable them to identify the paradigm shift in the law and act accordingly. It may be pointed out that ever since the code came into effect in November 2017 even though it received presidential assent on 28th May 2016, there has been a lot discrepancy in the applicability of the law.

Facts of the Case

The present petition has been filed by previous directors of Innoventive Industries Limited (hereinafter referred to as the "appellant") against ICICI Bank Limited (hereinafter referred to as the "Bank") for having violated.

The appellant in the case is a multi-product company catering to applications in diverse sectors. The appellant suffered losses owing to labour problems and was consequently unable to honour its financial commitments towards 19 banking entities, which had extended credit to the appellant. The appellant itself proposed corporate debt restructuring regarding Maharashtra Relief Undertakings (Special Provisions) Act, 1958 (hereinafter referred to as "MRA" or Maharashtra Act). These 19 financial entities led by the Central Bank formed a consortium and approved a corporate debt restructuring plan. However, subsequently, ICICI Bank applied to the National Company Law Tribunal (hereinafter referred to as "NCLT) seeking a declaration of the appellants as insolvents under the IBC as they had defaulted on their payments. The National Company Appellant Tribunal (hereinafter referred to as "NCLAT") agreeing with the decision of the NCLT held that the IBC was to prevail over MRA. Consequently, the appellants were declared as defaulters under the IBC and that no moratorium on payment by the appellant was to run as no application for the same had been made under the Code, and the entire debt restructuring plan had been drawn up under the MRA. Further, it had been ruled that the IBC be to prevail over the Maharashtra Act as the central law prevails over the state law. The appellants had argued that they be entitled to a moratorium on repaying of debt as per the Maharashtra Act, and the corporate debt restructuring plan that had been drawn up. As per the Maharashtra Act once Corporate Debt Restructuring has been put in place a moratorium over payments gets created for a limited duration, while under the IBC the moratorium gets created till the time the insolvency proceedings are in place[1]. The Supreme Court dismissed the appeal filed on behalf of Innoventive Industries Limited and confirmed the decision of the National Company Law Appellate Tribunal (NCLAT), which in turn had affirmed the order passed by the National Company Law Tribunal Mumbai (NCLT) admitting the insolvency petition filed by ICICI Bank Limited against Innoventive Industries Limited.

Keeping these facts in mind, the Bench was faced with the following questions:

(i) what is the concept of default under the Insolvency Code and how it must be ascertained?

(ii) what is the scope and extent of enquiry at the admission of an insolvency application?;

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[1] *See*, s.14 of the IBC

14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare a moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall affect the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation ofcorporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

(iii) consequently what is the scope of hearing to be provided to a corporate debtor?; and

(iv) whether the protection granted under the Maharashtra Relief Undertaking Act (MRU Act) renders an application under the Insolvency Code not maintainable?

The Supreme Court went on to examine the legislative history and the scheme of the Code *vis-à-vis* the Maharashtra Act, after concluding that the appeal filed in the name of the Innoventive Industries Limited by its former director was not maintainable. This verdict was based on the fact that after the insolvency resolution professional that been appointed to manage the company its old management and old directors were no longer in command and could not, therefore, initiate the proceedings against ICICI Bank before the adjudicatory authority, i.e. NCLT and or NCLAT.

Discussion Concerning the IBC

The Bench while analysing the provisions of the IBC observed the following:

Statement of Objects and Reasons

The Statement of Objects and Reasons of the IBC reads that there is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for the creation of multiple fora such as Board of Industrial and Financial Reconstruction, Debt Recovery Tribunal and National Company Law Tribunal and their respective Appellate Tribunals. The High Courts handle the liquidation of companies. Individual bankruptcy and insolvency are dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the Courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.

It further goes on to observe that the objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner. This is for the maximisation of the value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected in addition to that or incidental thereto. A useful legal framework for the timely resolution of insolvency and bankruptcy would support the development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development. The Bench while reading the provisions noted that one of the important objectives of the Code is to bring the insolvency laws in India under a single unified umbrella with the object of speeding up of the insolvency process. The Bench went onto compare the provisions of the IBC with the prevalent insolvency laws in UK and US. It concluded that UK Law viz. the Insolvency Act of 1986 has served as a model for the IBC. The Court noted that the crucial difference between the US Law and UK Law is that while the debtor remained in possession in the former under the latter, the debtor made way for an administrator once insolvency commenced.

Observation about the IBC

Other observations emanating out of the judgment are as follows:

1. The Code has identified various new terms[2] which were hitherto non-existent within the legal terminology. With these new terms, greater uniformity and certainty concerning entitled persons are visible. Further, the definitions accorded to these terms allow a much wider amplitude and higher inclusion, rather than keeping the provisions limited to only a certain set of people.

2. The scheme of the Code is to ensure that when a default takes place, in the sense that debt becomes due and is not paid, the insolvency resolution process begins. The Code gets triggered the moment default is of rupees one lakh or more as per section 4.

3. The corporate insolvency resolution process may be triggered either by the corporate debtor, or the financial creditor or the operational creditor. The Code makes a distinction between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed, and financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of the provision of goods or services. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicable financial creditor. The time-period, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is essential. This must be done within 14 days of the receipt of the application.

[2] These terms include financial creditor, insolvency professional, operational creditor, resolution professional etc.

4. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. Debt may not be due if it is not payable in law or fact. The moment the adjudicating authority is satisfied that default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within seven days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within seven days of admission or rejection of such application, as the case may be.

5. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before the corporate debtor received such notice or invoice. The moment there is an existence of such a dispute, the operational creditor gets out of the clutches of the Code.

6. In the case of a corporate debtor who commits a default of financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that default has occurred. It is immaterial that the debt is disputed so long as the debt is "due".

7. The rest of the insolvency resolution process is also e ssential. The entire process is to be completed within 180 days from the date of admission of the application under Section 12 and can only be extended beyond 180 days for a further period not exceeding 90 days if the committee of creditors by a vote of 75% of total voting shares so decide. It can be seen that time is of the essence in seeing whether the corporate body can be put back on its feet, to stave off liquidation.

8. As soon as the application is admitted, a moratorium in terms of Section 14 (as detailed above) of the Code is to be declared by the adjudicating authority and a public announcement is made stating, inter alia, the last date for submission of claims and the details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims. Under Section 17, the former management of the corporate debtor is vested in an interim resolution professional who is a trained person registered under Chapter IV of the Code. This interim resolution professional is then to manage the operations of the corporate debtor as a going concern under the directions of a committee of creditors appointed under Section 21 of the Act. Decisions by this committee are to be taken by a vote of not less than 75% of the voting share of the financial creditors. Under Section 28, a resolution professional, who is none other than an interim resolution professional who is appointed to carry out the resolution process, is then given extensive powers to raise finances, create security interests, etc. subject to prior approval of the committee of creditors.

9. Under Section 30, any person who is interested in putting the corporate body back on its feet may submit a resolution plan to the resolution professional, which is prepared on the basis of an information memorandum. This plan must provide for the payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the plan, and implementation and supervision of the plan. It is only when such plan is approved by a vote of not less than 75% of the voting share of the financial creditors and the adjudicating authority is satisfied that the plan, as approved, meets the statutory requirements mentioned in Section 30, that it ultimately approves such plan, which is then binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders. In a significant departure from the previous legislation on the subject, the moment the adjudicating authority approves the resolution plan, the moratorium order passed by the authority under Section 14 shall cease to have an effect.

10. The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body can pay back its debts and get back on its feet. All this is to be done within six months with a maximum extension of another 90 days, or else the chopper comes down, and the liquidation process begins.

Finally while analyzing the factual situation pertaining to the case the court observed that MAR is repugnant to the Code, the State Government may take over the management of the relief undertaking, after which a temporary moratorium in much the same manner as that contained in Sections 13 and 14 of the Code takes place under Section 4 of the Maharashtra Act. There is no doubt that by giving effect to the State law, the aforesaid plan or scheme which may be adopted under the Parliamentary statute will directly be hindered and/or obstructed to that extent in that the management of the relief undertaking, which, if taken over by the State Government, would directly impede or come in the way of the taking over of the management of the corporate body by the interim resolution professional. Also, the moratorium imposed under Section 4 of the Maharashtra Act would directly clash with the moratorium issued under Sections 13 and 14 of the Code. It will be noticed that whereas the moratorium imposed under the Maharashtra

Act is discretionary and may relate to one or more of the matters contained in Section 4(1), the moratorium imposed under the Code relates to all matters listed in Section 14. In the present case it is clear, therefore, that unless the Maharashtra Act is out of the way, the Parliamentary enactment will be hindered and obstructed in such a manner that it will not be possible to go ahead with the insolvency resolution process outlined in the Code. Further, the non-obstante clause contained in Section 4 of the Maharashtra Act cannot possibly be held to apply to the Central enactment, since a matter of constitutional law in terms of article 254(1); thus the code would prevail over the Maharashtra Act.

Nikesh Tarachand Shah v. *Union of India*: Diluting the Money Laundering Legislation in India

*Susmitha P Mallaya**

Introduction

In order to address the issues generating from offence of money laundering, past decade has seen an overwhelming array of new anti-money laundering rules, regulations and legislations by different countries.[1] The objective of these rules is to protect the financial institutions from liability and to prevent laundered money from entering the legitimate economy and curb the growth of criminal activity. These measures have become the focus of an intense international effort. It is a challenge for developing countries to combat money laundering because of the inadequate regulatory environment and vulnerable financial system.[2] In India, in order to meet its international obligations the Prevention of Money Laundering Act, 2002, the first piece of legislation to regulate all types of money laundering was passed by the legislature, though it became effective only from 1st July, 2005. In order to improve implementation by entrusting the enforcement of the Act to the Directorate of Enforcement in the Ministry of Finance, setting up of four Benches of Adjudicating Authorities and setting up the Appellate Tribunal, the act was amended in the year 2005. However, the enforcement of the PMLA was still severely criticized because there have been very few investigations, prosecutions and convictions.[3] Later, again in 2009, an amendment was made to PMLA which enhanced enforcement by empowering the Enforcement Directorate to search premises immediately after the offence is committed, attach any property and search a person.[4] However, that too failed to bring it in its ambit many of the financial transactions, offences under the ambit of money laundering in order to prosecute a person for the offence of money laundering. Again in the year

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1 Philip J Ruce, *Anti-Money Laundering: The Challenges of Know Your Customer Legislation for Private Bankers and the Hidden Benefits for Relationship Management (The Bright Side of Knowing Your Customer)*, 128 (6) The Banking Law Journal 548 (2011).

2 Shwgat S. Kutubi, *Combating Money-Laundering by the Financial Institutions: An Analysis of Challenges and Efforts in Bangladesh*, 1 (2) World Journal of Social Science 36 (2011).

3 Aparna Viswanathan, *India* in Arun Srivastava, Mark Simpson & Nina Moffatt (Eds.), International Guide to Money Laundering Law and Practice 24.1 (Bloomsbury Professional, 4th edn., 2013).

4 The Prevention of Money Laundering (Amendment) Act, 2009.

2012, PMLA was amended to bring drastic changes, including far-reaching changes in the power to attach and confiscate property, creating more reporting entities with enhanced responsibilities, imposing KYC obligations on various entities beyond banks and financial institutions and notably bringing in real estate transactions within the purview of the PMLA for the first time. In a radical step, the 2012 amendment make confiscation independent of conviction.[5] It was in this context the provision of section 45 of the PMLA which mandates for the twin conditions to be followed by courts while considering the application for bail, needs to be examined.

Judicial approach prior to *Nikesh Tarachand*

In the criminal law jurisprudence, the concept of bail becomes juxtapose, one from the perspective of innocence to the person accused of crime, his personal liberty and other from the perspective of the investigating agencies when the accused misuse this right of bail. The discretion of court to grant bail as a rule paves way for judicial interpretations both by high courts as well as apex court.[6] Section 45 of the PMLA 2002, relates to the conditions on which bail can be granted by the court for the offence under PMLA.[7] Earlier the apex court in *Gautam Kundu* v. *Directorate of Enforcement (Prevention of Money Laundering Act)*[8] examined one of the incidental issue relating to bail application in money laundering cases. The issue was with regard to the binding nature of provision of section 45 of the PMLA on high courts while considering the application for bail under section 439 of the Code of Criminal Procedure. The apex court came to a conclusion that the conditions enumerated in section 45 of PMLA will have to be adhered to even in respect of an application for bail under section 439 of CrPC for the reason that notwithstanding anything inconsistent therewith contained in any other law for the time being in force, the provisions of the PMLA shall have overriding effect over Cr PC.[9] While discussing the issue before it, the court also made the following observations which highlights the gravity of the money laundering offence:[10]

> We cannot forget that this case is relating to "Money Laundering" which we feel is a serious threat to the national economy and national interest. We cannot brush aside the fact that the schemes have been prepared in a calculative manner with a deliberative design and motive of personal gain, regardless of the consequence to the members of the society.

5 The Prevention of Money Laundering (Amendment) Act, 2012, s.8(5), s.24.

6 Vikramjit Reen, *Proof of Innocence before Bail: Amendments Required*, 37 Journal of Indian Law Institute 256 (1995).

7 The Prevention of Money Laundering Act, 2002, s.45 (1). It provides for twin conditions on which bail can be granted. One condition mandates that the Public Prosecutor must be given an opportunity to oppose any application for release on bail and secondly the subjective satisfaction of the court that the accused is not guilty of such offence as well as belief that he is not likely to commit any offence while on bail.

8 (2015) 16 SCC 1.

9 *Supra* n. 3, s. 71.

10 *Supra* n.4, para 32.

In this case the appellant was arrested on suspicion of commission of offence punishable under provisions of PMLA. The apex court however, refrained from deciding the question regarding the commission of offence of money laundering and since the matter was pending before the division bench of the high court, it was cautious of the fact that any observations or remarks made by it may cause prejudice to the case hence, it held that the time taken to refuse the bail application by the high court is justified and it has exercised its discretion judiciously keeping in mind the nature of the offence and the probability of commission of further offence by the accused while on bail.

In the case of *Rohit Tandon* v. *The Enforcement Directorate,*[11] the apex court bench consisting of Dipak Misra, C.J, A.M.Khanwilkar and D.Y.Chandrachud,JJ., upheld the decision of rejecting the prayer of bail application to the accused both by the Sessions Court as well as the High Court. The *obiter dicta* emphasis the gravity of economic offences which includes money laundering, it reads:[12]

The consistent view taken by this Court is that economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. Further, when attempt is made to project the proceeds of crime as untainted money and also that the allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds of crime and were not, therefore, tainted shifts on the accused persons under Section 24 of the Act of 2002.

In this case also apex court reiterated the principle adopted in *Gautam Kundu* case[13] with regard to the provision of section 45 of PMLA. It emphasized the rule that the limitation on granting of bail specified in sub-section (1) of section 45 of PMLA is in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail. It also remarked that the sweep of section 45 of the Act of 2002 is no more *res intergra*. However, while deciding the case in *Nikesh Tarachand*, the apex court overlooked this remark, and opined that the *Rohit Tandon* case is not binding since the court has not considered the constitutional validity of section 45 of PMLA. The apex court failed to consider the reference and analysis of intricacies of section 45 of PMLA made in paragraphs of 28-30 of *Gautam Kundu* case which is emphaised again in the *Rohit Tandon* case. It accentuated on the provision[14] enumerated in PMLA which mandates for overriding effect of PMLA over other legislations including Cr PC as well as to the fact that it need to be presumed by the courts that unless the contrary is proved, the proceeds of crime are involved inmoney laundering and the burden to prove that the proceeds of crime are not involved in money laundering lies on the

[11] 2017 SCC OnLine SC 1304.
[12] *Id*., para 21.
[13] *Supra* n. 4.
[14] *Supra* n. 3. s. 24

appellant.[15]

Therefore, it can be observed that the apex court took a very stringent approach while deciding the question relating to the application of bail in the offences involving money laundering and it was guarding the spirit of money laundering legislation and never doubted the constitutional validity of the provision of section 45 of the PMLA which was inserted by the legislature considering the seriousness of the economic offence and its impact on economy of a nation.

Nikesh Tarachand : Judicial Interpretation

The constitutional validity of section 45 of the PMLA which imposes twin conditions for granting bail in the cases involving offences where the punishment prescribed is for a term of imprisonment of more than 3 years under part A of the Schedule mentioned in PMLA, however, for the first time was challenged in this case. The apex court ordered fresh trial in all cases in which bail was denied because of these conditions. "We declare section 45(1) of the Prevention of Money Laundering Act, 2002, insofar as it imposes two further conditions for release on bail, to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India". The bench consisting of R.F. Nariman and Sanjay Kishan Kaul, JJ considered the personal liberty of the persons languishing in jail and ignored the objective of the PMLA and failed to address the repercussions of granting bail for the accused in PMLA. The court observed that section 45 of the PMLA is a drastic provision which violates the fundamental rights of accused person. It reads:[16]

We must not forget that Section 45 is a drastic provision which turns on its head the presumption of innocence which is fundamental to a person accused of any offence. Before application of a section which makes drastic inroads into the fundamental right of personal liberty guaranteed by Article 21 of the Constitution of India, we must be doubly sure that such provision furthers a compelling State interest for tackling serious crime. Absent any such compelling State interest, the indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution. Provisions akin to Section 45 have only been upheld on the ground that there is a compelling State interest in tackling crimes of an extremely heinous nature.

Nonethless, while upholding the Constitutional rights of the accused person, the court failed to examine the gravity of the offence of money laundering and its impact on the economy of the nation. Moreover, it gave importance only to the constitutional perspective of section 45 of PMLA and overlooked the constitutional rights of the citizens of the country for a welfare state which includes economic growth of nation. In PMLA, scheduled offences mentioned in Part A and Part B and the offences under section 3 and 4 needs to be read

[15] *Supra* n. 7, para 18.
[16] *Supra* n. 1, para 46.

together. It is a special legislation and a complete Code in itself, hence, section 45 being part of a complete code cannot be separated, so that money that is laundered can be brought back into the economy and the persons responsible for the same will get punished. The expression "there are reasonable grounds for believing that he is not guilty of such offence" under section 45 provides an opportunity for the court to make prima facie assessment of reasonable guilt. This is one of the twin conditions mentioned for granting of bail in money laundering cases. The people involved in money laundering cases are generally, influential as they conduct these activities in a very secretive manner making it very difficult for the enforcement agencies to prove that the money laundered are "proceeds of crime". Therefore, making the provision for granting bail easy based on the arbitrariness in the scheduled offences under part A and part B needs reconsideration. In order to test the arbitrariness of the section 45 in violation of article 14 of the Constitution of India, the court relied upon the *State of Bombay* v. *F.N. Balsara*[17] especially the law which states that "while reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the objects ought to be attained, and the classification cannot be made arbitrarily and without any substantial basis."

On the other hand, the court overlooked the other principle of law laid down in the same case which states that "the presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate ground and also that the principle does not take away from the State the power of classifying persons for legitimate purposes". In this scenario, the amendment made to the schedule under PMLA by which the entire Part B offences were transplanted into Part A by way of Amendment Act of 2012 of PMLA needs to be looked into. The object states, "(j) putting all the offences listed in Part A and Part B of the Schedule to the aforesaid Act into Part A of that Schedule instead of keeping them in two Parts so that the provision of monetary threshold does not apply to the offences". The court viewed the entire case from the angle of right to life and personal liberty of the person accused and referred various landmark decisions including *Menaka Gandhi* v. *Unionof India*[18] as well as *Sunil Batra* v. *Delhi Administration*[19] and observed that there is an established trend to infuse the concept of due process in our constitutional jurisprudence whenever the court has to deal with a question affecting life and liberty of citizens or even a person. Moreover, the court refused to consider its earlier judgments relating to the bail in money laundering cases in *Gautam Kundu*[20] and *Rohit Tandon*[21]. It observed:[22]

[17] (1951) SCR 682.
[18] (1978) 1 SCC 248.
[19] (1978) 4 SCC 494.
[20] *Supra* n. 4.
[21] *Supra* n. 7.
[22] *Supra* n.1, para 52.

[G]*autam Kundu* (supra) is a judgment relating to an offence under the SEBI Act, which is a scheduled offence, which was followed in *Rohit Tandon* (supra). In *Rohit Tandon* (supra), Khanwilkar, J., speaking for the Bench, makes it clear that the judgment does not deal with the constitutional validity of Section 45 of the 2002 Act. Both these judgments proceed on the footing that Section 45 is constitutionally valid and then go on to apply Section 45 on the facts of those cases. These judgments, therefore are not of much assistance when it comes to the constitutional validity of Section 45 being challenged.

Thus, the court interpreted section 45 of the PMLA in favour of the accused person upholding his right to personal liberty by relying on its constitutional duty to secure the ends of justice and it upheld the decision of High Court of Punjab in *Gorav Kathuria* v. *Union of India*[23] which held that the twin limitations in grant of bail contained in Section 45(1) as it stands after the amendment to PMLA in 2013, are not applicable *qua* a person accused of such offences which were earlier listed in Part B. The main issue challenged in this case was regarding the amendment of PMLA in 2013 which brought Part B of the Schedule offences in the Part A so that the provision of a monetary threshold limit does not apply to the offences contained therein.

Conclusion

It is appreciable that the court upheld the fundamental rights of the accused persons and made an attempt to interpret the criminal justice principles in favour of the accused. It held that section 45 of the PMLA violated articles 14 and 21 of the Constitution. However, considering the technical and peculiar feature of offence of money laundering, declaration of section 45 of the PMLA as unconstitutional created a roadblock to book the culprits of financial crimes in tune with the international obligations to tackle the money laundering offence. The court viewed the seriousness of money laundering cases depending upon the amount of money involved (para 29 and 30). Since there is no monetary limit fixed in schedule A, the court concluded that the likelihood of being granted bail was being significantly affected under section 45 by factors that had nothing to do with allegations of money laundering. The court would have done well if it answered whether the classification of offences under schedule A of PMLA as well as other offences is in consonance with the objects of the PMLA and if they were not in tune with it could have struck down such classification instead of striking down the whole provision as unconstitutional.

The money laundering offence in India till date remains as a predicate offence, which depends on the outcome of the cases persuaded by the investigating agencies like CBI, Income Tax Officials as well as Police. Money Laundering is not recognized as a separate offence which makes the Enforcement Directorate (ED) authorities to prove that the crime proceeds generated relates to money laundering. The report submitted by FATF in 2010 recommended to initiate

[23] 2017 (348) ELT 24 (P & H).

legal measures to make money laundering a standalone offence since the predicate offence conditions create fundamental difficulties for the authorities while trying to confiscate the proceeds in crime in the absence of a conviction in the predicate offence. If it is made a standalone offence then the laundered assets will become *corpus delicti* and can be forfeitable as such.[24] Moreover, recently, the Government introduced a Bill to amend the PMLA, 2002 through the Finance Act, 2018. These amendments aims to enhance the effectiveness of the PMLA and address the issues of certain procedural difficulties faced by the ED in prosecution of PMLA cases. It includes amendment with regard to bail provision as well, apart from, bringing the proceeds from corporate fraud under PMLA and providing power to ED attach and confiscate property determined to be proceeds of crime, thereby preventing the dissipation of proceeds from corporate fraud.[25] Accordingly, the amendment proposed in section 45(1) will make bail condition uniform to all the offences under PMLA instead of only those offences under the schedule which are liable to imprisonment of more than 3 years. This will be a significant step forward in delinking the proceedings against scheduled offences and Money laundering offences under PMLA. Further, in order to apply bail provisions more leniently to less serious PMLA cases a limit of one crore is provided for courts to decide.

However, it is unfortunate to comment that the division bench decision of apex court in *Nikesh Tarachand Shah* has decision diluted the stringent standard once set by the legislature as well as judiciary for granting bail in the cases relating to money laundering considering its peculiar nature. Hence, at present to overcome the lacunas in the legislative system, there is an urgent need to make money laundering *per se* a separate offence instead of compounding it with the scheduled offences mentioned in the PMLA. This will shape the PMLA legislation more effective and the differential treatment to the persons accused of money laundering as discussed in this judgment will also get addressed. The proposed amendment in 2018 by the government can be viewed as a way forward to achieve this objective of making money laundering offence more stringent.

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[24] FATF Report (India) 2010, *Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism*.

[25] *Government introduces Bill to amend the Prevention of Money- Laundering Act, 2002 through Finance Act, 2018*, Press Information Bureau, Government of India, Ministry of Finance, (Feb 1, 2018).

Book Review

Law of Evidence

H.K. Saharay & M.S. Saharay

Eastern Law House Private Ltd, 1ST Edn., 2008
Pages: 946, Price Rs 990

Seema Singh*

In any civilised society, the importance of administration of justice is not only recognised but also respected and protected and accordingly, criminal law jurisprudence is developed as per the societal need and social structure.

In criminal justice system of any country 'adjudicatory body' and 'investigation agencies' play key role. In India on the pattern of U.S and U.K, 'adversarial system' is followed where the delivery of the judgment relies upon the analysis of collected evidence. Thus, the Act of Evidence becomes instrumental in guiding the judicial authorities about the relevancy and admissibility of evidence.

To explain the various provisions of the Act, some books have been written by eminent writers, but this book authored by Saharay & Saharay adds an excellent compilation of text and judicial pronouncements. The book contains thoughtful section commentary in a very comprehensive manner concerning both Indian and foreign case laws. British Parliament enacted though Indian Evidence Act but on specific issues how English and Indian law of evidence are different is successfully highlighted.

The book is divided into three parts and 11 chapters. The book begins with the historical background of The Evidence Act and discusses the Draft Reports of Select Committee on the Bill in very detailed manner, which is entirely unobvious in comparison to other books.

The importance of 'relevant facts' cannot be denied in the Evidence Act, as with the help of them only, facts in issue can be proved or disproved. The notable part of the chapter in, each and every provision is discussed in quite a detail and supported by an adequate number of case laws. Wherever it is required by provisions of Cr.P.C. and other relevant statutes are also mentioned. While dealing with Interpretation Clause (section 3) authors have mentioned some illustrative cases which help in developing a better understanding of the provisions for the first time readers. Reviewers feel that

while discussing the 'res gestae' authors did not mention appropriate reasoning of not using the term in Indian Evidence Act, though the same is used in English Law. Section 7 of the Act is also not exhaustively discussed. 'Conspiracy' which is the most important part of the organised crime is discussed with the help of many cases, but the absence of mentioning the facts of the case even in brief makes the reader little uncomfortable in understanding the provision. Difference between English law and Indian law about using 'in furtherance of the common design'' and 'about their common intention' respectively is also not properly explained, though it becomes essential, in the country like India where several conspiracies are going on by anti-national elements and organised gangs. The report of 69th Law Commission is also not mentioned which closely analysed section 10 of the Evidence Act in the light of English and Indian law. The view of the Privy Council in the case of *Mirza Akbar* v. *King Emperor*[1] regarding the difference between 'in furtherance of common design'' and 'about their common intention'' is not mentioned though it has been consistently followed by the honourable Supreme Court in various cases like *Sardul Singh Caveeshar* v. *State of Bombay*[2] etc.

Another essential provision of Evidence Act is 'admission and confession'. While dealing with 'admission' and 'confession', the authors tried to explain the things in the light of the judgments given by the English courts and in the light of the constitutional rights of the accused in India especially regarding the evidentiary value of confession under anti-terror laws. Meaning of hostile witnesses and evidentiary value of their statements are also discussed in the light of amendments in Cr.P.C. However, reviewer opines that by incorporating the suggestions of 69th Law Commission Report and 185th Law Commission Report the authors could make the book more informative and contemporary.

While dealing with 'dying declaration' authors have illustrated various cases to logically explain the attitude of the judiciary regarding the evidentiary value of dying declaration. Some significant recent cases like *State of Karnataka* v. *Shariff*[3] and *Laxman* v. *State of Maharashtra*[4] are mentioned to clarify the present position of dying declaration recorded by police and doctors respectively.

Next most contemporary topic is 'expert opinion'. Though the provisions are properly discussed reviewer feels that recommendations of 'Malimath Committee' regarding the use of modern techniques in a criminal investigation would also have to be discussed to give it a more useful shape.

Reviewer compliments both the authors for discussing 'Estoppel' in a very detailed manner by mentioning meaning, types and importance of estoppel.

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1 AIR 1940 PC 176 p. 180
2 AIR 1957 SC 747.
3 AIR 2003 SC 1074.
4 AIR 2002 SC 2973.

Many cases have also been cited to develop the better understanding of the topic in the changing scenario.

'Accomplice' under section 133 is another important topic which creates confusion many times. However, in explaining it, the authors well established the difference between accomplice and co-accused and interpreted effectively the combined effect of section 133 and section 114, illustration (b), which most of the time creates confusion in the mind of the reader. Authors have mentioned landmark judgments of England like *King* v. *Baskerville*,[5] and India like, *Rameshwar* v. *State*,[6] and *Md.Hussain* v. *K.S.Dalip*.[7] Similarly, the law regarding appreciation of approver's evidence, which is based upon the effect of sections 133 and 114, illustration (b) of the evidence Act is discussed in the light of various judgments pronounced by Supreme Court. Need of corroboration of approver's evidence, conviction on the uncorroborated testimony of an accomplice and relative scope of evidence of uncorroborated testimony of approver is also discussed in the light of cases like *Ram Narain* v. *State of Rajasthan*.[8]

Authors have also discussed many essential cases related to the examination of witnesses in the light of the provisions in sections 153,154,155 and 157.

The authors have also discussed section 165, which deals with the discretionary power of the judge, in connection with section 311 of Cr.P.C. To explain this power of judges they have not only mentioned the position in English law but also tried to explain it with the help of some landmark judgments like *State of Rajasthan* v. *Ani*,[9] in which honourable Supreme Court held that "criminal justice system should not be founded on erroneous answers out by witnesses, but the trial judge should remain active and alert to bring the justice.''

Except for the provisions mentioned above rest of the provisions have also been discussed unambiguously and lucidly. The great merit of this book is the difference between the Indian and English law which is highlighted at desired places to develop a better understanding of the subject. It is emphatically pointed out in various places in the course of the discussion that how the Indian judiciary has followed, approved, applied and departed from the principles laid down in foreign decisions and modified it as per Indian circumstances.

The book with the collection of numbers of judgments is comprehensive in all respect. The reviewer suggests that the incorporation of recommendations of various law commissions can add more value to it.

[5] (1916) 2 KB 658, p.663.
[6] AIR 1952 SC 54.
[7] AIR 1970 SC 45.
[8] AIR 1973 SC 1188.
[9] AIR 1997 SC 1023.

Overall the book is a qualitative contribution to the literature on Law of Evidence. Exhaustive headings and sub-headings, attached appendices and index at the end of the book enhance the quality and utility of the book. The book is well presented and useful for all readers especially for researchers and advocates as a vast reservoir of information on evidence law.

Book Review

United Nations and Gulf Crisis

Ram Prakash Anand

Banyan Publication, New Delhi, 1994
Pages: 110, Price Rs. 125/-

Atul Alexander*

The monograph titled *'United Nations and Gulf Crisis'* by Prof. R.P Anand presents a seminal outlook on the post-Soviet disintegration, the role played by the powerful countries in controlling the Security Council together with the dubious track record of the Security Council in upholding peace and securing justice. The era leading up to the gulf crisis witnessed unabated use of veto to undermine the Security Council's mandate. The so-called reprehensible greed on the part of late Saddam Hussain, impelled by expectations, forced the enigmatic ruler to attack the tiny oil rich neighbor Kuwait.

The Amir the then ruler of Kuwait was forced to flee to Saudi Arabia. The long-pending dispute between Kuwait and Iraq dates back to Anglo-ottoman convention based on which the boundary was drawn under the auspice of U.K. Iraq claimed to be the successor of ottoman empire, which drew flak from Kuwait and the western allies. Subsequently Kuwait was admitted to the League of Arab states on 14th may 1963. Iraq-Iran war during 1980s afforded opportunity to Iraqi and Kuwaiti leaders to forget their bilateral problems, and enter into an understanding to confront and contain Iran. Under the banner of Arab nationalism and solidarity, Kuwait offered substantial financial, political and logistic support to Iraq during its protracted war with Iran. Though Iraq desisted from raising the border issue with Kuwait so long as the Iran-Iraq war continued, but as soon as cease-fire agreement was signed between the two belligerents in 1988, Saddam Hussain raked up the border dispute with Kuwait again.

Another contributing factor that aggravated the relations between the two countries was the oil crisis; Saddam Hussain had accused Kuwait and the UAE of deliberately engineering a lower price for oil in order to damage the Iraqi economy. Both these countries, it was pointed out, exceeded by 25 per cent of the oil production limits set by OPEC (Organization of Petroleum Exporting Countries) driving down the price of crude which cost Iraq US $14.1 million in lost revenue. In this hostile environment U.S stepped in to make the matter worse, because of their national interest in oil. Iraq finally invaded Kuwait on August 2, 1990, which compelled the Security Council to step in by passing resolution 660. It remains a fact that the said resolution was drafted by the American diplomat condemning the Iraqi invasion of Kuwait. Expressly "acting under Articles 39 and 40 of the UN Charter" (Chapter VII), the resolution demanded the immediate and unconditional withdrawal of Iraqi forces. It also called upon Iraq and Kuwait to immediately begin intensive negotiations to resolve their differences. Failure on the part of Iraq to withdraw from Kuwaiti territory forced the Security Council to impose economic sanctions. Sanctions were comprehensive and the same included world-wide oil embargo along with banning economic and financial dealings with Iraq. In addition, a blanket ban was also imposed on Iraq in respect of supply of military equipment and weapons. Further, Security Council constituted a sanction committee to oversee the implementation and progress of the aforesaid resolution. In short there was total isolation of Iraq from the global community in light of severest economic embargo. The severity of sanctions on Iraq was also criticized as the embargo led to the complete devastation of Iraqi national economy.

In light of the way the Security Council acted in the Gulf War-I, the present work examines the Security Council resolution under Article 27(3) of the UN charter in regards to any procedural matter which has to be taken by affirmative vote by its members and concurrent votes of the permanent members. It is highlighted that when a state abstains in matter of passage of any resolution, it amounts to implied 'agreement' to operation of the resolution. Author pinpoints that Chapter VII requirements in relation to Gulf-War-I were not fully complied with. The provisions therein were rather abused by the U.S. and its western coalition allies. It is to be noted that before invoking punitive or coercive measures under Article 42, the conflicts are to be settled through the mechanism of negotiation. Yet in the instant case, US displayed lack of genuine effort in realizing negotiated outcome in relation to Gulf crisis, rather its hawkish foreign policy makers had from the very beginning made up their mind to use punitive measures against Iraq. It is an obvious truth that US and its powerful western allies were guided by their energy (oil) interests in Gulf which dictated their pre-determined use of force.

The present work first published in 1994 underscores the reality as to how U.S. paid little or no concern over the humanitarian costs of waging war. Gulf War-I could have been averted had pacific measures including diplomacy and negotiation been allowed to play its meaningful part. The war also depicted how the world body and its procedure may be used or abused for the achievement of national objectives and priorities of the only Super Power left without any checks and balances. In the concluding part, the seminal work of Prof. R.P. Anand cogently reveals the existing reality in international law which has been effectively hijacked by the sole superpower with its belief in 'might is right'.

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The present work provides a rich insight into the way UN Security Council has functioned under the shadow of sole super power. It does exhaustive analysis and examination of the factual and legal issues leading up to the war. It is strongly recommended for academicians, scholars and students of International Law.