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CONTENT

A Relook at Gandhi's Contribution to the Indian Political and Legal System

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It has become a fashion to applaud or condemn Gandhi, either of which is done with little thought and understanding of history or his work. It is time to take a dispassionate look on the contribution of the person whom Indians have endowed with the title of 'father of Nation'. What do we mean when we call him 'Father of Nation'? Did he create the Indian nationalism, or found it or taught a nation to live as a country? Born on 2nd October 1869 Mohandas Karamchand Gandhi was a gift of God to the Indian nation yearning for self esteem under the yoke of colonial masters who claimed that they were discharging their burden of civilizing us. Glimpse of attitude of the ruling British class towards India and its civilization can be found in the statement of Lord Macaulay about Indian literary achievements.

> I have never found one among them who could deny that a single shelf of a good European library was worth the whole native literature of India and Arabia. The intrinsic superiority of the Western literature is indeed fully admitted by those members of the committee who support the Oriental plan of education. It will hardly be disputed, I suppose, that the department of literature in which the Eastern writers stand highest in poetry. And I certainly never met with any Orientalists who ventured to maintain that the Arabic and Sanskrit poetry could be compared

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> to that of the great European nations. But when we pass from works of imagination to works in which facts are recorded and general principles investigated the superiority of the Europeans becomes absolutely immeasurable. It is, I believe, no exaggeration to say that all the historical information which has been collected from all the books written in Sanskrit language is less valuable than what may be found in the most paltry abridgments used at preparatory schools in England. In every branch of Physical or moral philosophy the relative position of the two nations is nearly the same.
>
> The question now before us is simply whether, when it is in our power to teach this language, we shall teach languages in which by universal confession there are no books on any subject which deserve to be compared to our own; whether when we can teach European Science, we shall teach systems which by universal confession whenever they differ from those of Europe differ for the worse; and whether, when we can patronise sound philosophy and true history, we shall countenance at the public expense medical doctrines which would disgrace an English farrier, astronomy which would move laughter in girls at an English Boarding school, history abounding with kings thirty feet high and reigns 30, 000 years long, and geography made up of seas of butter---- The languages of Western Europe civilised Russia. I cannot doubt they will do for the Hindu what they have done for the Tartar-----[1]

A hungry country was watching its wealth being bled and taken away beyond the seas. Systemic exploitation and ruin of the Indian economy has been documented in the official records.

> It was not only the manufacturing towns and centers that were laid waste, and their population driven to crowd and overcrowd the villages; it was above all the basis of the old village economy,

1 See Excerpts of Macaulay's Minute in Appendix of R.C. MAJUMDAR, K.K. DUTTA "English Education" in THE HISTORY AND CULTURE OF INDIAN PEOPLE: BRITISH PARAMOUNTCY AND INDIAN RENAISSANCE Part II (1965) edited by R.C. Majumdar, A.K. Majumdar and D.K. Ghose, 81 (3rd ed.1991).

> the union of agriculture and domestic industry, that received its mortal blow. The millions of ruined artisans and craftsmen, spinners, weavers, potters, tanners, smelters, smiths, alike from the towns and from the villages, had no alternative save to crowd into agriculture. In this way India was forcibly transformed, from being a country of combined agriculture and manufactures, into an agricultural colony of British manufacturing capitalism.[2]

A demoralized and economically devastated country was looking for messiahs. Since the 19th century many leaders like Raja Ram Mohan Roy, Swami Vivekanand, Bal Gangadhar Tilak among others tried to purge India of its ills and weaknesses reminding her of her past glory and her strengths. These leaders of Indian renaissance reminded the Indians that they were not savages waiting for deliverance through western education. They had a glorious past, though like every civilization it had weaknesses and was evolving with time. However, this cultural message was not properly translated into political action. Before Gandhi only Bal Gangadhar Tilak had attempted to link cultural awakening and nationalism to political freedom by claiming that 'Swarajya is my birth right and I shall take it.' However, his dream was destined to be fulfilled by others. Tilak may therefore in some respects be called a precursor to Gandhi. He did not succeed much in making the national movement a mass movement. He however came closest to linking together the two-cultural and political emancipation of India. Another problem with Tilak was that he could not find a rhythm in the diversity of India. His appeal could not attract every class and community of India. Country needed a Mahatama to rope into one two diverse programs of Indian national movements- cultural renaissance and reformation on the one hand and political freedom on the other. A great soul was indeed needed to show that this programme of Indian swarajya was inclusive of every individual and every ethnic and economic group in the country. It bred not on hatred but on love and compassion. According to Gandhi we need swarajya because that is what defines a human being.

2 REPORT OF THE PARLIAMENTARY ENQUIRY 103 (1840).

But what did he mean by Swarajya? How far has his concept of swaraj shaped the political and legal structure of Independent India? Where have we differed? Was Gandhi's vision a better alternative than the present legal, economic and political structure of India? In the following sections we would examine these issues by juxtaposing Gandhi's ideas on Indian nationalism, democracy, economy and religion with the independent India's political legal structure and present situation. We would see that these four were interlinked and part of his concept of 'Swaraj.

I
Gandhi and Indian Nationalism

We have become accustomed to examine the political and social systems of our country from the perspective of western terminologies and theories. Nation state system developed in Europe at a particular historical juncture as a revolt against dominance of the Roman Catholic Church. This Nation State system developed largely on linguistic lines. Development of the linguistic nationalism in Europe was a necessary antidote against religious loyalty and ensured European rulers loyalty of their subjects whether catholic or protestant although European countries and rulers continued to be identified with a particular religious faction that was dominant in that country.

India, on the other hand has been a culturally rich region with persons of different faith, languages and ethnicity living largely peacefully except for occasional skirmishes, and wars against foreign hordes and invaders. This cultural pluralism had been possible in India because of the basic psyche of its people that different persons realize the truth and ultimate reality within themselves by their own means. It is an individual's endeavour and every individual can pursue it by her own methods. Cutting across religions with less or more emphasis, religion remained an individual affair in Indian life but individual remained part of a social group. Social groups, largely caste based, were strong in India, because State did not have as strong a presence in India as it had in the West. These caste groups formed villages which

were largely self-sufficient working on the principle of division of labour and mutual interdependence. Individuals seldom bothered about national politics or what was happening at the national or provincial level. National and provincial governments also did not much interfere with the villages except for the basic sovereign functions. Hence Indian State with some aberrations has remained a soft State. No emperor could afford to radically change Indian social structure. Babur learned it quickly after coming to India and advised his son Humayun not to antagonize the Indian public on religious ground. Even a despotic ruler like Aurangzeb could not afford to interfere in many of the practices of the Hindus like Sati which he rightly thought needed to be eliminated. Hence Indian nationalism if we call it so, has been of a different type. It is not rooted in the political structure of the country but in its social structure. This geographical region, which has been called Bharat since ancient times has been considered to be one country by the people living here. Hence Shankracharya established four Dhams in four different directions of India, Ram is said to have established Rameshvaram in the southern coast of India, Parshuram is equally revered in north and south India. The Indian epics and purans have integrated and weaved India into one culture. Whenever antagonism appeared, saints of different faiths came to tell Indians the virtues of brotherhood, humanism, simplicity and peaceful coexistence. They taught these virtues as the fundamental religion of mankind.

But India has seldom remained politically united. One reason is that since Indian State has always remained a soft state, ambitious persons have declared independence and the general population largely aloof from the political developments has continued to be busy in its own life and accepted whichever rule allowed it to live in peace. Politics did not define the national life and nationalism of Indians. Although in medieval age we have Marathas and Sikhs who revolted against Mughal rule, it was more against despotism and to some extent against what was termed as foreign rule.

Hence Indian nationalism is not rooted in language or religion. It is rooted in a way of life which has developed through ages and has been

kept alive in difficult times by saints and poets of different sects like Kabir, Meera, Tulsidas, Guru Nanak, Khusro, Rahim, Muniudeen Chisthi, Tyagraj, Vivekanand etc. They kept the social and cultural fabric of India intact by songs and teachings independent of the political system of the day. Hence Indian nationalism, or Indian way of life, has not been bound by political and commercial goals as it was in Europe. It has been rooted in the social and cultural fabric of India which is rich in colours, texture and designs, woven around the central theme of Indian view of life, society and relation of the mundane with the metaphysical, the realization that we are parts of the whole, different in appearance but essentially one.

It was this nationalism or way of life which Mahtama Gandhi understood and tried to bring out in open. He found that India has a cultural synthesis but lacked political cohesion due to ambitions of select strong persons and the distrust that cultural diversity may create at times. Hence, he started a national movement at grassroot level, gave a vision of future India as 'Ram Rajya' which common man could understand and identify with, no matter of what region or religion she belonged to. His opposition to violent freedom struggle served two purposes. On the one hand it involved the Indian masses into the movement and freedom struggle became a mass movement thus beginning the end of political alienation of masses. Hence freedom struggle was not just an act of heroism by few who have gifted independence to others. It was achieved by every Indian and every Indian felt a belonging and sense of achievement on its attainment. Every Indian could participate in the struggle in her own small way. If nothing else, by making yarn on charkha or wearing a swadeshi dress, or going to nationalist schools or donating to congress fund, or just hearing and singing bhajans or giving up drinking. National movement encompassed the whole of social and cultural life of India. In this ostensibly simple way Mahtama Gandhi brought to the fore the nationalist spirit within the common mass of the Indians and brought about a political awareness in the Indian society.

Mahatama Gandhi had a clear understanding of Indian history and culture. He states in Hind Swarajya, that if English are ready to Indianise, they would cease to be foreign rulers and we would not need any independence movement. In this way he distinguished the medieval period of Sultanate and Mughal rule from the British Rule. Muslim rulers came from outside, but they accepted India as their country and settled in India as Indians. They might have been despotic or generous, narrow minded or broad minded but they were Indian rulers. British however, remained foreign rulers and instead of trying to adapt to Indian way of life had contempt for it and wanted to convert it into western way of life. Hence Gandhi and leaders before Gandhi, empahsised on awareness of the masses towards realization of self worth and thereby generate respect for the Indian culture and civilization. In Hind Swaraj he states that political independence would be meaningless if we are anglicized. An Indianised English rule would not be slavery and rule by Indians devoid of their cultural identity, slavishly copying the British and ruling in the British pattern, would still remain a foreign rule. This was a simple formulation for mass consumption of the theoretical idea of 'hegemony' developed by Antonio Gramsci.

Mahatama Gandhi's nationalism was cultural nationalism and not a political one. Hence he was skeptical of the idea of a centralized India. He understood Indian nationalism as a social and cultural phenomenon rather than a political one. He wanted to keep this idea of socio-cultural integration with political decentralization intact. Hence his idea of future political structure was based on the Indian system of village as unit rather than individual as a unit. History shows that individualism although a revolt against State requires a politically strong State for its survival. When political organization of State is weak, social organizations become strong as it happened in India. Gandhi understood India in terms of socially cohesive society rather than as a centralized political organization. This was keeping with the history of India but at odds with the vision of India which his followers like Pt. Nehru spread. Nehru understood India as

Gandhi understood it. But he wanted certain fundamental changes in the social, political and economic structure of India in order to make it ready for the contemporary world. Hence the Constitution of India is based on Nehru - Ambedkar's idea of individual as the center of political system which necessitates a strong political organization at the center, along with a system of cooperative federalism.

Irrespective of what form of political structure we adopted, it became possible because Gandhi and his followers ensured that every individual at her level gets associated with the national movement. In this way the underlying social and cultural nationalism or the Indian way of life was given a political expression through his efforts which has played a crucial role in ensuring the durability of our political system. It was the effort of Gandhi and his followers which made possible the fact that Indian Constitution was made by consensus in the Constituent Assembly which according to Granville Austin is a unique feature of the Indian Constitution.[3] This consensus became possible due to tireless efforts during the national movement under Gandhi's leadership to bring to the fore the underlying synthesis in the Indian way of life which was projected as a vision of future India in public meetings and this vision was incorporated in the Constitution.

II
Gandhi and Indian Democracy

Gandhi's idea of Indian nationalism and belief in its civilization formulated his ideas towards State and democracy. Democracy is a basic feature of the Indian Constitution. Any law student would tell us this citing *Keshvanand Bharti* vs. *Union of India.*[4] No one contests it now. We proudly proclaim ourselves to be a successful democracy, with actual guarantees of individual

3 GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (Oxford 1966).

4 (1973) 4 SCC 225

rights. Gandhi's contribution in ensuring success of democracy in an Indian society with feudal structure and majority of the population unconcerned about the politics of the day cannot be ignored. The non-violent struggle for independence which made every Indian a participant in the freedom struggle ensured success of Indian democracy. Possibly democracy might not have succeeded had India got independence through armed conflict. A freedom attained by these methods would have superimposed a national government in place of foreign governance. But for the common man this would have made little difference which would have been very detrimental to Indian democracy. The largely non-violent struggle of Indian freedom, made the common man understand the meaning of freedom and what a national governance would mean as opposed to foreign governance. The sense of political participation generated by the Indian national movement ensured that common man remained aware of his rights. Freedom meant what came to his door, not only what happened in the echelons of power.

This is how Gandhiji defined Swaraj or home rule in Hind Swaraj. Swaraj to him menat 'sva' (My) 'rajya' (Rule). Hence every individual could say that she is ruler of the country. This meant that each individual guided by her conscience could also decide to disobey an unjust or evil law or command. That is why he wanted an oceanic structure of Indian polity where the federal representative body would be indirectly selected. His theory is similar to view of writers of critical legal studies movement and post modernism. These writers feel that there is violence in the creation and maintenance of State. According to Derrida the whole law making process and its enforcement is an act of violence whereby the dominant section suppresses the minority view. According to him the whole concept of force of law and enforcement of law indicates violence whereby the dominant opinion suppresses the alternative opinion and declares it unlawful or illegal.[5] Benjamin feels that State monopolizes the use of force

5 Jacques Derrida, (Trans. Mary Quaintance), *Force of Law: The 'Mystical Foundation of Authority',* 11 CARDOZO L R, 921 (1989-1990).

and declares private use of force criminal and unlawful, to maintain its dominance and enable it to suppress alternative voices and dissensions.[6] For all these reasons Roberto Unger advises a thoroughly decentralized governance system with several mini constitutions. According to him this would ensure that one dominant perspective does not rule forever and continuous process of deconstruction would check the dominance of any one perspective.[7]

Gandhiji was also skeptical of centralized states and centralized industries. For him large industries and large scale mechanization had a dehumanizing effect and centralized State meant a violent and oppressive state. He possibly understood the connection between power of State and large companies or what we may call a modern Corporate State. Hence his idea of swaraj or home rule was 'my rule' where every individual would be guided by his own conscience. State would have minimum interference as each individual guided by her own conscience would not need regulation by the State as that would mean violence. This idea seems close to liberal political ideology of minimal State. But the concept of liberal State is based on the idea of rule of law and role of the State is to maintain internal order and protection from external aggression both of which require violence. In Gandhi's State based on love and compassion this would not be necessary because for him violence breeds more violence. This vicious circle would only increase the power of State as he tried to show through the example of Italy. According to him this would end the human aspect of an individual by subjugating her and killing her conscience. A soulless human being cannot be considered to be a free human being.

Democracy in India would not have been possible had strong roots not been created by the nationalist movement. This is not to undermine the

6 WALTER BENJAMIN, (Trans. Edmund Jephcott), CRITIQUE OF VIOLENCE IN REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 277-300(Rhus1986).

7 ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK (Verso 1986)

role of British government which established the parliamentary system in India. But it cannot be ignored that this was also done under the pressure of the national movement. Again it needs to be remembered that before independence, right to vote was a limited right given to few. Legislative elections alone did not ensure success of democracy among Indian masses.

Gandhi possibly understood that democracy was essential for the survival of political synthesis in India with its conflicts, contradictions and varieties. Democracy was a way to forge political dialogue. This political dialogue would solve any emerging conflict. Hence he spread the nationalist movement through negotiations and dialogues which brought under one umbrella variety of interests and issues. He is often criticized for supporting Khilafat movement which was not a secular movement. But it was Gandhi's way of politically aligning different interest and issues with the national movement. Similarly with Poona Pact he ensured that British do not succeed in further division in the social cohesion of India. Indian society had its evils, which we have to eradicate in our own way and no one should not take political advantage of such issues. The acceptance by all the parties that freedom meant end of social and economic exploitation at internal level too and that all sections are part of India and Indian society needs to be reformed from within and not from outside, strengthened the roots of Indian democracy. Similarly, in many instances of communal riots, Gandhi went on fast unto death. This was another way of forging political solutions to political problems. Equal faith of all communities in him, led them to accept peaceful coexistence as a basic principle. Hence Gandhi opted for longer road to freedom through negotiations, dialogues and compromises. This created a strong foundation for Indian democracy.

Justice Mathew considered the idea of Constitution being made by the people a mere 'rhetorical flourish'.[8] Criticism is that neither was the Constitution ever given to the people of India for ratification nor was it made by representatives of all the people of India because about half of

8 Keshavanand Bharti v. Union of India, (1973)4SCC 225

the population did not have right to vote. Members of constituent assembly were selected by state legislatures and people of India had nothing to do with it. However, we forget that the Constitution imbibes the ideals and vision of India discussed with the people of India by freedom fighters for many years. Although the process had started much before Gandhi, Indian nationalism was first a social and cultural awakening followed by political awakening. Gandhi kept this spirit of Indian nationalism alive throughout and his followers largely followed his example. Hence national movement was not just the quit India movement or the non-cooperation movement or the civil disobedience movement. It also encompassed picketing at liquor shops, upliftment of harijans, women libration and education, abolition of Sati etc. This was keeping in line with the essence of Indian nationalism which as stated above, is essentially a way of life or a social sentiment rather than a political structure. A social sentiment that is based on cohesion rather than on exclusiveness or exclusion of others.

It is this nature of freedom struggle which ensured strong foundations for Indian democracy. Gandhi understood that democracy was the only way whereby political cohesion would survive in ethnically plural Indian society. Hence although his opposition to violence in freedom struggle had a moral touch, it was also a lifeline for Indian political system. Freedom attained through violent means would not have allowed the masses to get politically active and diverse interests and factions would probably have left India ridden with civil war which the colonial government succeeded in bringing about in a limited way through partition of India on religious grounds.

Although history also points to other factors, Gandhi carefully chose the Prime Minister of India. He knew that Nehru had the ability to establish strong roots for democracy in Indian politics. Indians of all factions could identify with him and had faith in him. More than anything else, Nehru was committed to democracy, and a vision of India which the Congress had agreed upon, even though there were some differences. The Tripuri Session of the Congress in 1939

whereby Gandhi is charged of indirectly insisting on Nehru being the President even though Netaji was elected had been much criticized as unfair on the part of the Mahatama. But opposition by Gandhi was necessary from Gandhi's perspective who strongly felt that the non-violent means which he had propagated was necessary for the survival of a democratic free India. Possibly he felt that Netaji's methods and methods of other revolutionaries could have brought freedom but would not have ensured its survival in a peaceful democratic India.

III
Gandhi and the Indian Economic System

Gandhi's political economy is based on his idea of political structure of the State and democracy. He understood that political organization of State depends on its economic structure. His democratic ideal was not compatible with the idea of large scale industrialization and large companies. Decentralised production system enables a decentralized State. Large industries need powerful centralized State to maintain cohesion in regulatory mechanism and one spot bargaining and dealing. But Gandhi's opposition to western capitalist economy was not inspired by Marxism. Sarvodaya was Gandhi's dream. But this sarvodaya was not to be coloured in red, the colour of blood. His sarvodaya was coloured in *kesaria,* the colour of sacrifice. This was not the *tyag* of a sanyasi but by persons living a normal worldly life and caring for others along with self-interest. Hence he did not advocate revolutionary redistribution or of elimination of wealthy or the capitalists. His idea was 'trusteeship' where the rich would use the money they have for general welfare. Gandhi wanted economic justice and economic equilibrium in society but not through Marxist method of class war but by class cooperation.

Congress was divided into two groups on economic policy - the rightist and the leftists. The right wing included stalwarts like Sardar Patel who were opposed to radical change in the existing social and economic structure. The leftists led by Nehru and Netaji wanted a radical transformation of

the Indian social and economic structure. Gandhi, tried to balance the two groups, wavering between one and the other. In this process he was himself transformed from conservative to a more progressive thought and partially converted Nehru to a more moderate transformer. How much did Gandhi succeed in this?

For this we need to have a look on the Indian economic policy since the time before independence. Before colonizers arrived in India, historians state that India was richer than England and many parts of India were industrially advanced although modern mechanised production was not prevalent in India. According to this view British rule resulted in de-industrialisation of India. We all know that economic rationale for colonialism was that colonies were suppliers of raw materials and market for finished goods. Hence de-industralisation was necessary to achieve the economic rationale of European imperialism.[9] The British historian of Indian History, Wilson observes,

> It was stated in evidence (in 1813) that the cotton and silk goods of India upto the period could be sold for a profit in Britian markets at a price from 50 to 60 percent lower than those fabricated in England. It consequently became necessary to protect the latter by duties of 70 to 80 percent on their value, or by positive prohibition. Had this not been the case, had not such prohibitory duties and decrees existed, the mills of Paisley and

9 In the early nineteenth century the duty on Muslin and Calico was, respectively, more than 27 percent and 71 percent ad valorem. Even then unable to compete with Indian manufactures Britain prohibited the import of Calico cloths. Heavy protective duties in England 70 and 80 percent respectively on Indian silk and cotton goods ruined those industries, while British goods were imported into India at a normal duty. In the parliamentary enquiry of 1840 it was reported that while British cotton and silk goods imported into India paid a duty of 3and half percent and woolen goods 2 percent, Indian cotton goods imported into Britain paid 10 percent, silk goods 20 percent and woolen goods 30 percent. R.C. Majumdar, *Discontent and Disaffection* in K.M. Munshi et al (ed.) BRITISH PARAMOUNTCY AND INDIAN RENAISSANCE 413 (2002). See also Tirthankar Roy, *India and the World Economy, 1757-1947* in CHETAN GHATE (ed.) THE OXFORD HANDBOOK OF THE INDIAN ECONOMY (2011).

> Manchester would have been stopped in their outset, and could scarcely have been again set in motion, even by the power of steam. They were created by the sacrifice of the Indian manufacture.[10]

The ruin of Indian industry and commerce crowded the villages with little respite as agriculture was also ruined due to the new system of Zamindari.

The collaboration between Indian capitalists and the Congress has been criticized by some.[11] The Indian bourgeoisie or the Indian capitalist class helped the independence and Swadeshi movement because the Swadeshi movement killed the economic rationale for the British rule and helped Indian industrialists to grow to whatever, limited extent possible. The general opinion of Indian economists and intellectuals at that time was that India should grow with Indian capital and not with foreign capital.[12] Haunted by the East India Company syndrome and similar developments elsewhere around the world, middle class Indians felt that Indian economy should grow in a manner that control of the economy remains in Indian hands. The radical leftists like Netaji and Bhagat Singh felt imperialism and capitalism go hand in hand, and independence should result in re-distribution of wealth. Gandhi obviously being a moderate, supported the former view. He wanted economic development of India, in the absence of which political independence would be shortlived, but did not want a violent strife in the country.

This vision was clear in the minds of makers of Indian Constitution also. However, their path of economic development was different from the Gandhian ideal of self-sufficient and contended villages producing

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10 1,H.H. WILSON, HISTORY OF BRITISH INDIA 335(1848)

11 This is reflected in contemporary literature. See for Agyeya, *Shekhar Ek Jeevani* (2nd ed, 2017). Originally published in 1944; Yash Pal, *Jhootha Sach* (2007) Originally published in 1958.

12 DADABHAI NAOROJI, POVERTY AND UNBRITISH RULE IN INDIA (1901): 1&2,R.C. DUTT ,THE ECONOMIC HISTORY OF INDIA (1902)

just enough for its sustenance and choosing pursuit of moral advancement rather than economic advancement. According to Gandhi the western pursuit of material wellbeing would kill the moral fabric of society and close the chances of individual's salvation. According to Gandhi this was anti-civilization rather than civilization.

Independent India was, however, to pursue Gandhian goal of sarvodaya with a modernized and mechanized economy.

As Pandit Nehru put it,

> The first task of this Assembly is to free India through a new constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity.
>
> On the achievement of this great social change depended India's survival. 'If we cannot solve this problem soon,' Nehru warned the Assembly, 'all our paper constitutions will become useless and purposeless----If India goes down, all will go down; if India thrives, all will thrive; and if India lives, all will live-----.[13]

K. Santhanam, a prominent southern member of the Assembly and editor of a major newspaper, described the situation in terms of three revolutions. The political revolution would end, he wrote, with independence. The social revolution meant to get (India) out of the medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and secular education'. The third revolution was an economic one: 'The transition from primitive rural economy to scientific and planned agriculture and industry'.[14]

Gandhian ideal of sarvodaya is incorporated into the Constitution through Articles 14, 15(3)&(4), 16(3) &(4), 17, 23, 38, 39, 41, 43 and

13 GRANVILLE AUSTIN, *Supra* note 2

14 K. Santhanam, *Magazine Section,* THE HINDUSTAN TIMES, New Delhi, September 8, 1946.

47. The Supreme Court of India has kept this spirit alive through series of judgments expanding the scope of the right through article 21. Thus in *Francis Coralie* v. *Union Territory of Delhi*[15] the Supreme Court expanding the meaning of 'life' under Article 21 observed:

> We think that the right to life includes right to live with human dignity and all that goes along with it, viz., the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about mixing and mingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.[16]

In a series of other cases the Court has adopted the same position and has continued to expand the scope of Article 21 to include number of rights essential to enjoy the natural life fruitfully.

Hence Indian economic system was to work towards egalitarian distribution but not through violent redistribution but through peaceful evolution. It can be a matter of debate how far India has succeeded. Some would say that India remained a hybrid State and a bad one. The spread of naxalite movement shows that redistribution has not taken place. Suicide by farmers is also a warning. This shows that economic development through large scale industrialization has not completely succeeded in bringing sarvoday. On the other hand critics would point out that India could not develop because of its democratic political system and guarantees of individual freedom. Too many protests and incapacity of the government to take strong decisions due to political opposition,

15 (1981)1 SCC 608.

16 *Id,* 753.

has marred the pace of economic development in India.[17] However, few points need to be pondered. One is that naxalite movement better known as maoist movement is inspired by leftist ideologies which want radical redistribution of wealth. It also cannot be ignored that the right wing in the government and political system supported landlords against whose oppression the marginal sections of the society, landless labours and tribals revolted. What emerges is that each interest group has political backup on which it is thriving. These struggles have worsened the situation in affected parts and in certain areas it has taken the shape of caste war. The long lasting conflict shows that class conflict would never purge India of its economic ills. Development with democracy takes time but end result is stronger foundations, both for the economy and polity. Conflict and conciliation between divergent interests creates a long term consensus which provides a stable base to the nation. Hence we can hope that Gandhian concept of change in the political economy through class conciliation rather than class conflict would ensure survival of democracy with a more egalitarian society.

At the same time it cannot be ignored that in the enthusiasm to develop India and to industrialize it, the villages of India were somewhere forgotten. Villages became symbolic of everything that was regressive and backward in the Indian society. While India had major targets to achieve and somehow to revive its shattered economy, hence could not have given equal emphasis to all parts but somewhere government did not empathize with the villages of India the repository of rich Indian culture. The battle of tradition and modernization identified villages with everything backward which resulted in the lopsided development of the Indian economy. It is here that Gandhi becomes relevant. Gandhi from the beginning wanted villages to be the unit of the Indian political system. But both Nehru and Ambedkar were opposed to this idea. Nehru wanted individual to be the

17 See generally, ATUL KOHLI, DEMOCRACY AND DEVELOPMENT IN INDIA:FROM SOCIALISM TO PRO BUSINESS (Oxford University Press 2010); Atul *Kohli,,Politics of Economic Growth in India 1980-2005* 41(14)EPW., Apr. 2006.

basic unit as he was inspired by western individualism. Ambedkar feared that making villages basic unit of political system would mean that the tradition of exploitation of some caste groups would continue. He wanted a fundamental change in the social organization of the country. Tragedy is that while both Nehru and Ambedkar were right, Gandhi was also not wrong. India needed a fundamental transformation to cope with the challenges of the new world. Individual rights had to be respected and they could not be respected with villages being the basic unit of the political organization. Khap panchayats and killings of innocents in the name of tradition and culture taking place today prove that had Nehru and Ambedkar not prevailed at that time, India would have remained a socially backward country which would also have impeded its economic and overall development. Position of disadvantaged sections including women, underprivileged caste groups and scheduled tribes would have been much worse than it is today.

This, however, cannot justify ignoring the villages altogether. Gandhi's major political movement in India started at Champaran, an agitation for farmer's right. Even though he was from an urban background, he could identify with them and speak in their language. This is how his movement was different from other revolutionary freedom movements. And this is why it had more impact and influence on the masses. Common man sympathized with revolutionaries, respected and even revered them, but they could identify and fight along with Gandhi because they understood him and knew that he understood them. This link is missed in independent India, so much so that today we have hardly a few political leaders who can be called grass-root leaders, and existing few try to gain political advantage by playing divisive politics. Hence independent India though did pursue the policy of egalitarian development, it was largely on individual basis. It has so far failed to ensure equitable development of all parts of India. Hence there are regional disparities as well as disparities between rural and urban population in terms of opportunities for livelihood, education, medical facilities etc. Some initiative was taken

by the 73rd Constitution Amendment Act, strengthening the local bodies. However, this development has still to deliver the fruits. We see that the worst fear of Gandhi regarding Westminster style democracy is coming true. Local body elections have become another form of political party based elections. Hence local issues remain ignored and get submerged in rhetorics and slogans of political parties ranted indiscriminately at parliamentary elections, legislative assembly elections and local body election. Local bodies and gram pahnchayats have largely failed to ensure, local development in education, sanitation and creation of opportunities for livelihoods. Elections to gram panchayats are largely result of wide spread corruption and one wonders why the amount of money spent on gram panchayat elections could not be used for development of the villages. Had this been done, many of the social and economic problems of India would have been solved. Overall result is that urban development is also not yielding any result because unemployed, malnourished villagers are migrating to cities in search of better life and future for children. Hence overcrowded cities are struggling with slums, pollution, sanitation as well as occasional law and order problems.

Another important aspect of Gandhi's economic thinking was the idea of trusteeship. He was not against the rich or the capitalists, or even the feudal lords. But he wanted egalitarian construction of the Indian society according to Indian ethos. Mahatama Gandhi did not want a class war. He wanted an egalitarian society but through class cooperation. The revolutionaries on the other hand wanted elimination of any class distinction. More or less similar were the views of the left wing within the Congress. The right wing within the Congress was largely supportive of the advantaged sections of the society. Leaders like Sardar Patel also wanted an egalitarian society but through evolution rather than revolution. In this way they were more in line with early views of Gandhi. In this respect one should not forget the background of Mahatama Gandhi. He himself belonged to a traditional commercial class. Hence he did not have natural antipathy towards commercial class or the rich, even though he

could easily identify himself with the farmers and the downtrodden. His views of trusteeship were also influenced by his background. In his views of trusteeship equitable distribution of wealth is not done by violent re-distribution of wealth. Redistribution takes place by spiritual transformation of rich whereby they consider that the wealth they are having is for the society as a whole and not for their individual wellbeing alone.

Gandhi's view accepts as well as negates liberalism. Liberal economic theory is premised on the idea that different persons have different capacities and persons are able to earn according to their ability. Someone who is not rich is so because he has not been capable enough to earn. But trusteeship model also negates the idea that whatever an individual owns, is that person's rightful earning and society or state cannot take it away except the bare minimum which is necessary for the maintenance of State. Trusteeship idea supports the notion that wealth is a social creation. This would support the collectivist idea that wealth should be owned collectively and used for social welfare. Only difference that seems between the trusteeship idea and the collectivist is about the legal ownership of the wealth and thereby the political set up that such ownerships necessitate. Hence Gandhiji's theory of trusteeship tried to be a synthesis of two conflicting ideas with spiritual awakening being the catalyst. However, the synthesis failed. Failure of Bhudan Andolan led by Vinoba Bhave shows that except on a few committed persons Gandhi's trusteeship ideal could not succeed. The rich were more zealous to protect their wealth than their conscience. *Bisrampur Ka Sant* a novel by Shrilal Shukla nicely illustrates the tussle between the mundane and metaphysical on the one hand and the result of Bhudan Andolan on the other. The novel illustrates both the impossibility of the ideal of trusteeship and the fact that spiritual transformation is a long process not within the capability of every person. The natural human weakness for clinging to one's possession and wealth and trying to increase it for one's family makes the idea of self sustaining villages, producing just enough for sustenance an ideal within the reach of a Mahtama but not every person.

The trusteeship model however, is actually practiced in different forms by the modern liberal economies. Whole policy of taxation is based on the trusteeship idea. Taxation is not just to enable the State perform its sovereign functions. The welfare State of today undertakes multifarious tasks which require it to tax the subjects much more than what is necessary for its maintenance and sovereign functions. Most of the developed countries have high percentage of direct taxes and in some cases upto 50% of the national income goes to the State as tax.[18] This supports the social security programs of the developed countries. In developing countries since they do not have that sort of earnings, income tax is not a major source of revenue. Raising taxes are also difficult in this age of globalization because developing countries desirous of receiving foreign investments are afraid of directly raising taxes on corporations. Threat of harm to struggling national corporations is another impediment. In such a case India has made the law for corporate social responsibility. Actually the whole idea of corporate social responsibility, started in the middle of 20th century, revolves around the concept of trusteeship. This is clear from the debate between Berley and Dodd published in the Harvard Law Review.[19] The debate revolves round the question whether responsibility of the management of the company is only to enhance the shareholder's value or there is also a concept of corporate citizenship whereby the management should take into account the interest of all stakeholders.

The idea of corporate social responsibility is now incorporated in the Companies Act 2013. Under section 135 of the Companies Act, 2013, a company with a net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore

18 THOMAS PIKETTY(Arthur Goldhammer,Trans), CAPITAL IN THE TWENTY FIRST CENTURY 515 (Harvard Business School Press India 2014)

19 A.A.Berle, Jr, *For Whom Corporate Managers Are Trustees: A Note,* 45 HARV. L. REV. 1365 (1932); E.Merrick Dodd Jr, *For Whom Are Corporate Managers Trustees? 45 HARV. L. REV.* 1145 (1932)

or more during any financial year is required to constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director must be an independent director. Companies are encouraged to spend at least 2% of their average net profit in the last three years on CSR activities. This trusteeship model is based on the notion that a company is given an identity by the State and hence it needs to work for social welfare also as a citizen rather than just maximizing the shareholder profit.

We see that developed countries most of whom pursue liberal economic policies have acknowledged the concept of social origins of wealth which is reflected in their taxation policy. Developing countries like India and Malaysia have incorporated it as a law for corporate social responsibility because of political limitations in raising taxes. The difference between Gandhi's trusteeship model and the latter two models is that former is based on voluntary denial and spiritual awakening while latter is based on coercive state machinery. We know that former has failed and latter may succeed if pursued practically and by a determined State. In today's world when the state is withdrawing from many of its obligations and inviting private parties to participate in them, Gandhi's moderate views on wealth become relevant to the extent that it recognizes wealth as social attribute also and not only as a private property. However, there is a thin line between participating in social infrastructure and ownership of the social and natural wealth by private parties. State has to be careful and strictly guard against capture of social wealth by private parties. The public trust doctrine applied by the Supreme Court to regulate collusion between government and private interests, can be used effectively to check appropriation of natural resources by private persons.[20]

20 See Anil Kr. Rai and Sheela Rai, *National Accountability of International Business:Indian developments*, 36(2) BUS. LAW REV. 72-77(2015).

IV
Gandhi and Religion

This was possibly the central theme of Gandhi's social, economic and political theory. He criticizes modern western civilization, its industrialization and mechanization, its social, economic and political system because they have a tendency to make us irreligious. By being irreligious he does not refer to a particular religion. His concept of Dharma, simply put was the concept of righteousness. This concept of righteousness was not about blind following of the dictates of the State or of any dharmic guru or even of religious scriptures. His concept of righteousness was based on soul searching or self-realization. Stated in simple way, through introspection every individual was to critically assess his conduct by listening to her inner voice or 'atman'. This is not to be done as part of any religious sect but purely as a human being. A person should only follow what is right or what her 'atman' approves of, even if it is against the law of the State or the dictates of holy scriptures or of religious gurus. In this way his concept of religion was linked to his concept of swarajya. For him Swaraj meant 'my rule' which according to him meant that every individual should be free to do what she considered to be right and should not be forced to do what was wrong according to her conscience. This way his concept of 'swaraj' was linked to the concept of democracy and minimum governance because in a despotic or omnipresent State, an individual would not be free to decide and do what her conscience considered to be right. This again was linked to his idea of economy. For him large industries, mechanizations and mad race after amassing of wealth which was termed as development, actually had a de-humanising effect. Individual enslaved by mad race after wealth would not be able to pursue the path of self-development in the real sense. Such an individual would not be able to properly discern right from wrong and hence would not be able to refuse to obey an evil or bad law. Hence such persons can never attain swarjya and a State dominated by such mentality would not be a free State whoever might be its ruler. Such mentality would enable acceptance of western hegemony, which according to Gandhi was

another name for slavery even if we are choosing our own representatives and rulers. This cannot provide proper democracy, because such a State would be dominated by a particular perspective and would in turn be dominating the thinking of the citizens also. An individual who is not free to think and choose, was not free even if on paper there was independence. There was no swarjya in that state according to Gandhi and of course there cannot be democracy. For Gandhi choosing representatives in elections did not mean democracy, democracy meant that a person is able to think and act upon what she thinks is right, even if it means disobedience to the laws of the State. Thus we see that Gandhi's idea of religion was the nucleus of his ideas on property and politics.

After independence Indian leaders tried to follow Gandhi by stating that Indian State is not irreligious though there is no religion of the State. Indian State does not discard individual's quest for the divine although every person is free to choose her own way. Indian Constitution guarantees freedom of religion and conscience. Hence a person is free not to adhere to any religion also. In Gandhi's words that person would not be irreligious if she is following her conscience though she may prefer to be an atheist. Indian Constitution also guarantees religious and linguistic minorities certain rights to preserve their culture and traditions. Actually India follows a peculiar political system which is secular but not irreligious. This mix up has been a source of trouble now and then. Normal understanding of secularism is separation of church and State. Although it is true that in most of the secular countries, political process often gets mingled with religious dogmas and beliefs, in a plural country like India, it would have been best to keep a strict separation between church and State. Our notion of secularism has been that of sarv-dharm sambhav. It is difficult for a State to adopt this policy. Although Indian society is a plural society and different communities largely live together peacefully, respecting each other's belief and traditions, it becomes difficult for any government to keep a balance between different communities in the spirit of sarv dharm sambhav. Hence governments often are criticized either for playing the

politics of minoritism or of majoritism. And the criticism is not misplaced also. Political parties often play with the religious sentiments and create a sense of insecurity among different communities in their vote bank politics. Possibly Gandhi foresaw such developments and hence had disapproved of direct parliamentary elections. However, we see that in the village based political system, individual would have scarcely been free where she gets dominated by outdated customs and traditions. Tradition based hegemony is as bad as cultural hegemony of the west. Independence from this dominance was also necessary for Nehru and Ambedkar alonwith political independence. Gandhi also supported it but his idea of political system could not allow an individual the freedom he thought they would get. It often becomes more difficult for an individual to disobey unfair social norms than an unfair law. Continuing devdasi systems in certain villages, sacrifice of individuals by Khap panchayats all in the name of religion and tradition are examples of how Gandhi's idea could have been easily misunderstood and misapplied. In this respect Nehru and Ambedkar understood India better and their programme of making individual the basic unit of the State was more far sighted under the Indian circumstances. They knew that freedom of conscience was to be guaranteed not only against the State but also against social oppression and was necessary for social development. A free individual is one who pursues the voice of her conscience and opposes not only oppressive laws but also oppressive social traditions.

V
Conclusion

We find that Gandhi's concept of religion, Indian nationalism, democracy and economy were interlinked and revolved around his concept of swaraj. His concept of swaraj was born of Hindu concept of 'atman', pure, untainted and unconstrained by outside influence and pressure or force of any kind; foreign rule being one of them. Anything that prevents a person to think or act rightly in the manner that is consistent with a person's right reason

and directed by that person's true Self or 'atman' was denial of freedom or Swaraj. This is a right of every individual not just of the country. This way his concept of swaraj exemplifies Tilak's claim of 'Swaraj' as a 'birthright'. He unfortunately though did not sufficiently recognize the constraining influence of outdated customs and social systems. After India got swaraj, it moved out of Gandhi's concept of economy and political structure. He however, laid the democratic foundation of independent India's polity and so deeply engrained the egalitarian vision of Indian society and economy that it sustains, even though the economic structure of the country has changed from mixed economy to liberal economy.

India kept his idea of swaraj alive by refusing the hegemony of either Capitalist or Marxist group during the cold war. Under Nehru's leadership, the country became instrumental in forming a third front Non-aligned movement of developing countries. This possibly again explains the difference between Nehru and Bose. Netaji did not hesitate to take help from Nazi Germany and Japan for Indian independence. This was possibly necessary in his method of achieving independence by armed struggle. But this was not compatible with Gandhi's concept of Swaraj. Under Gandhi's leadership India got independence by its own efforts without any direct outside aid. Hence independent India under Nehru could always pursue independent policy without accepting any political, military or ideological dominance. In this way Gandhi can be called the foundation on which political and ideological freedom and democracy of India is strongly sustained.

Gandhi's understanding of large industries and their influence on the government was very accurate. This problem has plagued all economies. Multinational corporations are designing the national and international economic policies. This unholy alliance has made life and welfare of human beings secondary compared to quest for profits of the large companies. A glaring example is growth of insensitivity of medical professionals and pharmaceutical companies in the era of patents and privatization and commercialization of health care system. While it is

difficult to understand Gandhi's boycott of modern medicine and modern medical facilities, it cannot be denied that dominance of large companies are making the alternative medicines and healing systems nearly extinct. Hence traditional medicine has been replaced by modern medicine but its availability is restricted and dependent on the availability of money.

The most misunderstood part of Gandhi's ideology has been religion. This has been a misfortune for independent India and the country is still trying to cope with the confusion and frequent skirmishes it creates. While Gandhi was able to lay sound foundations of Indian democracy, it progressively seems to be plagued by unholy alliance between business, religion and politics. It is this unholy alliance which may endanger Indian democracy and Indian national identity revolving around the concept of *Vasudhaiv Kutumbtakm* since ancient times. Gandhi's idea of Indian nationalism and his understanding of Indian culture and traditions was based on this concept and this concept was the central instrument to his concept of 'Swaraj'. His concept of 'swaraj' was a positive one based on love and understanding, not a negative one based on hatred and violence.

Core Nine International Human Rights Instruments and Bangladesh: An Overview

Bahreen Khan & Emdadul Haque*

1. Introduction

The concept of HRs is a buzzing phrase while the core nine IHRs instruments are exponentially significant for everyone to survive and to live with dignity[1] leading towards social order, peace, prosperity and harmony. But, there are ample of examples of infringement of HRs everywhere in the world, though HRs is designed to protect all people everywhere from the clutch of severe political, legal, and social abuses. In true sense, the realization of HRs is overwhelmingly ambitious as well as a daunting task for all stakeholders involved in global, regional and national spheres. The recognition and fulfillment of the IHRs instruments depend on an array of cross-cutting issues such as the political commitment, institutional capacity and cooperation and overall respect for good governance and rule of law of a particular region or a country. Nonetheless, there are manifold challenges entangled with the realisation of HRs depending not only on structural and procedural issues but also on government's commitment, interests, views

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1 Conor O'Mahony, *There is No Such Thing as a Right to Dignity,* 10(1) INT'L. J OF CONST.L. 551, 552(2012).

and policies. As a result, the implementation of HRs is at crossroad in most developing countries including Bangladesh. As part of its sovereign political commitment, and as a developing one Bangladesh has shown a lot of respects towards IHRs in theory by becoming party to eight out of core nine but in practice, it is lagging behind as to effective compliance of IHRs like some other South Asian nations. Despite widespread hue and cry from different quarters in and outside of Bangladesh; it has been contravening basic HRs of people unflinchingly and is still out the purview of the ICPPED resulting in more enforced disappearances. Apart from enforced disappearances, the other forms of State sponsored HRs abuses have raised numerous questions and shackled the very existence of HRs in the country frustrating its commitment towards the regime of IHRs. Through assessment and analyses of the core nine IHRs instruments and their reflections in domestic laws, this paper presents an overview of the gradual pledge and performance of Bangladesh as to IHRs instruments.

2. Background

The root of HRs norms and values may be traced back to religious scriptures primarily.[2] The Hindu Vedas, the Babylonian Code of Hammurabi, the Bible, the Quran, and the Analects of Confucius are five of the oldest written sources which address questions of people's duties, rights, and responsibilities. The Constitution of Medina, 622 AD instituted a number of rights for the Muslim, Jewish and other communities of Medina and over the years indoctrinated in international, regional and national legal instruments. The historical traces of HRs are visible in the Magna Carta (1215), the English Bill of Rights (1689), the French Declaration of the Rights of Man and the Citizen (1789), and the Bill of Rights in the United States Constitution (1791). Early philosophical proponents of HRs include Francisco Suarez (1548–1617), Hugo Grotius (1583–1645),

2 AMARTYA SEN, IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY' 62(Penguin UK 2007).

Samuel Pufendorf (1632–1694), John Locke (1632–1704), and Immanuel Kant (1724–1804). The American Declaration of Independence, 1776 focused on right to life, liberty and the pursuit of happiness reflecting the essence of HRs. The foundation stone of the League of Nations pioneered protecting HRs at international level after World War I. The core nine IHRs instruments are the aftermaths of the creation of the United Nations (UN) in 1945 but the body is yet to be desirably successful in developing and implementing HRs mechanism.[3] The Universal Declaration of Human Rights (UDHR), 1948 has cemented and fomented the foundation of all IHRs from the ashes of the World War II. Later, from 1965 to 2006, a total of core nine IHRs instruments are born with a bundle of solemn vows to protect all humans from the curse of abuses of rights. Following the model of the UDHR, the regional IHRs instruments are adopted for the Europe in 1950, America in 1969, Africa in 1981 and Arab in 2008, except Asia having few declarations only.

3. Notion of Human Rights

The German philosopher Emmanuel Kant opined that humans are rational beings and hence they are worthy of HRs with dignity and respect. Generally, HRs as a set of norms and values protects all people everywhere from severe political, legal, and social abuses. Generally, HRs is inherent, inalienable, universal, indivisible, interdependent and interrelated to all humans regardless of their identity.[4] Specifically, the HRs is a combination of moral principles entailing certain standards of human behaviour with obligations to protect natural and legal rights through national, regional and international legal instruments.[5]

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3 Interview of David Weissbrodt with Uttam Kumar Das, The Daily Star, September 25, 2010.

4 The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993.

5 LOUIS HENKIN, THE RIGHTS OF MAN TODAY, xiv, 173 *(1978)*.

The Preamble and articles 1(3), 10, 13(1) (b), 56, 68, 76(c) of the UN Charter, 1945 reaffirmed the faith in basic HRs and dignity of all humans urging all member States to promote, protect and fulfill HRs amid fundamental freedoms, equality and justice without distinction of race, gender, language, nationality, ethnicity, religion, or any other status. After the creation of the UN, a comprehensive body of HRs was designed gradually for all nations to subscribe, comply and aspire. Subsequently, in 1948, the UN brought HRs in the sphere of international law varying from soft legal instruments like declaration to binding ones like Covenants or Conventions or Protocols. The UN has also established mechanisms to recognize, promote and protect these rights and to assist State parties to carry out their obligations.

In fact, HRs covers every spectrum of human beings from embryo to exhumation. The core HRs includes right to life and liberty, freedom from slavery and torture, equality before law or non-discrimination, fair trial, freedom of expression, religion, right to education and employment, right to franchise etc. In Bangladesh, according to section 2(f) of the National Human Rights Commission (NHRC) Act, 2009, HRs means right to life, right to liberty, right to equality and right to dignity of a person guaranteed by the Constitution of the People's Republic of Bangladesh, 1972 and other IHRs documents as ratified by the State and enforceable by the judiciary.

As propagated by experts, HRs has diverse classes, such as civil and political (CP) rights, economic, social and cultural (ESC) rights or the first, second and third generation rights. First generation includes CP rights like right to life, equality of before law, freedom of speech, right to free from torture, fair trial, freedom of religion, right to vote etc. The second generation rights are ESC rights including right to food, housing, shelter, education, health care, employment, social security, unemployment benefits etc. The third generation rights extend the first two-generation rights and include right to self-determination, right to environment, right to development, right to sustainability etc. These three generations of HRs are also known as 'blue', 'red' and 'green' rights implying respectively

western liberalism, socialism or communism and nationalism with priority on right to development and environment.[6]

4. Journey of HRs Laws in Bangladesh

Manifold exploitation and oppression in terms of CP and ESC rights of people of East Pakistan by the West Pakistani rulers led to the war of independence costing a sea of blood heralded independence as a ray of hope for HRs in Bangladesh. Since the birth of Bangladesh, the journey of HRs legally started with the inception of the Bangladesh Constitution. The people of Bangladesh in their quest for freedom and justice were involved in the creation of a new state.[7] The Declaration of Independence on March 26, 1971 by Bangabandhu Sheikh Mujibur Rahman, crafted the spirit of HRs claiming the right to self-determination, liberty, basic freedoms, and dignity. The Proclamation of Independence on April 10, 1971 as the first Constitutional document vowed to ensure equality, human dignity and social justice and the Second one i.e. the Provisional Constitutional Order on 11 January 1972 introduced Westminster model of parliamentary form of government replacing the presidential one. Accordingly on 23 March 1972 a Constituent Assembly was formed and on 10 April 1972 it created a 34-member Constitution Drafting Committee (CDC) headed by Dr. Kamal Hossain for drafting a full-fledged Constitution. The CDC was successful to draft a Constitution only after 325 days of independence. Adopted on 4 November and enforced on 16 December in 1972, the Constitution in its Preamble along with Part II and Part III indoctrinated the notion of HRs ranging from ESC rights to CP ones from articles 8 to 44 in broader sense.

In Para two of the Preamble, the four basic ideals, namely nationalism, socialism, democracy and secularism have reflected the notion of HRs while

6 John C Mubangizi, *Towards a new approach to the classification of human rights with specific reference to the African context,* 4(1) AFRI HUM. RTS L.J. 93, 98 (2004).

7 KAMAL HOSSAIN, BANGLADESH QUEST FOR FREEDOM AND JUSTICE (The University Press Limited Bangladesh 2013) .

Para three directly envisaged HRs pledging to secure an exploitation free socialist society through democracy ensuring rule of law, freedom, equality and justice in all spheres. Upholding the supremacy of the Constitution, Para four extended the commitment of Bangladesh towards international peace and aspiration of mankind covering HRs entailing mutual cooperation. HRs is enshrined in Part II (articles 8-25) in the name of Fundamental Principles of the State Policy (FPSP) which are treated as ESC rights. But the regime of the FPSP entails a set of guidelines towards responsibilities of three government organs in making, enforcing and analyzing laws but these rights are ornamental in nature due to non-enforceability under article 8(2). Part III (articles 26-44) deals with fundamental rights which are basically CP rights with constitutional protection. In shaping these two Parts of the Constitution in endorsing some core HRs, the UDHR had a profound impact.

The journey of HRs is facing hurdles even after the independence of Bangladesh. All successive governments have resorted to violation of HRs through aggressive ruling with iron fist and a large number of people were the worst victims of HRs violation during military regime from 1975 to 1990 halting the journey of democracy and HRs. The rejuvenation of the democracy started in 1991 paving the way for promotion of HRs. But, the heinous killing of Bangabandhu and his family members on 15 August 1975 blackened the country's HRs chapter. From 1991 to 2006, the democratic trends went steady but from January 2007 to December 2008, the military back government halted it restoring the same in December 2008 election and went well till December 2013. But, the ongoing parliamentary democratic trends from 2014 to present are far away from the country's commitment under the Constitution resulting in absence of strong opposition party along with poor checks-and-balances.[8] Allegations are unabated regarding violation of democratic norms, suppression of

8 USAID, *Democracy, Human Rights and Governance* (Jan. 23, 2019,4:45 PM) https://www.usaid.gov/bangladesh/democracy-human-rights-and-governance.

opposition voices and snatching of people's voting rights during 5 January 2014 and 30 December 2018 elections, aggravating democratic practice and State sponsored HRs violation. As per Transparency International Bangladesh (TIB) report, there were massive (94%) irregularities in the 11th Parliamentary election in 2018.[9] Apparently, democracy is in a stagnated position and a report reveals the velocity of crisis requiring ailment.[10] The norm of domestication of opposition party has inculcated sideling the constructive role of it. Though, in recent years, Bangladesh has been successful in alleviating poverty, ensuring gender parity, reducing infant and maternal mortality rate, this progress has not been steady in protecting over all HRs in the country.[11]

The absence of political hegemony is also responsible for the rampant violation of HRs leading political elites resorting to coercion and to seek remain unaccountable.[12] However, the ups and downs in establishing democracy have not waylaid in enacting laws on diverse aspects of HRs including environment, labour and employment, education, women and children. Showing respect to IHRs instruments Bangladesh has adopted some laws in the last two decades. These include the Bangladesh Environment Conservation Act 1995, the Women and Children Repression Prevention Act 2000, the Legal Aid Services Act, 2000, the Anti-corruption Commission Act 2004, the Bangladesh Labour Act, 2006, the Right to Information Act 2009, the Consumer Rights Protection Act 2009, the Anti-Terrorism Act 2009, the Domestic Violence (Prevention and Protection)

9 Mehedi Al Amin, *11th general election: TIB finds irregularities in 47 constituencies; EC rejects,* THE DHAKA TRIBUNE, Jan 15, 2019.

10 BTI Country Report, Bangladesh (Jan.31,2019,3:35 PM)https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Bangladesh.pdf.

11 Amnesty International, *Bangladesh: Enforced Disappearances, Torture and Restrictions on Freedom of Expression* (September, 2014)(Jan 30,2019,2:15 PM) https://www.amnesty.org/download/Documents/4000/asa130052014en.pdf.

12 Ali Riaz, *Electoral Democracy and Human Rights in Bangladesh* in HUMAN RIGHTS IN BANGLADESH: PAST, PRESENT AND FUTURE 133 (Imtiaz Ahmed, 2014),.

Act 2010, the Vagrant and Homeless Persons Rehabilitation Act 2011, the Public Interest Information Disclosure (Whistleblowers Protection) Act 2011, the Prevention and Suppression of Human Trafficking Act 2012, the Rights and Protection of Persons with Disabilities Act 2013, the National Food Security Act 2013, the Overseas Employment and Migrants Act 2013, the Parents Maintenance Act 2013, the Children Act 2013, the Bangladesh Water Act 2013, The National River Protection Commission Law 2013, the Torture and Custodial Death (Prevention) Act 2013, the Non-Formal Education Act 2014, the Formalin Control Act 2015, the Child Marriage Restraint Act 2017, The Bangladesh Biodiversity Act 2017, and the Dowry Prohibition Act 2018.

To fulfill the vacuum of specific law and institutional set up on HRs, the enactment of the NHRC Act, 2009 sparked a glimpse of hope to people but the aspiration has ended in dashed hope vilifying the Paris Principles, 1991.[13] The NHRC since its functional journey from 2010 to 2018 is able to cast a little shadow of success. As part of statutory commitment, this body authorizes to enquire into any HRs abuses, review HRs situation and can advise government for actions but the law does not empower it to take any direct action against any abuser. Since the body is devoid of having any executive authority, it performs like a clawless tiger providing lips services to the victims. In fact, the NHRC can only report the HRs abuses to concerned authorities and recommend to President for further actions and measures.

5. Core Nine IHRs Instruments and Bangladesh

Core nine IHRs instruments from 1965 to 2006, created under the auspices of the UN emanating directly or indirectly from the fabric of the

13 Tamanna Hoq Riti, *Some Questions on the Role of NHRC,* THE DAILY STAR, Jan.28, 2019.

UDHR 1948, have expanded the horizon of HRs.[14] Each of these IHRs instrument has established a separate treaty body of experts (Committee) to monitor implementation of the IHRs instruments by its State parties. The UDHR since its inception, on 10 December 1948, is treated as the most visionary document of the 20th century and also a corner stone of all HRs with translation over 500 languages in its 70 years in 2018.[15] It envisages a common standard of achievement regarding freedoms and rights for all people and nations by progressive implementation measures. In fact, it has deontological value and turned into a living tree for all branches of HRs but unfortunately, it is not legally binding. The UDHR in its 30 articles recognizes two sets of rights namely CP rights and ESC rights but with no distinction between them.

Considering its contribution in the global landscape of HRs, the UDHR is called the Magna Carta of HRs. Subsequently in 1966, the principles of the UDHR are reflected in the International Covenant on Civil and Political Rights (ICCPR) and in the International Covenant on Economic, Social and Cultural Rights (ICESCR). The spirit of the American Revolution of 1776 and the French Revolution of 1789 mirrored in the ICCPR while the Russian Revolution in 1917 cascaded in the ICESCR. Recognizing the value of the UDHR, ICCPR together with ICESCR, the UN has branded them as the International Bill of HRs for the entire mankind.

The following box discourses on the chronological overview of core nine IHRs instruments and the commitment of Bangladesh along with its reservations and declarations:

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14 Interview with Claude Welch, *Universal Declaration of Human Rights: Why does it matter?,* UBNow, (17 December 2015) <http://www.buffalo.edu/ubnow/stories/2015/12/qa_welch_udhr.html> accessed 23 January 2019.

15 United Nations, *Human Rights* (Jan 24,2019,3:35 PM) <http://www.un.org/en/sections/issues-depth/human-rights/>

SL	IHRs Instruments (State Parties up to 2018)	Adoption and Enforcement Date	Signature, Accession/ Ratification by Bangladesh	Reservations/ Declarations by Bangladesh, if any
1	ICERD (179)	21 December 1965 (Adopted) and 4 January 1969 (Enforced)	11 June 1979 (Acceded)	
2	ICCPR (179)	16 December 1966 (Adopted) and 23 March 1976 (Enforced)	6 September 2000 (Acceded)	Articles 10(3), 11 and 14(3)(d)
3	ICESCR (169)	16 December 1966 (Adopted) and 3 January 1976 (Enforced)	5 October 1998 (Acceded)	Articles 1, 2, 3, 7, 8, 10 and 13
4	CEDAW (189)	18 December 1979 (Adopted) and 3 September 1981 (Enforced)	6 November 1984 (Signed and Ratified)	Article 2 and 16(1) (C)
5	CAT (164)	10 December 1984 (Adopted) and 26 June 1987 (Enforced)	5 October 1998 (Acceded)	Article 14(1)
6	CRC (196)	20 November 1989 (Adopted) and 2 September 1990 (Enforced)	26 January 1990 (Signed) and 3 August 1990 (Ratified)	Articles 14(1) and 21
7	ICMW (54)	18 December 1990 (Adopted) and 1 July 2003 (Enforced)	7 October 1998 (Signed) and 4 August 2011 (Ratified)	
8	CRPD (177)	13 December 2006 (Adopted) and 3 May 2008 (Enforced)	9 May 2007 (Signed) and 30 November 2007 (Ratified)	Article 14(1)
9	ICPPED (59)	20 December 2006 (Adopted) and 23 December 2010 (Enforced)	Bangladesh yet to sign or ratify it	

5.1 The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965

Responding aftermaths of increasing racial discrimination in the 1950s and 1960s, the ICERD was adopted following structures of the UDHR, the ILO Convention No. 111 of 1958 and the Convention against Discrimination in Education, 1960. It has 25 articles in three parts conceptualizing and condemning of racial discrimination, xenophobia, exclusion, prohibition of incitement, hate speech, intolerance and taking effective measures to combat these. Its monitoring body named the Committee of Elimination of Racial Discrimination (CERD) considers individual complaint and dispute settlement.

In fact, Bangladesh is a liberal and pluralist country with social, communal, ethnic and religious harmony and the practice of discrimination is mostly absent here even before becoming its party. Article 23A of its Constitution requires the government taking steps for protection of culture and tradition of tribes, minor races, ethnic sects and communities. Article 28 provides for the anti-racial discrimination and even article 28(4) obliges the State making special provisions for the protection and advancement of vulnerable or backward community. However, Bangladesh made a declaration under article 14(1) of the ICERD denying any individual complaint of victimization to the ICERD.[16] It reaffirmed the commitment by the Durban Declaration against Racism, 2001. Apart from a separate ministry representing ethnic minority in Chittagong Hill Tracks (CHT) region, it has incorporated some laws including the CHT Land Disputes Resolution Commission Act 2001 and the Bangladesh Indigenous Peoples Rights Act 2015 for minority protection. Even Bangladesh is also a party from 1972 to the Indigenous and Tribal Populations Convention, 1957.

16 Acceptance of individual complaints procedures for Bangladesh (Jan 24,2019,3:45 PM)<https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=14&Lang=EN> .

5.2 The International Covenant on Civil and Political Rights (ICCPR), 1966

The ICCPR as the foundation of freedom, equality, justice and peace recognizes inherent dignity of all humans and urges State parties to promote conditions necessary for the enjoyment of CP rights. Its 53 articles divided into six parts, obliges every member to protect core HRs through legislative, administrative and judicial initiatives. The main essence of the ICCPR is reflected in articles 2 and 3 guaranteeing availability of certain rights and respect for men and women equally within the territory of all member States. But article 4 permits State parties to derogate from their responsibilities regarding national interest emanating from emergency. However, they may not derogate from rights under articles 6, 7, 8(1) (2), 11, 15, 16 and 18. The Human Rights Committee (HRC), under article 28, is empowered to monitor the State Parties' compliance. This Covenant has two optional protocols- the first one allows hearing of individual complaint for HRs violation while the second one aims to abolish the death penalty. Bangladesh is yet to be party in both.

The reflection of the ICCPR is visible in articles 26 to 44 of Bangladesh Constitution as enforceable rights. However, Bangladesh made some reservations in the ICCPR limiting its application. Its reservations under article 10(3), 11 and 14(3) (d) portray its financial, legal and logistic inadequacy along with conflicting laws such as Code of Criminal Procedure (CrPC) 1898, the Special Powers Act (SPA) 1974 and the Digital Security (DS) Act, 2018. Accepting the principle of compensation for miscarriage of justice under article 14(6), Bangladesh is unable to implement. But, its Apex Court has discretion to compensate the victims of miscarriage of justice by invoking original and extraordinary jurisdictions including epistolary and *suo moto* ones. But the law-enforcing agencies and prison administration are in need of reform regarding respect and realization of CP rights.

5.3 The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

Containing 31 articles in five parts, the ICESCR recognizes right to self determination pursuing ESC goals. Article 2 recognizes the principle of progressive realization of the ESC rights without any discrimination but such rights may be justifiably curtailed subject to national law and ESC capability. The Committee on ESC Rights monitors compliance of State implementation. The ICESCR bears an Optional Protocol establishing individual complaints mechanism. Bangladesh is not a party to it.

The pledge of the ICESCR is incorporated in the Preamble and articles 8 to 25 under Part II of Bangladesh Constitution but these ESC rights are not directly enforceable under article 8(2). However, the State is striving to enforce these rights gradually and has kept declarations to articles 1, 2, 3, 7, 8, 10 and 13 of the ICESCR. Impoverish socio-economic background coupled with Islamic Shariah law on personal matters instigated the country to keep these reservations. Bangladesh declaration in article 1 of the ICESCR on right of self-determination of people arises out of colonial domination and similar situations. Making declaration on articles 2 and 3 as to equality of men and women, Bangladesh refers its Constitutional and statutory limitations under the Shariah Law Application Act, 1937. Despite Constitutional obligations under articles 10, 11, 14, 19, 27, 29, 34, 36-39 and 40, Bangladesh has declared not to conform with article 7 and 8 of the ICESCR ensuring right to enjoyment of just and favourable conditions of work along with trade union. As part of progressive implementation of such rights, Bangladesh has enacted some laws including the BLA with its amendment in 2013, 2018 and its Rules framed in 2015 to comply these provisions. Bangladesh has formed separate Ministry for the protection of women and children and adopted statutory measures but the declaration resembles the incapacity of the country to comply. The declaration under article 10 of the ICESCR regarding right to family along with protection of mother and child, reflects the pledges of Bangladesh as to progressive implementation keeping consistency with existing economic conditions

and development plans. Due to demographic density, Bangladesh has a two child policy. Despite such declarations, Bangladesh Constitution under article 19(2) ensures equality of men and women and even in article 28(4), there are provisions uplifting women, children and backward section of people. In spite of provisions under articles 15 (basic necessities) and 17 (free and compulsory education) of Bangladesh Constitution, it has declared not to comply with article 13 of the ICESCR. Education up to class V is free and compulsory, but there are gaps in ensuring inclusive education for all in elementary and tertiary levels and the privatization of higher education is beyond the reach of low income people.

5.4 International Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979

The CEDAW is often described as an international bill of rights for women setting out a comprehensive bundle of rights for all women in their CP and ESCarenas.It consists of six parts with 30 articlesconceptualizing elementsof discrimination against women and establishes an agenda for national action to eradicate such discrimination.It obliges members to incorporate the principle of equality of men and women in education, health, employment and all other spheres, abolishing all discriminatory laws and undertaking measures. Article 17 provides a Committee on the Elimination of Discrimination Against Women to oversee the State parties' compliance. Its Optional Protocol allows to enquiry and individual complaint mechanisms on grave or systematic violation of this Convention. Bangladesh is also a party to it.

Initially, Bangladesh kept four reservations to the CEDAW. Later in 1997, it withdrew two reservations under articles 13 (a) providing women's right to family benefits and 16 (1) (f) entailing to take appropriate measures ensuring equality of men and women with regard to rights and responsibilities on guardianship, wardship, trusteeship and adoption of children. But it is yet to withdraw another two reservations under article 2 and 16(1) (c). Article 2 enshrines gender equality in national laws through

repealing all discriminatory legislations and making new enactments to shun any kind of discrimination. Article 16 (1) (c) binds State parties to eliminate discrimination relating to marriage and family relations. The reserve provisions under these two articles are considered as the most crucial as to women's equality. However, Bangladesh made commitments to withdraw the reservations while submitting its periodic report in 2004. A Law Commission report in 2013 and the NHRC's opinion in 2017 also indicate the justification of their withdrawal. Though Bangladesh is not ruled by the Sharia law, the personal and family matters of the 90% Muslims are governed by it. The rest 10% percent of the population belongs to other religious groups who are not governed by the Sharia law. A total of 29 Islamic countries out of 57 Organization of Islamic Cooperation (OIC) members have ratified the CEDAW without any reservation.[17] So, these reservations are contradictory with articles 10, 19, 27, 28 and 29 of Bangladesh Constitution but the Oxfam report represents the irony of fate of Bangladeshi women who are six times lower than men in terms of land ownership and possessonly 20 to 30 percent of total wealth impeding their empowerment.[18]

5.5 The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (commonly known as CAT), 1984

In its 33 articles under three parts,the CAT valiantly endeavours to preventall forms of torture, cruelty, inhuman or degrading treatment or punishment. The Convention binds State parties to take effective measures preventing torture in any territory within their jurisdiction and refrain from transport people to any country where there is a minimum possibility of

17 Sisters in Islam, *CEDAW and Muslim Family Law: In Search of Common Ground* (Jan 23,2019,2:40 PM)<http://www.musawah.org/sites/default/files/CEDAWMFLReport2012Edition_1.pdf >.

18 *Land Ownership: Men possess 6 times that of women,*The Daily Star, (Jan.22 , 2019,12:30 PM)< https://www.thedailystar.net/bangladesh/male-landowners-six-times-higher-women-in-bangladesh-1690681 >.

inflicting torture.A Committee Against Torture overseesimplementation of the Convention by the State partiesand to entertain individual's complaints. Its domain is extended by an Optional Protocol facilitating visits by any national or international bodyto places of torture. Bangladesh is not a party to it. Rather, Bangladesh puts a reservation in article 14(1) that bars ensuring adequate compensation and rehabilitation for the victims of torture, inhuman and degrading treatment and their dependents. The country prioritizes national law over the CAT and allegedly its law enforcing agencies often violate this provisiondespite Constitutional safeguard under article 33 and 35. Furthermore, section 197 of the CrPC,restricts filing cases against public officials,for their offence committed in official capacity, without the government's prior permission. Despite reservation, the country has enacted the Torture and Custodial Death (Prevention) Act, 2013 portraying the promise towards IHRs instruments but it is inadequate as to compensation and rehabilitation and also is hardly enforced.

Journey of crossfire since 2004 to present by the law enforcing agencies is going unabated. According to a report of 2018, a record number of 466 people were the victims of extrajudicial killings and the number of such victims from 2001 to 2017 is 2,987. Moreover, 1,011 children were tortured and 444 were raped or sexually harassed in 2018 while 283 children were killed, 108 committed suicide and 28 died mysteriously. A total of 732 women were raped in 2018 and 63 of them were killed and 7 committed suicide after rape. On the other hand, 470 incidents of electoral violence were reported in which 34 people were killed in between the announcement of the 11th parliamentary election schedule on November 8 to December 31 in 2018.[19]

Ironically, Bangladesh being obliged to submit an initial report within a year of becoming State party under article 19 of the CAT but yet to

19 Tapos Kanti Das, *Record 466 Extrajudicial Killings in 2018,* THE NEW AGE, January 11, 2018(Jan.12,2019,2:30 PM)http://www.newagebd.net/article/61404/extrajudicial-killings:-ask-demands-judicial-commission-.

submitit. However, the NHRC of Bangladesh submitted its alternative report on the same in 2015.[20] Besides, the CAT, the country is also obliged to safeguard people against torture under its Constitution [article 35(5)] and under various international instruments such as ICCPR (Article 7), Rome Statute of the ICC [(Article 7(1)(f) and 8(2)(a)(ii) & (c)(i)], the Four Geneva Conventions on the Protection of Victims of Armed Conflicts, 1949 (Common Article 3 and the grave breaches provisions). Furthermore, 'protection against torture' has been treated as Jus Cogens and the State cannot avoid its repercussion.

5.6 The Convention of the Rights of the Child (CRC), 1989

Historically, the CRC is the most comprehensive legal instrument on childrights ever formulated and is the most widely-ratified IHRs instrument. Every phrase of the CRC crafts human dignity focusing harmonious development of children. It contains 54 articles in three parts adopting four core principles namely equality or non-discrimination; devotion to child's best interests; right to life (survival and development) and respect for the views of the child. Article 1 defines 'child' as a person below 18 years of age, unless domestic laws of a State party prescribe otherwise. The Committee of the CRCmonitors State parties' fulfillment of commitment as to the Convention. It has three Optional Protocols- first one bars involvement of children in armed conflict and sale while the second one prohibits using children in prostitution and child pornography and the third one empowers children with individual complaints or communications procedure. Bangladesh is a party to the first two Protocols. Among the South Asian countries, Bangladesh next to Bhutan ratified the CRC in 1990 as part of its commitment but also kept reservations to article 14(1) and 21 concerningchild's freedom of thought, conscience and religion plus adoption respectively.

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20 Quazi Omar Foysal, *Overdue state party report of Bangladesh on the UNCAT,* THE DAILY STAR, January 08, 2019(Jan.23,2019,3:20 PM)< https://www.thedailystar.net/law-our-rights/news/overdue-state-party-report-bangladesh-the-uncat-1684297>.

As part of the compliance of the CRC,side by side with Constitutional commitment, Bangladesh has formulated the Children Act, 2013 and the Child Rights Policy, 2011 demarcating age of children as 18 but in some other laws such as Penal Code, the BLA, Women and Children Repression Prevention Act, 2000 and the Child Marriage Restraint Act 2018 consider as children under 18 years of age. Besides, the Partial Small Ethnic Group Cultural Institution Act 2010, and the Pornography Control Act, 2012 ensure stringent measures against child abuses.However, the grim picture of HRs violation of children is a shattering reality. According to a report of 2018, at least 418 children were victimized of murder while 4,566 others faced manifold violence across the country. Some 298 children committed suicide, 627 killed in road accidents, 606 died by drowning, 80 were killed by lightning strikes, 60 were electrocuted, 46 died due to wrong treatment and seven others were killed in inland water way accidents.Absence of specialized department and child commission for child protection, the occurrences of child abuse are aggravating requiring effective steps.[21]

5.7 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), 1990

The ICMW in its 93 articles divided in nine parts focuses on migration and HRs.Referring to the ILO Conventions on Migrant Workers of 1949 and 1975 and also the Convention on Discrimination in Education of 1960, it fostersthe rights of both documented and undocumented migrantworkersand their familiesthrough imposing obligationsupon State parties which are equitable and humane.It has a Committee on Migrant Workersmonitoring implementation of the Convention. Sadly, most migrant-receiving countries in Western Europe, North America, Australia, Middle East, South Africa and India have not ratified the Convention. In comparison to other IHRs instruments, this Convention is lacking authority to oversee the violation of rights under its belt and remains neglected.

21 *418 children murdered in 2018: BSAF report,* THE NEW AGE, January 24 ,2019 <(Jan.30,2019,3:40 PM)http://www.newagebd.net/article/62727/418-children-murdered-in-2018-bsaf-report >.

As part of Constitutional framework, Bangladeshi migrants living in overseas possess equal rights like other natural born Bangladeshi citizens. Bangladesh being a State party has taken some administrative and legal initiatives that include the Anti Trafficking Act 2012, the Overseas Employment and Migration Act 2013, the Migration Policy 2016. The Bureau of Manpower Employment and Training (BMET) since 1976 and a separate Ministry since 2001 are working to regulate the overseas employment issues.According to a report, Bangladesh is the 9th highest recipient of remittances jointly with Vietnam in 2018 with US $15.9 billion.[22] In 2015, migrants remitted US $15 Billion which was 13 times higher than foreign investment. Around 10 million Bangladeshis migrated to about 160 countries as documented and undocumented workers. From 2005 to 2017, a total of 33,112 Bangladeshi migrant workers lost their lives at overseas workplace mostly in the Middle Eastern countries.[23] At least 3,793 Bangladeshi migrant workers have died in overseas countries in 2018 surprisingly of strokes or heart attacks raising concerns of their safety and security.[24]

The major migrant receiving Middle Eastern countries along with East Asian, European, North American ones are reluctant to be party to this Convention. Countries of the aforesaid region are more enthusiastic to preach than to protect HRs of migrant workers and hesitantto consider the ICMW as a core IHRs instrumentresulting poor fate of them.

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22 Ben O. de Vera, *World Bank projects growth in remittances to PH slowing to 2.8%,* THE PHILIPPINE DAILY INQUIRER, December 14,(Jan.22,2019,4:05 PM)<https://business.inquirer.net/262185/world-bank-projects-growth-in-remittances-to-ph-slowing-to-2-8 >.

23 Rayhan Ahmed Topader, *Migration, a Major Pillar for the Bangladesh Economy,* THE ASIAN AGE, January 9, 2019(Jan.22,2019,3:20 PM)<https://dailyasianage.com/news/157976/migration-a-major-pillar-for-the-bangladesh-economy>.

24 *3793 Bangladeshi Migrant Workers Die Abroad in 2018,* MIGRATION NEWS, January 11, 2019 (Jan.22,2019,3:20 PM)<http://www.migrationnewsbd.com/news/view/32037/38/3793-Bangladeshi-Migrant-Workers-Die-Abroad-in-2018.

5.8 The Convention on the Rights of Persons with Disabilities (CRPD), 2006

Across the world, the CRPD,comprised of 50 articles, is called the code of justice for persons with disabilities intending to protect their rights and dignity.It obliges the State parties to promote, protect and ensure the full enjoyment of HRs of disable persons endorsing the principle of equality. It serves as the dominant catalyst of rights based approach towards the global movement of disability rights. Furthermore, the CRPD is the sole IHRs instrument with an unequivocal sustainable development dimension. It is not only a landmark international treaty but also a comprehensive HRs Convention and international development tool, and is at the heart of the disability rights movement.It has an Optional Protocol in which Bangladesh is a party and the Committee on the CRPD is the body to monitor implementation of the Convention by the members.

Through its ratification, Bangladesh shifted its paradigm towards rights based approach from the charity approach for the protection of disability rights resulting in enactment of the Rights and Protection of Persons with Disabilities Act, 2013. Besides, Constitutional safeguard, this law aims at HRs protection of disable people providing for inclusive education, the reservation of seats in public transports, accessibility provisions in all public places, equal opportunities in employment and the protection of inherited property rights. Another law on the Neurodevelopmental Disability Protection Trust Act 2013 was made providing for care, security and rehabilitation of persons with autism. Bangladesh has around 16 million disable people who are bigger than the combined population of Sweden and Denmark.[25] Here, disability is treated as a curse of society and major cause of discrimination. Despite laws on disability rights, the stigmatized societal attitude and lack of socio-economic ability, mainstream social protection is still absent for them.

25 RezaulHaque, *Global Goals and Persons with Disabilities,* THE DAILY STAR, November 14, 2015(Jan.22,2019,#:45 PM)< https://www.thedailystar.net/op-ed/politics/global-goals-and-persons-disabilities-171946> .

5.9 The Convention for the Protection of All Persons from Enforced Disappearance (CPPED), 2006

The CPPED is the first universally binding treaty defining and prohibiting enforced disappearance as one the gravest violations of HRs. In 45 articles,under three parts, it created a beckon of hope in the darkest clouds of enforced disappearance with a motto to preventoffenders and combattheir impunity.It discusses specific procedural safeguards from enforced disappearance recognizing the rights including reparation of the victimsand their dependants.The Convention mostly follows the model of the CAT with a Committee on Enforced Disappearances to monitor compliance and to review reports of members and also accepts individual complaints including 'habeas corpus'issue.Every State party is required to take sufficient measures to criminalize enforced disappearance under its existing criminal law. Under the Convention, the widespread and systematic practice of enforced disappearance amounts to crime against humanityunder the Rome Statute, 1998.

Enforced disappearance as an 'undefined crime' in Bangladeshis practiced rampantly. Starting in 1971 by the Pakistani military rulers against the intellectuals of Bangladesh, this crime again alarmingly restarted in 2009. Following the instances of enforced disappearance, the UN Working Group on Enforced and Involuntary Disappearances (WGEID) urged Bangladesh to visit the country in March 2013 and reminded the government in November 2015 but the government paid no heed to it. Among the victims since 2009, a large majority are members and activists of opposition political parties. The allegations of such victimizations go to the law enforcing agencies specifically members of Rapid Action Battalion (RAB) or the Detective Branch of the Police.[26] Besides extrajudicial killings, at least 310 people have been the victims of enforced disappearance in

26 International Commission of Jurists, *No More "Missing Persons":The Criminalization of Enforced Disappearance in South Asia,* https://www.icj.org/wp-content/uploads/2017/08/South-Asia-Enforced-Disappearance-Publications-Reports-Thematic-Reports-2017-ENG.pdf .

Bangladesh between 2014 and 2018. Out of them, 44 dead bodies were traced, 33 returned alive while 45 were later shown arrested.[27] In absence of specific laws on enforced disappearance, these offences are treated as the crimes of kidnapping and abduction under sections 362 to 365 of the Penal Code, 1860. Bangladesh Constitution as per articles 31, 32, 33 and 35 guarantees the inalienable right to equal protection, life, liberty and access to justice along with fair trial for all. Bangladesh as a party to the ICCPR and CAT cannot indulge in any such act. Moreover, as a party to the Rome Statute 1998, it must refrain from such practice as the Statute defines the widespread or systematic practice of enforced disappearance as a crime against humanity. If Bangladesh ratifies the ICPPED, the victims of enforced disappearance could have reparation rights along with prompt, fair and sufficient compensation from the State as per article 24(4).

6. Role of Bangladesh Supreme Court in Promoting and Protecting HRs

As the guardian of the Constitution and the court of last resort, the role of Supreme Court (SC) of Bangladesh, comprising of the High Court Division (HCD) and the Appellate Division (AD), is immense in promoting and protecting HRs as envisaged in Part II denoting FPSP and Part III stating fundamental rights.

Regarding the judicial application of the FPSP, the AD in *Kudrat-E-Elahi v Bangladesh* held that the FPSP under part II is a mere collection of principles not law with enforceability.[28] The AD also observed:

> They (ESC rights) are in the nature of people's program for socio-economic development of the country in peaceful manner, not overnight but gradually. Implementation of these programs

27 SM Abrar Aowsaf and Kamrul Hasan, *International Day of the Disappeared: Families of the missing continue to struggle,* THE DHAKA TRIBUNE, August 30, 2018 (Jan.22,2019,3:20 PM) <https://www.dhakatribune.com/bangladesh/2018/08/30/families-of-the-missing-continue-to-struggle>.

28 [1992] 44 DLR (AD) 319.

> requires resources, technical know-how and many other things including mass education. Whether all the prerequisites for a peaceful socio-economic revolution exist is for the state to decide.

Referring to the FPSP, the HCD enforced 'right to shelter and housing' in *Ain o Shalish Kendra v Bangladesh*[29] *(Slum case)* and 'right to health and medical care' in *Advocate Zulhasuddin v Bangladesh*[30] by making a 'progressive interpretation' of 'right to life'. In *Modhumala v Director, House Building Research Institute & Others*[31], *Kalam & Others v Bangladesh & Ors*[32] and *Aleya Begum v Bangladesh*[33] the HCD held the same view saying that the wholesale eviction of slum dwellers without prior notice and alternative accommodation is violative of right to livelihood and 'right to life'. However, ESC rights include both positive and negative dimensions and more recently, the HCD in *Major General K.M. Shafiullah & Another v Bangladesh*[34] directed the government to adopt measures for protecting all places of historical importance (positive dimension) and also to refrain from disfiguring them by development activities (negative dimension).

Upholding the spirit of the FPSP, the AD in the landmark case of *Dr. Mohiuddin Farooque v Bangladesh* directed the government to take initiatives in realizing these rights.[35] In absence of specific domestic laws, there is no bar to apply IHRs instruments. In *Professor Nurul Islam v Government of Bangladesh*[36], the HCD embraced a progressive attitude even by endorsing the Resolution of the World Health Organization

29 [1999] 19 BLD (HCD) 488.

30 (2010) 30 BLD (HCD) 1.

31 [2001] 53 DLR (HCD) 540.

32 [2001] 21 BLD (HCD) 446.

33 [2001] 53 DLR (HCD) 63.

34 Writ Petition No. 4313 of 2009, decided on 8 July 2009.

35 [1997] 49 DLR (AD) 1.

36 [2000] 52 DLR HCD 413.

(WHO) banning advertisements of cigarettes and its related products while interpreting of right to life (article 32) considering the health hazards. In *Bangladesh v Professor Nurul Islam*[37], the AD has extended the term right to life incorporating the protection of health, enjoyment of pollution free air and water, maintenance and improvement of public health. In line with article 22 of Bangladesh Constitution, the verdict of AD in *Secretary, Ministry of Finance v Masdar Hossain*[38] on the separation of judiciary from the executive, is a good gesture but the judiciary was separated taking eight years, leading to the creation of the Bangladesh Judicial Service Commission to ensure judicial independence in term of appointment of judges of subordinate courts while the apex court has political leanings in appointment of judges.

The HCD in *State v Secretary, Ministry of Law, Justice and Parliamentary Affairs*[39] made some recommendations to implement the provisions of the CRC enacting or amending the existing laws serving the best interest of the children in terms of determination of age, standard of living, anti-torture, deprivation of liberty and justice. Accordingly, the Children Act 2013 replacing the Act of 1974 conformed the CRC. In *State v Deputy Commissioner, Satkhira and Others*, the HCD held that no child is to be charged with or tried for any offence together with an adult and the Child must be tried in the Juvenile Court and not in the ordinary Court.[40] Similarly, in *Shiplu and Another v State*, the HCD held that any order of conviction and sentence passed by the Trial Court not being a Juvenile Court in respect of an accused below the age of 16 years is liable to be set aside for want of jurisdiction, in view of the Children Act.[41] The

37 [2016] 68 DLR (AD) 378.

38 [1999] 52 DLR (AD) 82.

39 [2009] 29 BLD (HCD) 656.

40 [1993] 45 DLR (HCD) 64.

41 [1997] 49 DLR (HCD) 53.

HCD in *BNWLA v Bangladesh and Others*[42] issued an order on May 14, 2009 to form a five-member harassment complaint committee, headed by a woman in their respective organizations to investigate allegations of sexual harassment. The HCD in the same case issued groundbreaking directives to prevent sexual harassment at workplace and in public places. However, the HCD observed that it will not even enforce any ratified IHRs instrument unless it is a part of the *corpus juris* of the State through incorporation in the domestic laws. The parallel approach of the Court was reflected in *BNWLA v Government of Bangladesh and others*[43], where the HCD orchestrated 'eve teasing' as 'sexual harassment' increasing its domain by incorporating 'stalking'. The Court further directed to frame laws in the light of relevant IHRs instruments where there is vacuum of domestic laws.

The HCD in *BLAST and Others v Bangladesh*[44] observed that Sections 54 and 167 of the CrPC are not fully consistent with the fundamental rights as enshrined in articles 27 (equality before law), 31 (right to protection of law) 32 (right to life and personal liberty), 33 (safeguards as to arrest and detention) and 35 (protection regarding trial and punishment) of the Constitution. Safeguarding against the cruel, inhuman and degrading treatment and punishment, the SC laid down a 15-point guidelines including necessary amendments of both sections of the CrPC along with other provisions of relevant laws regarding exercise of powers of arrest and interrogation of an accused. The AD in *Bangladesh v BLAST* upheld the judgment of the HCD and reflected the principles of some IHRs instruments as envisaged in the UDHR, ICCPR and CAT.[45] The AD in *Tayeeb and Others v Bangladesh*[46] held that any act of extra-

42 [2009] 14 BLC (HCD) 694.

43 [2011] 31 BLD (HCD) 331.

44 [2003] 55 DLR 363.

45 [2016] 8 SCOB AD 1.

46 [2015] 67 DLR (AD) 57.

judicial punishment in pursuance of *fatwa* (religious edict) affecting the rights, reputation or dignity of any person would be completely illegal and punishable offence. Even, the HCD in *Badiul Alam Majumdar and others v Information Commission, Bangladesh and another*[47] has facilitated the disclosure of information as to financial matters of political parties of Bangladesh and outlawed the plea of secrecy of information reflecting the spirit of article 19 of the UDHR and ICCPR.

The recent attitude of the SC in burying the cruel, inhuman and degrading treatment towards women is laudable. The HCD in *BLAST and Others v Bangladesh* bans the 'two finger test' of the rape victims since it undermines the integrity or dignity of women and girls directing the lawyers not to ask any question to the rape victims that jeopardizes their dignity. This case has impliedly reflected the spirit of the CEDAW, 1979 and CAT, 1984.[48] But in *Hussain Muhammad Ershad v Bangladesh and Others*[49], the AD observed that universal norms of HRs enshrined in the UDHR and other Covenants are not directly enforceable in domestic Courts but the Court should not straightaway ignore international obligations. It also observed that if domestic laws are not clear enough then it should take help from international IHRs instruments. Similarly, in *Bangladesh v Hasina*[50], the AD opined that the courts would not enforce IHRs treaties, even if ratified by Bangladesh, unless these were enunciated in national laws. But in the same case, the Court took proactive approach in interpreting the provisions of life, liberty and other rights under the Constitution in parity with the UDHR and the ICCPR.

The above discussion divulges that the judicial precedents set by the SC as to domestic acceptance and enforceability of IHRs instruments enumerate mixed reactions regarding its commitments towards IHRs

47 [2017] 69 DLR (HCD) 100.

48 Writ Petition No. 10663 of 2013 and decided on 12 April 2018.

49 II ADC (2005) 371.

50 60 DLR (AD) (2008) 90.

standard. If IHRs instruments do not contradict with domestic laws, it may be considered for implementation in line with the pledge of article 25 and 145A of Bangladesh Constitution. But the inherent limitation of the SC arises when President declares the state of emergency under article 141A suspending the application of articles 36-40 and 42 of the Constitution entailing some CP rights. In *Shamsul Huda and Others v Bangladesh*[51], the HCD aptly said that the judiciary stands between the people of the country and the State as a shield against all pressures and misuse of power by the executive authority. Besides, the SC can take any *suo moto* initiative for the protection of HRs as part of discretionary power in the form of judicial activism. Nevertheless, in practice, the SC generally prioritizes domestic law over international law like other common law countries. More specifically, it follows the notion of dualism rather than monism concerning interpretation of Constitution and its attachment with international laws including IHRs instruments.

7. Challenges and Opportunities

Bangladesh is far ahead in term of being State party in core nine IHRs instruments in comparison to other South Asian countries. As part of Bangladesh's commitment towards ensuring freedom, equality, justice, peace, security and solidarity for uplifting human dignity and welfare, it has embraced eight core IHRs instruments out of nine as a State party. The commitment of the country is expected to be reflected with responsible behavior. For the promotion and protection of HRs, democratic development plays a crucial role. Rule of law as a tenet of democracy, attempts to safeguard individual's freedoms and rights.[52]

However, there are enormous political, economic, social and cultural challenges taking more time in fulfilling the commitment of the IHRs

51 [2009] 61 DLR (HCD) 523.

52 HILAIRE BERNET, CONSTITUTIONAL & ADMINISTRATIVE LAW 591 (Cavendish Publishing Ltd 2002) .

instruments. Since independence in 1971, Bangladesh is facing numerous hurdles, like poverty, natural and human induced disaster, unemployment, partisanship, domestic violence, socio-economic upheaval, political intolerance, pervasive corruption, money laundering, bureaucratic complexity, decentralization of powers, independence of judiciary, over population etc. in establishing democracy, rule of law and good governance and to overcome these hurdles in inculcating the culture of HRs protection is not easy. Some other challenges include lack of awareness, dearth of resources and backward mindset of people, unskilled manpower, divided Civil Society Organizations (CSOs), lack of coordination among the State entities with CSOs, inefficient institutional set up, less proactive judiciary, poor education and research on HRs etc. About 50% people of the country are not familiar with the concept of HRs.[53] Application of HRs protection mechanism is still in far behind for the downtrodden and poverty stricken people which is seemingly a rhetoric.

In Bangladesh, HRs are mostly being intermittently violated by the State itself along with influential quarters and very often the opposition political party members and activists are the worst victims. Professor Mizanur Rahman, the former chairman of the NHRC from 2010 to 2016 stated that 70 % of the allegations of HRs violations go against the law-enforcement agencies.[54] Among the common infringements, extrajudicial killing, enforced disappearance, institution of ghost or fictitious cases, arbitrary arrest, torture, domestic violence, detention, persecution in the name of interrogation, oppression on minority, curtailing of freedom of expression, freedom of press, corruption, vote rigging etc. are worth mentioning. The rising number of extrajudicial killings, enforced

53 Mizanur Rahman, National Human Rights Commission: Six Year of Aspirations and Accomplishments (2010-2016), *Human Rights Theory, Law and Practice in Bangladesh: Lectures and Essays,* 294(2018).

54 Ridwanul Hoque, *Clashing Ideologies' Development and Cooperation,* (Jan 22,2019,3:40PM) <https://www.dandc.eu/en/article/bangladeshs-crisis-civil-liberties-and-human-rights> .

disappearances, blocking of freedom of expression and other forms of HRs violation are exposing the absence of rule of law and accountability of the law enforcement agencies and of the government. Out of 113 countries, Bangladesh has ranked 102 in rule of law index.[55] From 2006 to 2015, about US$81.74 billion was siphoned off Bangladesh.[56] Considering the deplorability of HRs, eminent jurist Shahdeen Malik opined that in bringing the trust back on the law enforcing agencies, each HRs violation issue should be neutrally investigated for unearthing the truth taking punitive actions.[57]

Though the State agencies including the NHRC, Information Commission, Anti Corruption Commission, Public Service Commission and Election Commission are functional in snail's pace, they are highly politicized and reluctant to serve their duties transpiring their rhetoric mindset as to HRs commitment. For example, the NHRC is striving to promote and protect HRs but it lacks in terms of its active visibility and functionality owing to over dominance of government officials, shortage of manpower, logistic support and budgetary allocation.

The overall HRs situation is now very alarming and is gradually aggravating putting the safety and security of people at stake. The prevailing shabby state of HRs in Bangladesh is revealed by the UN Human Rights Council (UNHRC) through a process of Universal Periodic Review (UPR), where the non-compliance of several HRs issues such as torture, enforced disappearance, marital rape, defamation and freedom of

55 *Bangladesh ranks 102 out of 113 countries on WJP rule of law index,* THE DAILY STAR, January 31, 2018 (Feb 4,2019,2:45 PM) https://www.thedailystar.net/country/bangladesh-ranks-102-out-113-countries-wjp-rule-law-index-1527916.

56 Bertil Lintner, *Illicit money gushing out of Bangladesh,* ASIA TIMES ,January 30 2019(Feb 4,2019,2:20 PM) < http://www.atimes.com/article/illicit-money-gushing-out-of-bangladesh/> .

57 Prapti Rahman, *Human Rights Watch Slams Bangladesh Over Forced Disappearances,* BENAR NEWS, July 6 2017(Jan 31,2019,3:45 PM) < https://www.benarnews.org/english/news/bengali/disappearance-report-07062017161444.html>.

expression, abolition of death penalty, labour rights, and LGBT issues are addressed by the body giving a long list of recommendations. Of those recommendations, Bangladesh accepted some of them but refused quite a few.[58] On the contrary, the role of CSOs in promoting and safeguarding HRs through their different actions such as awareness building, publication of reports, filing cases, policy advocacy etc. is acclaimed by both national and international bodies. But in many cases, the donor driven attitudes of the CSOs along with their divided role in prioritizing their vested interests and in some cases partisanship cannot be refuted.

International community has expressed cynicism to the vow of the country concerning the objective implementation of eight IHRs instruments in which Bangladesh is a party.[59] Human Rights Watch and Amnesty International have expressed serious concerns on the deterioration of HRs issues of enforced disappearance, extrajudicial killing, torture, arbitrary arrest, freedom of expression etc. They urged the government to show more respect towards the basic HRs for its citizens as the government is serving for the rights of the Rohingya.[60] However, because of several reservations to IHRs instruments, the pledge of Bangladesh reflects a piecemeal pledge and a metaphor in realizing HRs. Above all, like other Asian countries including Bangladesh, the notion of HRs is treated as a Western concept and the IHRs system as Eurocentric paving the way for reluctance in advancing comprehensive promotion and protection of HRs.[61]

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58 THE DAILY STAR, May 25, 2018(Jan.11,2019,4:00 PM) <https://www.thedailystar.net/star-weekend/human-rights/7-human-rights-recommendations-1581010>.

59 Kawser Ahmed, *Doubtful Commitment to Human Rights,* THE DAILY STAR, December 13, 2016(Jan 20,2019,2:30 PM) < https://www.thedailystar.net/law-our-rights/doubtful-commitment-human-rights-1329391> .

60 *HRW: Bangladesh skirts human rights issues at UN,* THE DHAKA TRIBUNE, May 17, 2018 (Jan. 19,2019,1:00 PM)<https://www.dhakatribune.com/bangladesh/2018/05/ 17/human-rights-watch-bangladesh-avoids-major-issues-at-the-un> .

61 Abdullah Al Faruque, *International Humans Law: Protection Mechanisms and Contemporary Issues* 149, 150 (New Warsi Book Corporation 2015).

Despite boundless challenges, Bangladesh is making tremendous economic progress in the last couple of decades with the contribution of the readymade garment and migrant workers and so economic development can help realizing HRs through eradication of poverty. The blooming economy has been elevated to 41st position among 193 countries.[62] Besides, the incumbent government has initiated couple of visionary plans up to 2021, 2041 and 2100 with a view to attaining various goals including the Sustainable Development Goals (SDGs) amid realization of HRs. Since around half of the population of Bangladesh is less than 18 years of age and the literacy rate is enhancing gradually, there is a possibility of sensitization of HRs protection. From 1990, there is tremendous development in term of women empowerment. In fact, 50 reserved seats[63] in the Parliament, inclusion of 33% women leadership in political party charters by 2020[64] and participation of women in different job sectors and other representative bodies under various sectoral laws which will further empower them to claim and realize their core HRs. As part of Constitutional and legislative obligations, there is an opportunity to establish the office of the Ombudsperson to check back the anomalies of government agencies. Also, there is necessity for continuous reformation of police personnel sensitizing them for HRs compliance. However, a large number of development organizations including INGOs and NGOs especially BRAC, Grameen Bank, along with various media outlets play a

62 *Study: Bangladesh ranked 41st largest economy in 2019,* THE DHAKA TRIBUNE (Feb.5,2019,5:30PM)<https://www.dhakatribune.com/bangladesh/nation/2019/01/07/study-bangladesh-ranked-41st-largest-economy-in-2019> .

63 The provision of reserved seats for women was introduced in the 1st parliament in 1973, with 15 seats reserved for women in addition to the 300 general seats. Later in 1990, the 4th parliament increased the reserved seats to 30 for the next 10 years. The 8th parliament increased the numbers to 45 for the next 10 years by passing the constitution's 14th amendment act in 2004. The 9th parliament by the 15th amendment in 2011 raised it to 50. The 10th parliament by the 17th amendment in 2017 has kept intact same reserve seats for the next 25 years.

64 Section 90(B) (1) (b) (ii) of the RPO-1972 (Amendment made with effect from 19th August 2008).

crucial role in awareness building, conducting research and policy advocacy on HRs issues. To reflect the commitment of IHRs instruments several domestic laws are enacted and now in operation to secure the various aspects of HRs. The higher judiciary has been seen slightly proactive in interpreting and applying the IHRs instruments through PILs as part of judicial activism.

8. Recommendations

i) Since there are ample of instances of HRs violation, such as extrajudicial killing, torture, domestic violence, arbitrary arrest and detention, Bangladesh is obliged to comply with international standard as State party to eight out of core nine IHRs instruments. Hence, implementation of Constitutional pledge under Preamble, Part I and II along with other existing laws to ameliorate the gaps of HRs compliance is required.

ii) As Part II of Bangladesh Constitution bearing ESC rights is not directly enforceable under article 8(2), the parliament should consider removing this restriction after almost 50 years of independence of the country.

iii) Some provisions of existing laws especially sections 54, 167 and 197 of the CrPC, sections 17, 18, 21, 25, 28, 29, 31, 32, and 43 of the DS Act, sections 2, 3, 16, 17, 18, 19 and 20 of the SPA which are inconsistent with IHRs instruments and are in need of amendment or repeal.

iv) As the practice of enforced disappearance is widespread, Bangladesh should sign and ratify the ICPPED, 2006 without further delay. Moreover, the reservation as to victim's compensation and rehabilitation under the CAT and application of the Shariah law contrary to CEDAW may be lifted.

v) As the law enforcing agencies are found to be perpetrators of HRs violation in most cases, they should be sensitized through

awareness and education being equipped with institutional capacity, specialized training in institutionalizing the culture of HRs. Their transparency and accountability need to be ensured amid rewards for good practices or penalty for malpractices.

vi) Strengthening of the State entities especially the NHRC, through amendment of relevant provisions of its law by incorporating provisions of adequate manpower including panel lawyers, curtailing dominance of government officials in its functionary, should be done for its effective functioning.

vii) All stakeholders including the NHRC, CSOs, development partners and the higher judiciary should work hand in hand through mutual cooperation in fulfilling the mandate of HRs. For ensuring child protection, formation of a separate 'Child Commission' may be actively considered. The creation and implementation of 'Ombudsperson' may be considered for eradicating government anomalies.

viii) Bangladesh Constitution along with other national laws and IHRs instruments bearing provisions of HRs may be introduced in elementary to tertiary level education so that people of all strata remain aware of their basic HRs and claiming their progressive realization.

ix) The parliament should be activated as the hub of all actions including HRs issues amidst ensuring the presence of strong opposition party. The mentality of ruling party to accept the constructive criticisms by the opposition party or CSOs should be practiced properly.

x) For securing HRs for all, the independent judiciary is imperative. So, the initiative of 1 November 2007 as to separation of judiciary from the executive should be made more meaningful in realizing the rule of law and other basic HRs.

9. Concluding Remarks

Apparently, Bangladesh has shown positive commitment towards core IHRs instruments but mostly state-sponsored repeated violations of HRs has vitiated its commitment tarnishing the image of the country. Only political commitment is not enough for the realization of HRs rather economic development is also necessary for fulfilling the cherished commitment. In 50 years of independence, Bangladesh is in need of rethinking of its ESC rights as enforceable rights while the enforceable CP rights should be streamlined in terms of application. People of all walks of life are eagerly waiting to see the rejuvenating attitude of all the stakeholders especially government entities in ensuring core HRs including freedom, equality, rule of law and justice aiming at the welfare, dignity and peace of all citizens and non-citizens. Successive governments showed little respect towards compliance of global HRs standard. Politicians in power and in opposition are at loggerheads in their commitments and positive actions for HRs protection. The political parties in power are reluctant towards realizing the commitments for HRs *vis a vis* when in opposition they take a sharp u-turn in raising voice as if they are pro- HRs activists. Lastly, it may be stated that in ensuring the promotion and protection of HRs, the State-owned entities as part of their obligations arising out of core nine IHRs instruments and national HRs instruments and the CSOs can play a pivotal role.

Integrating Victim Impact Reports in the Indian Criminal Justice Process: Feasibility and the Way Forward

Dr Jacob Joseph*

1. Introduction

In traditional justice systems, victims of crime usually found support and assistance from their family, village or tribe.[1] However, as societies became more complex and as the systems of justice evolved and took new forms the state gradually assumed a dominant role in the justice process. As the state took over the responsibility for investigation of crimes, prosecution of accused, adjudication and enforcement of sentencing decision the victims were afforded few opportunities for directly participating in the criminal justice process. Since the middle of the twentieth century the international community started paying increased attention to the problems faced by victims of crime. The United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power which adopted in 1985 was a milestone document in the onward march of victim jurisprudence. The 1985 Declaration recommended, *inter* alia, measures to be taken on

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1 UNITED NATIONS OFFICE FOR DRUG CONTROL AND CRIME PREVENTION, HANDBOOK ON JUSTICE FOR VICTIMS, iv(1999).

behalf of victims of crime at the international, regional and national levels to improve access to justice and fair treatment, restitution, compensation and assistance.

For a long time, the Indian criminal justice system was broadly insensitive to needs of victims of crime. However, as an outcome of the 152nd and 154th Reports of Law Commission of India as well as the Report of Committee on Reforms of Criminal Justice System (Malimath Committee) several far reaching victim-oriented reforms have been brought about in the Code of Criminal Procedure, 1973 (Cr.P.C.)

In spite of the various reforms, the statutory landscape relating to criminal procedure in India has not put in place judicial and administrative processes which permit presentation and consideration of the relevant materials relating to the impact of the crime on victims at various stages of legal proceedings. In other words, the right of victim to present before the court materials relating to impact of crime has not yet merited statutory recognition.

Information on the impact of a crime on the victim is highly essential, *inter alia*, for two purposes. Firstly, to take informed decisions in the matter of sentencing and secondly, to determine the compensation that can be awarded to the victim. This paper aims to examine whether there is scope for facilitating the presentation and consideration of the relevant materials relating to the impact of crime on victims at various stages of the criminal justice process. It also attempts to offer suggestions on the improvements that can be made in the present system so as to facilitate the presentation and consideration of the relevant materials relating to the impact of crime on victims.

2. The Current Scenario

The investigation of crime is exclusively a police function and the victim has a role only if the police consider it necessary. The police department of certain states have issued administrative instructions requiring the police

to give information on progress of investigation to the victim. In 2012 the police department of State of Kerala, by way of a circular[2], introduced a system of Victim Liaison Officer (VLO) to establish a meaningful link between the investigating officer and the family of the victim. The stated objectives of the VLO system were twofold. Firstly, to acquire vital and relevant information useful for investigation and secondly, to instil confidence in the victim or the family of the victim. The VLO in respect of each case was to be designated by the investigating officer within 48 hours of commencement of investigation The sub-divisional police officer is to approve the nomination of the VLO with due care paying adequate attention to his professional integrity and blemishless antecedents and character. The VLO is required to meet the victim or the family of a deceased victim atleast once every week and inform them about progress of the investigation. VLO is also required to maintain a separate diary in which the details of the visits and the information obtained from the victim which are useful to the investigation of the case should be noted. The duty of the VLO will end with the submission of the final report under section 173 of Cr.P.C. Though a novel initiative, the VLO system has certain limitations. Firstly, it is envisaged to be applicable only in respect of offences of murder, rape as well as atrocities against scheduled castes and scheduled tribes. Secondly, though instilling confidence in the victim is one of the stated objectives of the system the emphasis appears to be more on acquiring relevant information useful for investigation.

In its report submitted in 2013, the Malimath Committee had pointed out the need for an officer equivalent to Probation Officer to take care of the interests of victims during the investigation and trial stages.[3] According to the Committee such an officer may work closely with the police and courts to monitor, co-ordinate and ensure delivery of justice during pendency of

2 *Circular Number 36/2012,* KERALA POLICE WEB PORTAL (15. Nov, 2012), https://old.keralapolice.gov.in/media/pdf/circulars/2012/36.pdf.

3 GOVERNMENT OF INDIA, REPORT OF COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM 6.7.12 (2013).

a case.[4] The Committee however stopped short of elaborating further or offering concrete recommendations on how such an officer can take care of the interests of victims and also how 'justice to victims' can be realized in the overall context of criminal justice process.

A criminal court which determines the guilt of the accused is primarily concerned with the facts and circumstances in so far as they are relevant to the crime and the manner in which it was committed. All the facts and circumstances bearing upon the crime and the manner of its commission is brought to the notice of the court through the section 161 statements, the report submitted by the police on the completion of investigation as well as the evidence adduced during the course of trial.

The oral testimony of the victim when he appears as a witness during the trial may help the judge in understanding the facts and circumstances of the case from the victim's perspective and thereby, to a certain extent, assess the impact of the crime on the victim. The impact of the crime on the victim is also put across to the court by the public prosecutor during the course of oral and written submissions made after the close of evidence in a trial.[5] The primary focus of the prosecution being proving the guilt of the accused it is doubtful whether the prosecution can profitably use this opportunity to bring to the attention of the court the multidimensional impact of the crime on the victim. Further, the absence of adequate materials and records to establish the extent of impact – physical, psychological, economic and other kinds of impact – of crime on the victim can also be a deficiency which can hamper the process of convincing the court on the nature and scope of the impact.

The pre-sentence hearing conducted as per the requirement of section 235 (2) Cr.P.C. is primarily a mechanism which facilitates the process of hearing the accused on the question of sentence. Be that as it may, it

4 *Id.*

5 Code of Criminal Procedure, 1973, § 314, No. 2, Acts of Parliament, 1973 (India).

primarily helps the court to gather adequate information regarding the accused.[6] Though section 235 (2) is more concerned with hearing of the accused, the pre-sentence hearing may afford some opportunity to the prosecution to bring to the attention of the court, through oral as well as written arguments, the impact of the crime on the victim. As held by the Supreme Court in *Santa Singh* v. *State of Punjab*[7] the hearing contemplated by section 235 (2) Cr.P.C. is not confined merely to oral submissions but extends to giving an opportunity to the prosecution and the accused to place before the Court facts and materials relating to the various factors bearing on the question of sentence and, if they are contested by either side, then to produce evidence for the purpose of establishing the same. In *Mallikargun Kodagali* v. *State of Karnataka*[8], the Supreme Court of India speaking through Justice Madan B. Lokur referred to the need to give due recognition to victim impact statements so that an appropriate punishment is awarded to the accused.

Though the proviso to section 24 (8) Cr.P.C. permits a victim to engage an advocate of his choice to assist the public prosecutor conducting the prosecution of the offence the said right has been given a restricted interpretation by the Indian judiciary. In *Rekha Murarka* v. *State of West Bengal*[9] the Supreme Court of India held that an advocate engaged by the victim should ordinarily not be given the right to make oral arguments or examine and cross-examine witnesses. According to the Court the advocate engaged by the victim shall be subject to the directions of the public prosecutor just as a pleader engaged by a private party is subject to the direction of the public prosecutor as per the scheme of section 301 (2) of Cr.P.C. Be that as it may, all that an advocate engaged by a victim can do is to route certain questions or points through the public prosecutor and

6 It is also possible for the court to get any additional information on the accused by obtaining a report of the probation officer under the Probation of Offenders Act.

7 Santa Singh v. State of Punjab, (1976) 4 SCC 190.

8 Mallikargun Kodagali v. State of Karnataka, (2019) 2 SCC 752.

9 Rekha Murarka v. State of West Bengal, MANU/WB/1854/2019.

if that does not produce desired results bring those questions to the notice of the court. In addition to the above, such an advocate can, after evidence is closed, submit written arguments if the court permits him to do so.

In short, at the conclusion of a criminal trial and prior to sentencing very little information, either obtained in the form of documents or oral submissions, is available with the sentencing judge to assess *the impact of the crime on the victim* (emphasis added).

The absence of a comprehensive framework and adequate machinery for collection and presentation of information on the multidimensional impact of the crime on the victim is a missing link in the current landscape of criminal justice process in India. In other words, there is no explicit provision in Cr.P.C. facilitating the production of any relevant materials before the court so as to enable it to formulate an informed opinion on the impact of the crime on the victim. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power requires states to establish judicial and administrative processes which permit presentation and consideration of the concerns of victim at appropriate stages of the legal proceedings.[10]

3. Victim Impact Reports and the Sentencing Process

A judge who is involved in the process of sentencing has a duty to maintain the proportion between the crime and punishment while further balancing the rights of the wrongdoer as also of the victim of the crime. If one goes through the decisions of Supreme Court of India it would appear that the court takes into account a combination of different factors while exercising discretion in sentencing. Gravity of the offence, manner of its execution, impact on the society, repercussions on the victim and proportionality of punishment have been emphasised upon as relevant

10 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power cl. 6 (b), Nov. 29, 1985, A/RES/40/34.

factors to be taken into account in the sentencing process.[11] In *State of Madhya Pradesh* v. *Suresh*[12] the Supreme Court had an occasion to remind that factors relating to the nature of crime and its impact on the victim cannot be lost sight of when certain extenuating or mitigating circumstances are suggested on behalf of the convict.

The Supreme Court has often taken the position that the rights of the victim cannot take a back seat while considering the rights of accused persons. The responsibility of the sentencing court to pay due regard to the agony of the victim or survivors of the victim has been emphasized by the Supreme Court in several judgments. In *Shyam Narain* v. *State (NCT of Delhi)*[13] the Supreme Court held:

> "The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim"[14]

11 Ramashraya Chakravarti v. State of Madhya Pradesh, (1976) 1 SCC 281; Dhananjoy Chatterjee alias Dhana v. State of W.B., (1994) 2 SCC 220; State of Madhya Pradesh v. Ghanshyam Singh, (2003) 8 SCC 13; State of Karnataka v. Puttaraja, (2004) 1 SCC 475; Union of India v. Kuldeep Singh (2004) 2 SCC 590; Shailesh Jasvantbhai and Anr. v. State of Gujarat and Ors., (2006) 2 SCC 359; Siddarama and Ors. v. State of Karnataka (2006) 10 SCC 673; State of Madhya Pradesh v. Babulal, (2008) 1 SCC 234; Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498).

12 State of Madhya Pradesh v. Suresh, (2019) 14 SCC 151.

13 Shyam Narain v. State (NCT of Delhi), (2013) 7 SCC 77.

14 *Id,* para 11.

The Supreme Court has time and again emphasised that while sentencing, the courts must keep in view not only the rights of the accused but also the interests of the victim and the society at large. For instance, in *Suryakant Baburao* v. *State of Maharashtra*[15] the Supreme Court observed that the courts must keep in view the interests of the victim and society at large while sentencing in criminal matters. In *Sevaka Perumal and another* v. *State of Tamil Nadu*[16] the Supreme Court emphasised on the need for giving due consideration to the needs of the injured and observed:[17]

> "...undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. If the courts did not protect the injured, the injured would then resort to private vengeance…."

As discussed elsewhere, there are serious limitations with respect to the interventions the public prosecutor can make during the course of pre-sentence hearing. Absence of documented materials showcasing the impact of the crime on the victim is a serious handicap which prevents the sentencing judge from taking informed decision in the matter of sentencing. Absence of such materials can also affect the quality of the decision making when the court award compensation to victims of crime. The last part of this paper will therefore offer suggestions on how the presentation and consideration the relevant materials relating to the impact of the crime on victims can be integrated into the sentencing process in India.

4. Victim Impact Reports and the Compensation Frameworks

There are several channels through which compensation can be awarded to victims of crime in India. Under the Code of Criminal Procedure, 1898, no compensation was payable to victims of crime unless a substantive

15 Suryakant Baburao v. State of Maharashtra, MANU/SC/0996/2019

16 Sevaka Perumal and another v. State of Tamil Nadu, MANU/SC/0338/1991

17 *Id,* para 9.

sentence of fine was imposed and the amount of compensation was limited to the extent of fine realised, and that too, when compensation was, in the opinion of the court, recoverable by the court in a civil court. The Cr.P.C. made an improvement and it recognised in section 357 the principle of compensating the victim, even when no sentence of fine was imposed. In due course it was felt that principles of compensation to victims of crime need to be reviewed and expanded to cover all cases. It was also felt that the State should accept the principle of providing assistance to victims out of its funds, even in case of acquittals or where the offender is not traceable or identifiable. It is in this background that Law Commission of India in its 154th Report recommended for incorporating a provision in Cr.P.C. so that opportunities for securing justice are not denied to any citizen on ground of economic or other disabilities. This led to the incorporation of section 357A Cr.P.C. in 2009.

Today, there are several frameworks for payment of compensation to victims of crime in India, the most important of them being (a) victim compensation schemes notified by state governments under section 357A Cr.P.C; (b) 2018 NALSA Compensation Scheme for Women Victims / Survivors of Sexual Assault and other Crimes and (c) framework under POCSO Act. These frameworks are diverse in their own ways. Though there are several limitations in these frameworks it is advisable to have a close look at the broad features of these frameworks since they may be of some assistance in developing a new framework for assessing the impact of a crime on a victim.

4.1 General Victim Compensation Scheme

Section 357A Cr.P.C. requires State Governments to prepare a scheme for providing funds for the purpose of compensation to the victims or his dependents who have suffered loss or injury as a result of crimes and who require rehabilitation. As per section 357A Cr.P.C. the compensation under the victim compensation scheme is to determined and awarded by the legal services authority. This can be done broadly under two circumstances.

The first circumstance is on a recommendation by a trial court. If at the conclusion of the trial, the trial court is satisfied that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.[18] The second circumstance is where the offender is not traced or identified, but the victim is identified, and where no trial takes place. In such a situation the legal services authority can on receipt of an application from the victim or his dependents determine and award compensation under the victim compensation scheme. In both circumstances the legal services authority can make necessary enquiries with respect to award of compensation and the procedure must be completed within two months from the date of recommendation or application as the case may be.[19] Section 357A also empowers the legal services authority to pass appropriate orders to make available immediate first-aid facility or medical benefits free of cost or any other appropriate relief so as to alleviate the suffering of the victim.[20] This order is to be issued on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned.[21] Thus, apart from the power to award compensation as discussed above, the Cr.P.C. also empowers the legal services authorities to grant interim reliefs so as to alleviate the suffering of the victims.

The Government of Kerala notified the victim compensation scheme as required by section 357A Cr.P.C. in 2014. The Kerala Victim Compensation Scheme, 2014 was thereafter replaced by the Kerala Victim Compensation Scheme, 2017 (hereinafter referred to as KVCS). The KVCS is applicable only in respect of the offences and injuries specified in the schedule to

18 Code of Criminal Procedure, 1973, § 357A (5), No.2, Acts of Parliament, 1973 (India).

19 *Id.*

20 Code of Criminal Procedure, 1973, § 357A (6), No.2, Acts of Parliament, 1973 (India).

21 *Id.*

the scheme.[22] According to KVCS the legal services authority is to award compensation only after conducting *due enquiry through appropriate authorities* (emphasis added). The appropriate authorities through which such an enquiry can be conducted is not expressly stated in the KVCS. In practice, the legal services authority utilises the resources of probation officers who are attached to the Social Justice Department of Government of Kerala as well as para legal volunteers for the purpose of conducting such enquiries. The KVCS also empowers the legal services authority to *call for any relevant information necessary to determine the genuineness of the claim* (emphasis added). Though the amount of compensation is to be decided in accordance with the standard criteria given in the schedule to the scheme, the KVCS unlike the other two frameworks, does not enumerate the factors which may be taken into consideration while deciding any matter relating to loss or injury suffered by the victim.

4.2 Compensation Framework under POCSO Act

The Protection of Children from Sexual Offences Act, 2012 envisages a framework for compensating children who are victims of POCSO offences. The POCSO special court is empowered by law to direct payment of compensation to the child for the immediate rehabilitation as well as for any physical or mental trauma caused as a result of the offence.[23] The

22 The KVCS mainly covers the following offences and injuries: (a) death (b) culpable homicide not amounting to murder; (c) causing death by negligence; (e) dowry related violence; (f) permanent disability (80% or more); (g) partial disability (40% to 80%); (h) burns affecting greater than 25% of the body (excluding acid attacks); (i) burns affecting less than 35% of the body (excluding acid attack); (j) loss of foetus; (k) physical abuse of minor; (l) rape; (m) sexual assault (excluding rape); (n) fracture/dislocations' (o) injury resulting in surgery/serious damage to vital organs; (p) loss of fertility; (q) major injuries not specified otherwise; (r) minor injuries not specified otherwise; (s) acid attack (disfigurement of greater than 40%); (t) acid attack (disfigurement of less than 40%); (u) human trafficking; (v) women victims of cross border firing

23 Protection of Children from Sexual Offences Act, 2012, § 33 (8), No. 32, Acts of Parliament (India).

power available to a POCSO special court is of wider amplitude. The court can *order for interim compensation* (emphasis added) for relief or rehabilitation of the child at any stage after registration of first information report (FIR). By its very nature such an order will have to be complied with and the legal services authority shall be bound to provide that compensation without fail. Such an *order* (emphasis added) can be issued by the court either on its own or on an application filed by or behalf of the child. An indicative list of factors that may be taken into account by the special court while issuing a direction for award of compensation have been listed out in POCSO Rules.[24] Apart from the power to order for interim compensation, the special court can also *recommend award of compensation* (emphasis added) where (a) the accused is convicted or (b) the case ends in acquittal or discharge or (c) in situations where the accused is not traced or identified. This *recommendation for award of compensation* (emphasis added) can be issued by the court on its own or on an application by or on behalf of the child and if in the opinion of the court the child has suffered loss or injury as a result of the offence. The recommendation for award of compensation made by the special court is thereafter dealt with in accordance with the framework of the victim compensation scheme notified under section 357A of Cr.P.C.

24 Severity of the mental or physical harm or injury suffered by the child; expenditure incurred or likely to be incurred on medical treatment for physical and / or mental health; loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason; loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason; whether the child contracted a sexually transmitted disease as a result of the offence; whether the child contracted human immunodeficiency virus as a result of the offence; any disability suffered by the child as a result of the offence and financial condition of the child against whom the offence has been committed are some of the factors which a POCSO special court can take into account while issuing a direction for award of compensation.

4.3 2018 NALSA Scheme

The *NALSA Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes, 2018* (2018 NALSA Scheme) is a compensation scheme which has been designed for providing relief and rehabilitation to victims or dependents[25] of victims of certain offences.[26] The interim compensation under the 2018 NALSA Scheme can be awarded by the legal services authority in deserving cases as well as in cases of acid attacks either *suo motu* or on an application made by the woman victim or her dependent or by the Station House Officer. The legal services authority can determine the final compensation either on the basis of the recommendation for award of compensation made by the court under section 357 (2) or 357 (3) or on the basis of an application made under section 357 (4) by the woman victim or her dependent. The factors which may be taken into consideration by the legal services authority while deciding any matter relating to loss or injury suffered by the victim have been enumerated in clause 8 of 2018 NALSA Scheme. These factors are almost identical to the factors specified in the POCSO Rules. The only additional factor which one can notice in clause 8 of 2018 NALSA Scheme is *'the age of deceased, her monthly income, number of dependents, life expectancy, future promotional/growth prospects etc in the case of death of the victim'* (emphasis added).

5. The Way Forward

Though Section 357 Cr.P.C., the 'victim compensation scheme' notified under section 357A, the 2018 NALSA Compensation Scheme as well as the POCSO framework for award of compensation lay down the rules relating to victim compensation they are silent on how the information pertaining

25 The term 'dependent' as defined in the 2018 NALSA Scheme includes husband, father, mother, grandparents, unmarried daughter and minor children of the victim.

26 The 2018 NALSA Scheme is only applicable in the context of the offences under sections 326A, 354 A to 354 D, 376 A to 376 E, 304B, 498A (in case of physical injury as specified in the schedule to 2018 NALSA Scheme) and 509 of Indian Penal Code, 1860.

to the impact of the crime on the victim is to be gathered, presented and effectively used in the context of compensating the victims. The current scheme of Cr.P.C. also does not provide a detailed framework which can assist the sentencing judge to gather information as to the impact of the crime on the victim. Thus, it is highly necessary that we develop and put in place an institutionalised mechanism to facilitate the presentation of information regarding the impact of the crime on the victim both before the trail courts as well as other entities entrusted with the mandate of awarding compensation to victims of crime.

It is suggested that the system of VLO should be institutionalized by bringing about suitable amendments in the Cr.P.C. To begin with, designation of a member of the investigation team as VLO shall be made mandatory in context of select offences which are of a grievous nature. The appropriate state governments should take a call on this aspect. The mandate of the VLO shall be clearly defined in the Cr.P.C. and his interaction with the victim shall extend till the stage of competition of judicial proceedings in the trial court. Though the Cr.P.C. lays down an elaborate scheme relating to the investigation of offences it does not specifically require the investigating officer to collect and consolidate information as regards the impact of crime on the victim. Therefore, after registration of the first information report (FIR), the VLO shall be required to prepare a detailed report on the multidimensional impact of the crime on the victim in close co-ordination with the Probation Officer. Necessary powers should be conferred on VLOs to seek the assistance of persons having knowledge of psychology, social work, physical health and mental health in the matter of preparation of the report which may be called the Victim Impact Report (VIR). The VIR should be viewed as an instrument to inform judges of the physical, psychological and financial impact of the crime on the victim. It is expected that the VIR can result in sentences more congruent with the harm done to victims. Necessary clauses should also be incorporated in the Cr.P.C. which may provide a guidance to the VLO while he is involved in the exercise of preparation of VIR. As in the

context of the POCSO Rules[27] or the 2018 NALSA Scheme[28] the factors which should be addressed by the VLO while preparing the VIR shall be clearly stated in the Code.

Since the impact of a crime on the victim is not restricted in time and can be a continuing process necessary allowance should be made to incorporate subsequent developments. Though, generally speaking, the role of the police culminates with the submission of the report under section 173 Cr.P.C. (generally referred to as 'charge sheet') the VLOs should continue to maintain link with the victim atleast till the pronouncement of sentence. The VIR should be updated as new developments occur in the status of the victim.

Necessary provisions should be incorporated in Cr.P.C. so that in situations where the accused is discharged the trial court shall be required to permit the prosecution to submit the VIR for its consideration. The VIR so submitted shall be perused by the court before it makes a recommendation for award of compensation under section 357A (3) Cr.P.C. Similarly, provisions can be incorporated in the Cr.P.C. so that in situations where a case goes for trial and the accused is acquitted the trial court shall be required to permit the prosecution to submit the VIR before it. The VIR so submitted shall be perused by the court before it makes a recommendation for award of compensation under section 357A (3) Cr.P.C.

In situations where the trial is completed and the accused is found guilty the VIR shall be submitted at the stage where the court takes a decision on the sentence to be imposed. The contents of the VIR should be capable of assisting the trial court in coming to an informed decision on the nature and quantum of sentence and also on the quantum of compensation to be awarded under section 357 Cr.P.C. If the court feels that there are limitations with respect to the amount that can be directed to be paid

27 Protection of Children from Sexual Offences Rules, 2012, rule 7 (3) (India).

28 NALSA Compensation Scheme for Women Victims/Survivors of Sexual assault/ other Crimes, 2018, cl. 8 (India).

as compensation under section 357 Cr.P.C. the contents of VIR can be utilized by the court to issue appropriate recommendations for award of compensation under section 357A (3) Cr.P.C.

As discussed earlier, under section 357A (4) the legal services authority can take an appropriate decision on award of compensation to the victim in situations where the accused is not traced or identified. This decision is taken by the legal services authority on receipt of an application from the victim. The VIR prepared by the VLO in pursuance of registration of FIR can be helpful in such scenarios too. The legal services authority can call for the VIR and peruse it while taking an appropriate decision with respect to award of compensation under section 357A (4) Cr.P.C.

In POCSO cases the special court while exercising the power to order interim compensation under section 33 (8) POCSO Act read with rule 7 (1) of POCSO Rules can also call for the VIR prepared by the VLO. The special court can also peruse the VIR while making a recommendation for award of compensation under section 33 (8) POCSO Act read with rule 7 (2) POCSO Rules. The VIR can also be of considerable assistance to the legal services authority when takes an appropriate decision on the above recommendation made by the special court.

As already discussed, the 2018 NALSA Compensation Scheme allows the legal services authority to award interim compensation in deserving cases as well as acid attack cases. This can be done either *suo motu* or on an application by the victim or her dependent or even on an application by the Station House Officer. The VIR prepared by VLO can also be of considerable assistance in this scenario and also when a recommendation is later made for the award of compensation.

In situations where the accused is prosecuted before a trial court an enquiry by the legal services authority under KVCS will happen only after the trial court makes a recommendation for award of compensation under section 357A (2) or section 357A (3) of Cr.P.C. This generally occurs after

the accused is discharged or acquitted or convicted. Thus, there is a long-time gap between the commission of the offence and the time when an enquiry is conducted by the legal services authority. This can seriously affect the quality of the assessment of the impact of the crime on the victim. In situations where the accused is not traced or identified such an enquiry happens where the victim submits an application to the legal services authority under section 357A (4) Cr.P.C. Compared to the earlier scenario the enquiry in this situation can happen much earlier. In the absence of clear guidelines with respect to conduct of such enquiries, it goes without saying that a VIR prepared through an institutionalised framework and involving the contribution of VLOs, Probation Officers and necessary experts will be qualitatively better and more helpful in taking informed decision in the matter of determining the compensation to be paid to the victim.

The criminal justice process should also recognise the right of the victim to have access to the copy of the VIR. Whether the VIR is submitted to the court at the time of discharge/acquittal/sentencing or to the legal services authority when it considers applications/recommendations for award of compensation the victim should, if he disagrees with the contents of the VIR, be given an opportunity to contest it and put across his/her version on it. Though the judgment of Supreme Court in *Rekha Murarka*[29] has limited the role of the counsel for victim the Cr.P.C. should be amended to confer power on the counsel for victim to address the court at the pre-sentence hearing as regards the sentence and compensation. It shall also be made obligatory on the legal services authority to hear the victim while taking a decision in the matter of award of compensation.

Crime takes an enormous physical, financial, social and psychological toll on its victims. Victims of crime deserve to be treated with compassion and respect for their dignity and they are also entitled to a prompt redress for the harm they have suffered. It is true that the Indian criminal justice process has undergone a paradigm shift in its approach towards victims of

29 Rekha Murarka, *Supra* note 9.

crime. However, there is still more to be done. It is high time the Indian criminal justice process imbibes the constitutional philosophy reflected in articles 38 (1)[30] and 41[31] and bring about structural changes so as to provide avenues for victims of crime to present and the competent entities to consider the relevant materials relating to the impact of the crime on victims more particularly in the realm of sentencing and award of compensation.

30 INDIA CONST. art. 38. § 1. "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life".

31 *Id.* "The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want".

Revisiting the WHO's Position in Pandemics & Disease Outbreaks

Dr. U. Deepti*

Introduction

Epidemics and disease outbreaks have been a part of human history for thousands of years. However, many diseases have become trans boundary because of technological advancements. Globalization has also accelerated the global transmission of viruses and increased the likelihood of global public health problems because of greater cross-border flow of people, goods, and cash. No country is immune to diseases that travel the world, and biosecurity is becoming increasingly intertwined. As a result, cooperation among member countries and international organizations has become increasingly important. The global recurrence of disease epidemics has also underlined the growing importance of international organizations, which provide technical expertise and scientific evidence on which states can base their actions.

The World Health Organization(WHO) is a specialized agency under the United Nations that is responsible for global health. Its main responsibilities include forming alliances with other global health initiatives, conducting research, producing health guidelines and establishing standards,

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providing technical assistance, and helping countries to address public health issues.[1] As the only United Nations entity dedicated completely to health, the WHO views itself to be the steering and coordinating authority in worldwide health activities.[2] It was formed on the concept that health is a human right and that everyone should have access to the best possible health.[3] Furthermore, when it comes to disease outbreaks, the WHO admits that managing the worldwide regime for the control of the international spread of disease has been a central and historic responsibility of the organization.[4]

WHO has a long list of accomplishments since its inception. Controlled six deadly infectious illnesses over the world, including cholera, plague, yellow fever, smallpox, relapsing fever, and typhus. The most well-known of these is the eradication of smallpox, which was declared complete on December 9, 1979, after a long effort. Another notable achievement is the near-eradication of polio through worldwide vaccination programmes and the provision of life-saving immunizations to all children around the world.[5] Furthermore, when the Ebola virus broke out in 2014 in Congo and Zika virus in Brazil in 2015, the organization was able to contain the epidemic with the help of its technological expertise, support workers, and medical equipment. Aside from these, WHO has worked on issues such as sexual and reproductive health, lifestyle illnesses, HIV/AIDS, occupational health and substance misuse, ageing and food and nutrition.[6]

1. See, WHO CONST. art.2.
2 WHO CONST. art.2(a).
3 WHO CONST. art.1.
4 See, International Health Regulations, 2005, WHO.
5 *Milestones for health over 70 years,* WHO REGIONAL OFFICE FOR EUROPE, https://www.euro.who.int/en/about-us/organization/who-at-70/milestones-for-health-over-70-years>(Last visited on Sep 19, 2021). In June 2002, all 53 countries in the WHO European Region were certified polio free.
6 ENCYCLOPEDIA OF FOOD AND HEALTH 585 (Benjamin Caballero et al., eds., 2016).

However, the organization has been chastised on numerous occasions. In the 2009 H1N1 pandemic, for example, WHO was accused of inflating the threat to member states, resulting in the purchase of a billion doses of vaccines that were never utilised, resulting in a billion dollar waste.[7] Similarly, during the 2014 Ebola virus outbreak, the organization was slow to anticipate and respond to the outbreak, exposing the institution's shortcomings even further. Furthermore, the 2020 coronavirus pandemic has renewed debate over the organization's effectiveness. While many have commended the WHO's leadership in dealing with the COVID-19 pandemic, the agency's main funder, the United States, has harshly criticised the organization, accusing it of failing to give timely and accurate information on COVID-19 and being too 'China centric'. In addition, the World Bank, the regional development banks, the Global Fund, bilateral development agencies, private foundations, and other global health partnerships are contesting WHO's claim to global leadership in health issues.

In the light of the aforementioned criticisms of the organization, the purpose of this article is to clarify the WHO's role in pandemic prevention and control. In addition, the article analyses flaws in the WHO's pandemic response operations and makes recommendations for how to address them.

The Role and Response of WHO to the Pandemics and Disease outbreaks

The world was initially more concerned with maintaining peace, order, and security than with appreciating the importance of everyone's health. When the world began to experience large illness outbreaks due to increased trade and travel, there was a serious need of or consideration of paying attention to health at the worldwide level. The Plague of Athens in the

7 Stoff, *World Health Organization admits Failures in Communication during Swine Pandemic,* SALIENT NEWS 12 April 2010(Aug 9, 2021,9.30 P.M) <http://www.salient-news.com/2010/04/who-admits-failurecommunication-during-swinepandemic.

second year of the Peloponnesian War (430 BC), the Black Death in Europe in the 1340s, cholera epidemics during the industrial revolution, and the influenza pandemic following World War I, to name a few examples, all motivated efforts to increase collective action. As the causes of cholera, plague, and yellow fever were uncovered, the pace of international health cooperation accelerated, leading to the establishment of the Pan American Sanitary Bureau, the Office international d'Hygiene publique, the League of Nations Health Organization, and finally, the World Health Organization, which incorporated all of its predecessors.

During a summit to establish the United Nations(UN) in San Francisco in April 1945, officials from Brazil and China recommended for the first time that a global health organization be founded, and be brought into relationship with the Economic and Social Council. The United Nations Economic and Social Council directed the Secretary-General to convene a conference, and a Technical Preparatory Committee met in Paris from 18 March to 5 April, 1946, to prepare a draft of the constitution for the new international health organization, which was presented at the International Health Conference in New York from 19 June to 22 July 1946. On the basis of these, the new body was named 'World Health Organization', and delegates from 61 UN member-states and ten additional nations signed it on July 22, 1946. It now has 194 member states. The WHO's Constitution came into force on April 7, 1948, a date we now commemorate every year as World Health Day.

The WHO's constitution defines health as a complete state of physical, mental, and social well-being, not just the absence of disease or disability.[8] As a result, the organization's primary goal is to promote the highest possible level of health for all people without discrimination.[9] The management of the worldwide regime for the control of the international spread of illness has been a major and historic responsibility for the WHO

8 See, WHO CONST

9 WHO CONST. art.1.

in the case of disease outbreaks.[10] The WHO's extensive responsibility is further reflected in its constitution which includes advocating for universal healthcare, monitoring public health dangers, coordinating responses to health emergencies, and promoting human health and well-being.[11]

The organization is composed of three main organs-the World Health Assembly(WHA), the Executive Board, and the Secretariat.[12] The WHA represents States and develops policies, programmes and budgets, as well as elects a Director-General to manage WHO for five-year term.[13] The WHO's governing body, the WHA, has the authority to adopt international disease prevention regulations,[14] which, once adopted by the Health Assembly, become effective for all WHO member States, with the exception of those who expressly reject them within a specified time limit.[15] The function of the Executive Board is to give effect to the decisions and policies of the Health Assembly, to advise and generally to facilitate its work.[16] With the support of the Director-General and more than 7000 technical and administrative professionals working at the global, regional, and national levels, the Secretariat administers WHO's day-to-day operations.[17]

The WHO includes six regional offices[18], each with its own governance procedures and a large network of national offices. Each regional office has

10 See, International Health Regulations.

11 See, WHO CONST art.2.

12 See, WHO CONST art.9-37.

13 See, WHO CONST art.10-23.

14 See, WHO CONST art.21.

15 See, WHO CONST art.22.

16 See, WHO CONST art 24-29.

17 WHO CONST art.30.

18 See, WHO CONST art.44-54. The regional offices are located in Copenhagen for Europe, Cairo for the eastern Mediterranean, New Delhi for Southeast Asia, Manila for the western Pacific, Harare for Africa, and Washington D.C. for the Americas. The Director-General, shares responsibilities with six regional directors, who are in turn chosen by member states of their respective regions.

a regional director who reports to the Director-General and the regional committee and is responsible for carrying out the organization's numerous programmes. The development of regional groups is a unique feature of WHO and is regarded crucial since it allows the organization to tailor its programmes to the needs of individual member nations and facilitates project coordination.[19] Furthermore, in combating disease outbreaks, the organization collaborates closely and consults with specialized agencies of UN, intergovernmental organizations, governmental and non-governmental organizations, and other authorities.[20]

The International Health Regulations (IHR), which were amended in 2005, are the new international legislative framework for international cooperation on public health emergency response and are one of the most important tools in the battle against the global spread of infectious illness. The IHR, 2005 is a legally binding international treaty signed by 196 countries, including all WHO member states. Its mission is to 'prevent and guard against the international spread of illnesses, to control and respond to them in proportion to the hazards they pose to public health, and to avoid unwarranted interference with international travel and trade'.[21] Countries have rights and obligations under the health regulations, including the responsibility to report public health events. Unlike the old health regulations of 1969, which had little impact on the spread of pandemics because they were limited to specific diseases like cholera, yellow fever, plague, and other diseases and required states to notify each other only about outbreaks of these specifically listed diseases, the IHR 2005 has expanded it to any 'unusual or unexpected' disease. The WHO Director-General can evaluate whether an incident qualifies as a Public Health Emergency of International Concern (PHEIC) based on information received[22] and with the assistance

19 Kelley Lee, *Global health promotion: how can we strengthen governance and build effective strategies?,* 1 HEALTH PROMOT INT 42, 42-50 (2006).

20 See, WHO CONST art. 69-72.

21 IHR (2005) art.2.

22 IHR (2005) art. 12, 49.

of an Emergency Committee comprised of specialists in the relevant field. By formally declaring a PHEIC, the international community will be made more aware of the situation. IHR (2005) permits WHO to consider reports from sources other than notifications or consultations, analyse these reports using established epidemiological principles, and then send information to the State party whose territory the alleged event is taking place.[23] As a result, even if the competent State authorities refuse to assist, WHO now has the legal authority to analyse disease outbreaks at the national level and declare a PHEIC. The state parties have a responsibility to build national health systems that can respond quickly to health emergencies. This necessitates the member states' fundamental surveillance, risk assessment, reporting, and response systems being strengthened and maintained.[24] Furthermore, depending on whether or not there are chronic public health hazards, the Director-General has the ability to make temporary or permanent recommendations. This may already be encouraging other countries, NGOs, or international organisations to mobilise resources and assistance. The guidelines are non-binding, risk-specific advice that serve as the WHO's primary tool for coordinating international emergency response within the IHR's regulatory framework.[25]

At regular intervals, the WHO publishes pandemic plans, updates, drastically revises, and replaces them, which have proven to be useful in directing pandemic preparation and dealing with multiple events involving limited human infections with novel influenza subtypes among member states.[26] The majority of countries created pandemic preparations based on WHO recommendations. The respective government of each member state is charged with providing sufficient health and social measures. There is a growing understanding that an outbreak anywhere can possibly become

23 IHR (2005) art. 9, 10.

24 IHR(2005) art.5, 13.

25 IHR (2005) art. 15.

26 For e.g., Influenza Pandemic Plan published by WHO in 1999 was updated and revised in 2005,2007,2009,2014 and 2019.

a global public health emergency. They need regional and global alarm and response mechanisms to enable quick access to technical advice and resources, as well as to strengthen national public health capacities. No single institution or country has all of the resources necessary to respond to international public health crises brought on by epidemics and new and emerging infectious diseases.

In order to keep track of public health concerns and ensure that countries have quick access to the best expertise and resources for outbreak response, the World Health Organization established the Global Outbreak Alert and Response Network(GOARN) in 2000. The primary aim of GOARN is to assess risk, assist and provide appropriate technical support for containment of epidemic threat to affected countries.[27] In addition, specific surveillance networks have been established by WHO to monitor particularly severe infectious illnesses. The Global Influenza Surveillance and Response system (GISRS), for example, functions as a global warning system for influenza viruses with pandemic potential.[28] The role of GISRS is to keep track of the evolution of influenza viruses and offer recommendations on such matters as laboratory diagnostics, vaccines, antiviral susceptibility and risk assessment.[29] The system operates through a network of National Influenza Centres, WHO Collaborating Centres (CCs) and Essential Regulatory Laboratories (ERLs).[30] In 2012, WHO established the Public Health Emergency Operations Centre Network (EOC-NET) to identify and promote best practices and standards for EOCs and provide support to EOC capacity building in member states. WHO has been collaborating

27 World Health Organization, 'Global Outbreak Alert and Response Network-GOARN Partnership in Outbreak Response(9 Sep 2021,10.30 A.M))', https://www.who.int/csr/outbreaknetwork/goarnenglish.pdf.

28 World Health organization, *Global Influenza Surveillance and Response System (GISRS)'* (9 Sep 2021,10.30 A.M), http://www.who.int/influenza/gisrs_laboratory/en/..

29 *Id.*

30 *Id.*

with EOC-NET partners to develop evidence-based guidelines for the construction, operation, and improvement of public health EOCs. Many member States are building or strengthening their EOCs to increase communications and coordination for efficient public health response in order to meet the mandates of IHR (2005) and to address emergencies with health implications that can be triggered by any or all hazards.[31] The EOC-NET, however is not an independent legal entity but a collaborative mechanism between the interested parties including WHO and the EOC-NET participants. The EOC-NET is established to provide a faster, more effective and more predictable humanitarian response by operationalizing the Emergency Response Framework, with the vision that all public health emergency operation centres (EOC) will have the capacity to perform core supporting functions to ensure effective response to public health risks and public health emergencies and especially those of international concern.[32]The ECO-NET shall function in accordance with the WHO Constitution, WHO's Financial and Staff Regulations and Rules, Manual provisions, and applicable policies, procedures and practices.[33]

The World Health Organization's main purpose is to establish global standards and provide countries with clear guidance on how to execute strong public health policies. It does not typically provide grants or loans to accomplish these goals, nor does it send doctors or other members of its staff to countries to provide direct medical care. Its job is to get on the ground and provide advice, counsel, and assist in tracking disease outbreaks, as well as further support as needed. Despite the fact that governments are not legally compelled to adopt these guidelines in the event of an outbreak, many do so. WHO is run by its member countries, and it has no legal authority to visit countries without their consent or compel them to adopt

31 World Health Organization, 'Public Health Emergency Operations Centre Network (EOC-NET)' (9 sep 2021,10.30 A.M). < https://www.who.int/groups/eoc-net>

32 *Id.*

33 *Id.*

its recommendations. The organization's power is the ability to persuade through science, evidence, and demonstrations of what other countries are doing and showcasing good examples of good practise. Aside from that, WHO has no authority to impose or exert pressure on a country to change its sovereign will. Malaria, maternal and child health, TB, venereal disease, nutrition, and environmental cleanliness were all key concerns for the WHO when it was founded in 1948. Furthermore, the Organization was active in a variety of disease prevention and control initiatives, including mass campaigns against yaws, endemic syphilis, leprosy, and trachoma. Other disciplines such as public health administration, parasitic and viral infections, and mental health were eventually added. Since 1948, WHO's work has extended to include health challenges such as HIV/AIDS, cancer, heart disease, and other relatively new diseases that were not even identified in 1948.[34]

Why is it necessary to overhaul the WHO?

WHO, which was hailed at its inception as the 'directing and coordinating authority on international health activities', has been the subject of unprecedented scrutiny, gaining praise and criticism in equal measure during the on-going pandemic which has impacted more than 220 countries and territories. The high number of coronavirus cases has put a strain on health systems all throughout the world, including the wealthiest and best-prepared nations. Millions of people in the world's poorest countries lack access to life-saving supplies such as test kits, face masks, and respirators. The pandemic disrupted the lives of countless people, resulting in the world economy collapsing. However, there is now a light at the end of the tunnel: several vaccinations have been approved for use, and as of September 16, 2021, more than 5.85 billion vaccine doses had been administered globally.[35] The WHO's approach to the COVID-19 pandemic had several

34 J Charles, *Origins, History, and Achievements of the World Health Organization,* 2 Br MED J 293, 293-296 (1968).

35 World Health Organization, *Newsroom* (20 Sep, 2021,11.30 A.M),https://www.who.int/news-room.

faults. For example, the organization has been admonished for making contradictory, if not outright incorrect, statements to the public concerning human-to-human transmissibility and asymptomatic transmission, as well as for being slow to modify its official position on facemasks in light of new scientific data. It is also possible to argue that WHO erred by postponing the formal declaration of a PHEIC. The decision of the United States to leave the WHO provoked significant debate, with many criticising the organization's effectiveness and core *raison d'etre*. Even some WHO supporters in government, academia, and NGOs argue that the WHO has bowed in to nationalist bullies, supported extreme quarantine measures, and failed to accomplish its basic objectives since the coronavirus crisis began. The pandemic of COVID-19 has also exposed that WHO lacks the legal instruments and mechanisms needed to enforce its rules and guidelines, and that its resources is insufficient to meet the challenge. As a result, efficient global governance became a pressing necessity.

Since 2009, the press and the international community have condemned the WHO for its handling of several crisis. The first round of criticism came in March 2009, when the H1N1 influenza outbreak was reported in Mexico and the United States. Given the increasing risk of disease caused by this virus, as well as its unique genetic and antigenic characteristics as an influenza A (H1N1) variation of animal origin, WHO raised the influenza pandemic alert in accordance with established procedures. The WHO's approach, however, was quickly questioned as epidemiological evidence grew indicating the H1N1 virus caused very mild sickness in the vast majority of cases. Despite the fact that there were numerous suspected deaths, only 61 H1N1-related deaths had been confirmed by laboratory testing, with the majority of sick patients exhibiting symptoms more typical to a seasonal strain of influenza.[36]

36 World Health organization, *New influenza A (H1N1) virus infections: global surveillance summary, May 2009,* 84 WEEKLY EPIDEMIOLOGICAL RECORD 173, 173-179 (2009).

Another example of the WHO's ineffectiveness and lack of response is the Ebola pandemic in West Africa (2013–2016). It turned out to be disastrous as a result of WHO's increased caution following the backlash from the 2010 H1N1 influenza pandemic, as well as diminished financial support for the organisation, which resulted in disaster. The outbreak claimed the lives of about 11 000 people and cost the West African countries more than $2.8 billion in economic losses.[37] The outbreak has had a considerable socio-economic impact on the lives of millions of survivors and unaffected people, through the indirect consequences of lack of routine.[38] Due to a failure to organise an international response at a critical time, the outbreak quickly overloaded epidemic response mechanisms at the national, regional, and global levels. The WHO's reputation became irrefutably damaged during the Ebola outbreak, with a general consensus in the global health community that it fell short of its leadership responsibilities.

While the WHO may appear to be the world's leading health organisation, the global health community has grown significantly since 1948, and there are now several players with overlapping functions and responsibilities.[39] Multinational corporations and other global organisations, particularly the World Bank and the International Monetary Fund, are now having a greater impact on population health than the WHO. As a result of globalisation, international trade has become a significant predictor of global health, particularly for low-income countries, yet WHO has struggled to negotiate with powerful groups such as the World Trade

37 Suwit Wibulpolprasert and Mushtaque Chowdhury, *World Health Organization: Overhaul or Dismantle?,* 106 AJPH SPECIAL 1910, 1910-1911 (2016).

38 World Health Organization, *WHO: Ebola Situation Report 17 June 2015* (18th Sep 2021,9.30 P.M),https://apps.who.int/iris/handle/10665/176148..

39 For e.g., UNAIDS (the Joint United Nations Programme on HIV/AIDS), the GAVI Alliance (previously the Global Alliance for Vaccines and Immunisation), the Global Fund to Fight AIDS, Tuberculosis and Malaria (The Global Fund), and UNITAID, for example, were established to address specific disease issues.

Organization and the pharmaceutical sector.[40] New funding sources, such as the Bill and Melinda Gates Foundation, have transformed the power dynamic in influencing policy and budget allocation, even inside WHO. Furthermore, the World Bank's large-scale incursion into health-sector loans in the 1980s, as well as the appearance of a spate of new global health programmes in the last decade or so, have called into question WHO's function as a directing and coordinating agency.

Organizational Challenges in terms of Modernization and Streamlining

Lack of financial resources

The WHO's complex financial process is a major issue that has to be solved, as the organization's current funding is a hindrance to its effectiveness. WHO is funded by two main sources: assessed contributions or countries' membership dues paid by Member States, and voluntary donations from Member States and other partners. Assessed contributions are the fees that countries pay to join the Organization. The amount that each Member State is required to pay is determined by the country's wealth and population. Essentially, it is a percentage of a country's Gross Domestic Product, the percentage is agreed by the United Nations General Assembly. Every two years, during the World Health Assembly, member states approve them. They account for less than a quarter of the overall budget.[41] Voluntary donations, on the other hand, are primarily from member states as well as from other United Nations organizations, intergovernmental organizations, philanthropic foundations, the private sector, and other sources. The degree of flexibility that WHO has in determining how to use these

40 Charles Clift, *What's the World Health Organization For?,* Final Report from the Centre on Global Health Security Working Group on Health Governance, Chatham House Report Charles Clift, 2014(18 Sep 2021,10.40 P.M)< https://www.chathamhouse.org/2014/05/whats-world-health-organization>.

41 World Health Organization, *How WHO is funded,* (19 Sep 2021,11.30 P.M),https://www.who.int/about/funding.

funds is used to further define voluntary contributions. Core voluntary donations, for example, are totally unconditional (flexible), implying that WHO has complete control over how these funds are spent to support the Organization's programming work. Aside from these, the WHO has emergency funding. The World Health Organization's Contingency Fund for Emergencies (CFE) enables WHO to respond quickly to disease outbreaks and health emergencies, frequently in less than 24 hours. This helps to save lives and save unnecessary misery. Rapid reaction cuts the cost of controlling outbreaks and emergencies, as well as the larger social and economic consequences. WHO also relies on specific appeals as well as allocations from joint funds like the UN Central Emergency Response Fund (CERF) and Humanitarian Response Plans to fund its emergency responses.[42]

Initially, assessed contributions provided the majority of WHO's revenue, but over time, voluntary contributions have come to account for a larger portion of the organization's budget. The agency relies heavily on voluntary contributions for funding from philanthropists, UN agencies, corporations, and non-governmental organizations, putting the organization at the mercy of donors. Governments too frequently delay or refuse to make mandatory payments in order to gain more control over the agency. Assessed payments, for example, totaled $956.9 million (17 percent of income) in 2018-2019, while voluntary donations totaled $4.49 billion (80 percent).[43] Other sources provided the remaining donation of $178.1 million (3 per cent of revenue).[44] As a result, just about 20 per cent of the WHO budget is guaranteed, while the rest is questionable. This could lead WHO to prioritise the interests of contributors over its own. Former US President Donald Trump, for example, is said to have threatened to

42 *Id.*

43 World Health Organization, *The Future of Financing for WHO: Report of an Informal Consultation Convened by the Director-General* (Geneva: WHO, 2010), http://www.who.int/dg/who_futurefinancing2010_en.pdf.

44 *Id.*

reduce US contributions in 2018 if other member states passed a resolution encouraging breastfeeding. Similarly, in the wake of the COVID-19 epidemic in 2020, Trump severed all connections with the WHO, accusing the organization of failing to provide timely and accurate information on COVID-19 and claiming it had failed to take efforts to diminish China's control over the organisation. Soon after, WHO issued a wide public plea for cash to aid in the fight against the coronavirus epidemic, and countries such as the United Kingdom, Finland, and Ireland responded quickly with financial assistance.[45] Under the COVID-19 Solidarity Response Fund, WHO collaborated with the United Nations Foundation and the Swiss Philanthropy Foundation to raise funds from the general public to help the humanitarian organization sustain its response to the epidemic. Of course, upon his nomination, US President Joe Biden signed an executive order to suspend the withdrawal and reengage with the agency. It should be noted that the United States contributes around 15% of the WHO's current budget, and the agency, which is already stretched tight, may not be able to rapidly make up the difference.[46]

A pandemic must be contained on a worldwide scale, even in poor nations that rely on the WHO for assistance. The WHO is the only global organisation with the necessary mission, reach, and infrastructure. Many countries, particularly the poorer ones, rely on the WHO for medical assistance and supplies. To avoid potential shocks if donors withdraw funding from WHO, expanding the donor base must be a priority. WHO requires a larger share of its budget to come from sustainable and predictable sources. Currently, the WHO is heavily reliant on voluntary contributions, which account for more than 80% of the organization's revenue. However,

45 *'Debate: It's time for us all to fund the World Health Organization',* THE CONVERSATION (April 23, 2020)(14 Sept,2021,10.30 P.M), https://theconversation.com/debate-its-time-for-us-all-to-fund-the-world-health-organization-136743.

46 *Id.* The second-largest funder is the Bill and Melinda Gates Foundation, which provides 9.8% of the WHO's funds.

the agency seeks to address budget gaps with flexible funding, such as assessed contributions from member states, but this is in short supply, not totally predictable, and subject to conditions, such as parliamentary approval.[47] As a result, some areas of the organisation have been left underfunded.[48] Lack of funding has also hampered the organization's ability to retain and attract personnel, forcing it to rely on a larger number of temporary employees and consultants, which has resulted in higher administrative and transaction costs, as well as increased employer-employee dissatisfaction, and is not long-term sustainable. Another area where WHO has to focus and control is unnecessary spending. According to a research, the UN health agency spends nearly $200 million per year on travel expenses, which is more than it spends on fighting some of the most serious public health issues, such as AIDS, tuberculosis, and malaria combined.[49]

To address these issues, the World Health Organization suggested the formation of a time-bound, result-oriented working group on sustainable finance, which will meet for the first time in March 2021 and is open to all member nations. The working group is supposed to identify WHO's core tasks that should be sustainably financed, assess their costs, and find and recommend acceptable financing sources as well as opportunities for improvement, such as cost savings and efficiencies. The working committee would offer these ideas, which would be voted on during the 75th World Health Assembly in January 2022.[50]

47 Regional Committee for Africa, *The Future of Financing for WHO: Report of an Informal Consultation Convened by the Director-General. Regional Office for Africa* WHO (2010) http://www.who.int/dg/who_futurefinancing2010_en.pdf.

48 For instance, non-communicable diseases and mental health.

49 Dr. Frank Musmar, *'It's Time to Reform the World Health Organization',* BESA CENTER PERSPECTIVES PAPER NO. 1,660 (July 26, 2020) https://besacenter.org/wp-content/uploads/2020/07/1660-Time-to-Reform-WHO-Musmar-final.pdf.

50 Jenny Lei Ravelo, *Can WHO find a concrete solution to its funding woes?,* DEVEX (January 26, 2021)(last visited Sept 12,2021), https://www.devex.com/news/can-who-find-a-concrete-solution-to-its-funding-woes-98978 .

Lack of capacity in management and leadership

The WHO is currently experiencing a credibility issue, which can be attributed in part to its complex bureaucratic inertia. For example, the nomination of the current Director-General of the World Health Organization, Dr Tedros Adhanom Ghebreyesus has been heavily criticised because he was chosen over Dr David Nabbaro, an exceptionally competent British candidate. Tedros is an untrained non-physician who lead the Tigray People's Liberation Front, a faction of Ethiopia's government Marxist-rooted Ethiopian People's Revolutionary Democratic Front. Tedros is accused of covering up three cholera epidemics in his country while serving as health minister, putting bordering governments in jeopardy. He allegedly did this to avoid international embarrassment. He is suspected of assisting a terrorist organisation and embellishing his credentials by falsely claiming to have beaten malaria and HIV. Tedros was also the Foreign Minister of one of the world's most restrictive governments, with tens of thousands of political detainees. China hid that aspect of his background, emphasising his purported health credentials in order to make him appear acceptable for the WHO's D-G position. Beijing used its African assets to compel the African Union to support Tedros.[51]

The highly politicised nature of Director-General and regional director elections must be moderated. High level workers at WHO must demonstrate successful leadership and management experience as a prerequisite for hiring, especially at senior levels. The function of WHO as a global health defender has changed substantially since 1948. Many NGOs, private foundations, companies, and academic institutions are currently involved in global health. In order to reform WHO, it will need a Director-General who can work with a variety of stakeholders and nations to address norms and standards. The future leader must have the confidence

51 Dr. Frank Musmar, 'It's Time to Reform the World Health Organization', BESA CENTER PERSPECTIVES PAPER NO. 1,660 (July 26, 2020),https://besacenter.org/wp-content/uploads/2020/07/1660-Time-to-Reform-WHO-Musmar-final.pdf.

to outsource operational functions to UN agencies or non-governmental organizations that are more qualified than the WHO to carry them out. The appointment of Dr. Gro Harlem Brundtland in 1998, for example, is noteworthy. Brundtland had a background in medicine as well as national and international political experience. She set out to raise the profile of health on the international development agenda by investigating the link between economic growth and health. She was key in getting health on the forefront at the UN Millennium Development Goals conference, as well as convincing all member nations to sign the 2003 WHO Framework Convention on Tobacco Control, the world's first public health treaty. The WHO strengthened its organisational and ideological ties with the World Bank, as well as encouraging public-private partnerships, throughout her tenure. Brundtland implemented major internal reforms aimed at making the WHO more business-like and result-oriented. Furthermore, encouraged the WHO to locate possible epidemics via local contacts, diplomatic channels, and the burgeoning internet, making the organization less reliant on state governments for information. This proved to be beneficial in controlling the SARS pandemic, which began in China at the end of Feburary 2003 and spread to four other countries.[52]

Power games of international politics

The WHO is a United Nations body governed solely by member states through the World Health Assembly (WHA) and the executive board. There will always be politics in the creation and execution of WHO's work plan as long as membership is restricted to states. That is, causes other than the dictates of medical knowledge will affect judgments. Therefore, it is very essential that politics remain separate from WHO's operations.[53] In

52 World Health Organization, *Severe Acute Respiratory Syndrome (SARS),* <https://www.who.int/health-topics/severe-acute-respiratory-syndrome#tab=tab_1> (last visited Sept 19 ,2021.

53 Ascher, C.S. *Current Problems in the World Health Organization's Program,* 6 INTERNATIONAL ORGANIZATION 27, 27-50 (1952).

general, international humanitarian organisations are hesitant to engage with national or local governments on the ground that a close working connection with the government could jeopardise commitments to independence and impartiality. While this may be a real issue in some cases, a lack of participation and connection with governments hinders humanitarian activism and the ability to meet the needs of the most vulnerable.[54] The on-going epidemic has demonstrated that overseas employees and efforts are unable to be deployed due to travel and access constraints, posing a risk to a number of activities. In fact, governments are playing a key role in pandemic response by mobilising local community volunteers to fill the void left by international organisations funding and presence. Surprisingly, the epidemic has also demonstrated that local volunteers, rather than international institutions, are better able to solve local public health challenges and has potential to provide a more rapid and effective response.[55] Covid-19, therefore, emphasizes the importance of giving voice and representation to the under-appreciated role of community volunteers or local humanitarian actors in pandemic control.[56] Similarly, the organisation must develop standards for key private partners such as the food, pharmaceutical, and biotechnology industries and oversee their compliance. Furthermore, increased meaningful stakeholder participation will aid the agency in establishing confidence and stimulating investment, as well as moving toward result-based financing and performance-based measures.[57] The on-going pandemic must therefore, be used to empower

54 Veronique Barbelet et al., *All eyes are on local actors: COVID-19 and local humanitarian action opportunities for systematic change,* HUMANITARIAN POLICY GROUP 5 (2020).

55 Veronique Barbelet et al., *All eyes are on local actors: COVID-19 and local humanitarian action opportunities for systematic change,* HUMANITARIAN POLICY GROUP 9 (2020).

56 *Id.*

57 Devi Sridhar and Lawrence O. Gostin, *Reforming the World Health Organization,* 305 JAMA 1585, 1586 (2011).

and support a wide range of stakeholders, including donors, corporations, non-governmental organisations, and civil society.[58]

Given that international organisations cannot be separated from the political environments in which they exist and operate, it is vital to describe measures aimed at increasing transparency and developing procedures to demand accountability for critical decisions. Because great-power competition is likely to persist in global dynamics for the foreseeable future, significantly improved international collaboration, in which international and local humanitarian actors complement one another, is essential to address present and future global challenges.[59] This would allow for more immediate access and response to new events.

International Health Regulations and WHO

Every country must have a well-developed national healthcare system in place to avoid, prepare for, and respond to any international pandemic, according to the IHR 2005. Member states must plan for public health threats in accordance with WHO guidelines, as well as report any outbreaks and subsequent developments. Surprisingly, no system exists to monitor whether fundamental health-care capacities exist and function effectively. Although the WHO has the legal capacity to declare a PHEIC, it does not have the legal right to violate national sovereignty and compel a country to provide all essential information on a domestic disease outbreak. Faced with this strategic dilemma, the WHO has turned to softer forms of diplomacy as a more realistic means of gathering essential information from national governments around the world. IHR 2005 enables the WHO to declare a 'Public Health Emergency of International Concern' based on its own data rather than relying on outside sources. Despite WHO's newly gained right to independently collect information on health hazards in

58 *Id.*

59 Veronique Barbelet et al., *All eyes are on local actors: COVID-19 and local humanitarian action opportunities for systematic change,* HUMANITARIAN POLICY GROUP 10 (2020).

member States, the flow of information about infectious disease outbreaks is still insufficient to ensure a timely and efficient pandemic response. For example, despite Medecins Sans Frontieres informing WHO of the Ebola outbreak's unprecedented extent early on, the WHO's classification of the outbreak as a public health emergency of international concern came far too late. One of the most significant criticisms of IHR (2005) is that there are no penalties for State Parties that fail to notify the WHO of disease outbreaks on their territory. It's worth mentioning that there's a general aversion to giving the organisation more power. In reality, the US, which was preoccupied on bioterrorism after 9/11, advocated giving the organisation more powers, but Brazil, Russia, India, and China, which were apprehensive of US dominance, were against it. Furthermore, a reform of the IHR should consider the negative economic effects that States Parties face after being notified of transmissible disease epidemics. Closer collaboration with the WTO to prevent arbitrary traffic or trade restrictions could be beneficial in this regard.[60] In the event of a public health emergency of worldwide relevance, the creation of a combined WHO-WTO commission to resolve such disagreements would be an effective strategy.

The management of transmissible diseases is a multi-sectoral task and hence, there is a requirement for better coordination between the WHO and the United Nations (UN). The UN plays a vital role in addressing infectious disease emergencies.[61] During the Ebola crisis, for example, the UN Secretary General, in collaboration with the UN Security Council and the UN General Assembly, established the UN Mission for Ebola

60 Allyn Taylor, *International Law, and Public Health Policy,* INTERNATIONAL ENCYCLOPEDIA OF PUBLIC HEALTH 667, 676 (2008).

61 Apart from the WHO, organisations with significant involvement in the health sector within the UN system include, the World Organisation for Animal Health, the United Nations Children's Fund, the Food and Agriculture Organization, the United Nations Environment Programme, the United Nations Development Programme and the United Nations Population Fund.

Emergency Response, which took immediate action. As a result, the Health Regulations should include explicit recommendations for cooperating with UN organs and other independent players such as the World Bank.

The WHO's constitution gives it enormous regulatory capabilities, yet in more than seventy years, the body has only issued two significant treaties: the International Health Regulations and the Framework Convention on Tobacco Control. On critical areas such as counterfeit medicinal drugs, alcoholic beverages, food safety, and nutrition, the WHO might play a more active role in regulating for global health. It also has the potential to be significantly more involved and influential in international systems that have significant health consequences, such as trade, intellectual property, arms control, and climate change.

Conclusion

The WHO, with its innovative constitution and global authority, is unrivalled. It plays an irreplaceable role in global disease outbreak response and, it has mostly accomplished its goal throughout the on-going pandemic. Given the WHO's track record of implementing immunisation programmes, it's apparent that the organisation will be a critical component of the global response to the continuing COVID-19 pandemic, as well as future disease outbreaks. Climate change, rising inequalities associated with globalization, lack of access to healthcare, spread of communicable and non-communicable diseases, migration, population explosion, environmental degradation and so on are all major threats to global health. WHO appears to be unable to cope with the dynamics of a quickly changing global health scene in its current state. A robust global health agency is urgently required. A new cohesive legal foundation is required to re-establish the WHO as the international custodian of global health, which must adapt to a new political context, display global leadership, and achieve outcomes.

Can Migrant Women in India Afford the Luxuries of Human Rights?

To understand the specific ways in which women are impacted, female migration should be studied from the perspective of gender inequality, traditional female roles, a gendered labour market, the universal prevalence of gender-based violence and the worldwide feminization of poverty and labour migration.[1]

Dr. Veena Roshan Jose*
Ms. Reet Bose**

1. Introduction

Human Migration is a very common practice followed by people everywhere due to various reasons, the most prominent reason being, poverty. Migration of people from their place of original habitat to other takes place due to various reasons such as economic reasons, security reasons, environment factors, poverty, socio-political reasons, climate

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1 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), General Recommendation No. 26 about women migrant workers, Paragraph 5. https://www.ohchr.org/Documents/Issues/SRMigrants/submissions/Mexico_HR C-DF_Annex16_Submission_GA-Report.pdf

change, and so on. Individuals migrate with a hope that they would be able to find more opportunities which would ultimately improve their life, which in turn will help them to improve their economic conditions and of their dependents. Thus, migration is the "geographic movement of people across a specified boundary for the purpose of establishing a new permanent or semi-permanent residence".[2]

A wide difference in the migration patterns have been noticed in the developed and non-developed nations. In India, the migration is more actuated by push factors such as joblessness, penuriousness, marriage and family development, natural disasters, and so on; in industrialised countries, the reasons for migration are forced by factors like prosperity, safety, freedom, and so on. The number of people who migrate from a given area changes with the diversity of that region, diversity of individuals, and the changes and fluctuations in the economy of that region.[3] Migration thus helps millions in overcoming of their poverty woes, further developing wellbeing, training, income, and so on. The decrease in migration usually results from a less-adaptable economy.

1.1 Definition of Migrants

'Migrants' is used as an umbrella term, which is not well defined under the international law. However, in general parlance, the term denotes "the persons who moves out of his/her place of usual residence, whether within the country itself, or across the country's border, either temporarily or permanently, for various reasons.[4] In a broader understanding, the term 'migrants' includes a number of well-defined legal categories of people,

2 Kailash C. Das and Subhasis Saha, *Inter-State Migration and Regional Disparities in India*, International Union for the Scientific Study of Population, https://iussp.org/sites/default/files/event_call_for_papers/Inter-state migration_IUSSP13.pdf

3 K. Singh, V. Patel, *et. al., Reverse Migration of Labourers Amidst COVID-19*, 55 (19) EPW, 28-31 (2020).

4 The International Organization for Migration, https://www.iom.int/node/102743, (last visited July 18,2021.)

such as migrant workers, immigrants, refugees, asylum seekers, etc. However, there are people who falls under the broader term migrants, but whose movements do not fall within the legally defined framework, such as smuggled migrants; as well as those whose status are not specifically defined under international law, such as international students.[5] The International Organization for Migration (hereinafter referred to as IOM), in its Glossary on Migration also provides for the definitions of "migrant in an irregular situation", "migrant in a regular situation" and "migrant in vulnerable situations" and so on.[6]

The United Nations have traditionally defined international migrants as "people who change their country of usual residence", regardless of their reason for migration or legal status.[7] This definition is opposed by the UN High Commissioner for Refugees (hereinafter referred to as UNHCR). The UNHCR defines international migrant as "any person who is outside a State of which they are a citizen or national, or, in the case of a stateless person, their State of birth or habitual residence".[8] According to Prof. Jørgen Carling, there are two approaches can be adopted to define the term "migrant". First is the inclusivist approach, which is followed by the International Organisation for Migrants, and other institutions, which considers the term "migrant" as an umbrella term which covers all kinds of movements of people from their place of residence. The second approach is the residualist approach, which excludes those who flee from their place of residence due to wars or persecution, from the term "migrant".[9] In this article, the term "migrant" is used to refer to a person who leaves his/her

5 https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf,.

6 International Organization for Migration, Glossary on Migration, (2019), https://publications.iom.int/system/files/pdf/iml_34_ glossary.pdf,.

7 https://refugeesmigrants.un.org/definitions, (last visited Sept 22,2021).

8 https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/MigrantsAndRefug ees.pdf.

9 J. Carling, *What is the Meaning of Migrant?*,Prio Policy Brief (2017) , www.meaningofmigrants.org, (last visited July 18,2021).

place of origin voluntary for a better life. This also means that they have a choice of returning to their place of origin if they wish to.

In 1990, the United Nations adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter referred to as the Migrants Convention). The Migrants Convention provides for a strong and concurred lawful system for the privileges of every migrant labourers and their families. The Migrants Convention defines "migrant worker"[10] as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national." Thus, defining the term "migrant" is a difficult task due to the very complexities and dimensions involved in the same.

1.2 Different Types of Migration

Migrations can be classified into several broad categories: internal and international migration may be distinguished at the first level. Internal migration refers to the movements of people with their families from one area to another, such as, from rural areas to the urban areas within the country is generally referred to as internal migration. This is different from movements from one country to another. When people cross their national boundaries, it is often referred to as international migration. Thus, international migrants are people who moves to a different country, other than the country of their original residence. The migrants entering another country may be further classified as legal immigrants, illegal immigrants, and refugees.[11]

The next classification of migrants may be done looking into the nature of migration, i.e., whether it is voluntary migration or forced

10 Article 2 (1).

11 Migration - Types of Migration - Family, International, and Internal - JRank Articles, https://family. jrank.org/pages/1169/Migration-Types-Migration. html#ixzz76rtSxcXs, (last visited July 21,2021).

migration. Voluntary migration, whether internal or external, is mostly undertaken by people in search of better economic opportunities, housing, health facilities or education facilities for their children. Sometimes, people fear that they may be expelled by governments during war or other political upheavals, which forces them to migrate. There may be situations when people may be forcibly transported as slaves or prisoners. Intermediate between these two categories are the voluntary migrations of refugees fleeing due to war, famine, or natural calamities.[12]

1.3 Reasons for Migration

Reasons for migration differs from person to person. Poverty, unemployment and poor economic conditions compel people to leave their place of ordinary residence and to move to unfamiliar places for job even in difficult conditions. The factors that may prompt migration can be both pull factors and push factors.[13] Pull factors are those factors which attract an individual to migrate. Opportunities in the urban areas for employment, education, better housing facilities and healthcare facilities, recreational facilities, etc. acts as pull factors which attract migrants from smaller towns and cities to larger cities and people from rural areas are attracted to the urban areas.[14] The push factors are those factors which compel migration, which includes poverty, indebtedness, unemployment, natural calamities, etc. Apart from these, certain other factors such as natural calamities such as earthquakes, landslides, climate change, floods, droughts, and so on also

12 The Editors of Encyclopaedia, *Human Migration*, ENCYCLOPEDIA BRITANNICA, 31 Aug. 2021, https://www.britannica.com/topic/human-migration, (last visited Sept19,2021).

13 S. Srinivasan, Dr. P. Illango, *A Study on the Problems of Migrant Women Workers in Thuvakudi, Trichy District*, 4(4) IOSR JOURNAL OF HUMANITIES AND SOCIAL SCIENCE (JHSS), 45-50 (2012).

14 Office of the Registrar General & Census Commissioner, Ministry of Home Affairs, Government of India, https://censusindia.gov.in/Census_And_You/migrations.aspx, (last visited Dec 03,2020).

influences migration. These natural calamities also tend to force people to leave their place of origin in favour of safer areas.[15]

Migration does not happen with regard to certain parts alone. It is a global practice which is influenced by various factors such as economic, social, political, cultural, environmental, health, education and transportation factors. Economic factors such as search for better occupation and opportunities, lack of cultivable land and increase in the concentration of population, etc. is a major motivating factor for migration. People who migrate due to the economic reasons believe that they would have better opportunities in some other place. There are certain social factors also which prompts migration. For example, the increase in the number of deserted women is one reason which can be attributed to the increase in the migration of women in search of livelihood.[16] The growth of population and unbalanced growth of literacy are also other important factors that results in migration. People with comparatively higher education and work experience move to new places for better livelihood. The growing population results in the increase in the number of labours, and the surplus labour from rural areas migrate to urban areas.[17]

Thus, migration is not a phenomenon peculiar only among the poor during times of crisis for the sake of survival and coping. It has all the time more become an option for the poor and the non-poor alike.[18] The lack of employment opportunities in the rural areas and better employment prospects and infrastructure facilities in the urban areas may also act as a motivating factor for the people to migrate to urban areas.

15 The term "climate refugee" is used to refer to a person who has migrated to some other place from his home, due to the effects of climate change taking place in the environment.

16 P.D. Sutherland, *Migration is Development: How Migration Matters in Post-2015 Debate*, 2 (2) Migration and Development, 151-156 (2013).

17 Ibid.

18 Das and Saha, *Supra* note 2.

2. Migration in India

India is the Union of twenty nine States divided mostly on the criteria of language and cultural practices. Migration within India is always associated with the urbanization, modernization and industrialization.[19] The post-liberal Indian economy has seen an uneven growth of cities. The developed areas are hubs of capital growth and expansive activities that attract the labour force from underdeveloped areas, thereby creating the phenomenon of migration.[20] Urbanization, growth of service sector, infrastructure development and growth of informal employment require abundant cheap labour in the cities and migrants are the only source to provide the same.[21] The disparities in the regional development is the most prominent factor that prompts migration within the country and this is evidenced by the pattern of inter-state migration in India.[22] The general trend of internal migration reflects that the migrants are mostly young, single male migrants undertake long journeys to diverse work locations.[23]

The freedom of movement is guaranteed by the Constitution of India under the clauses (d) and (e) of Article 19(1). The said clauses form the basis of right to free migration in India.[24] Article 15 which prohibits discrimination on the basis of place of birth, among other grounds should also be read with the above-mentioned clauses. The plain reading of these provisions gives a clear understanding of the right to migrate and settle down in whichever part of the country.

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19 S. Irudaya Rajan, Sumeetha M., HANDBOOK OF INTERNAL MIGRATION IN INDIA, (Sage Publications 2020).

20 *Ibid*.

21 *Ibid.*

22 Das and Saha, *Supra* note 2.

23 Rajan and Sumeetha, *Supra* note 19.

24 The clauses (d) and (e) of Article 19(1) guarantees all citizens the "right to move freely throughout the territory of India, and reside and settle in any part of the territory of India".

2.1. Migration Statistics in India

The Census of India is the single largest source of data on the migration of the people of India. The Census of India classifies migration as two types. Firstly, "migration by place of birth" and secondly, "migration by place of last residence". When a person is enumerated in the Census at a place that is different from her/his place of birth, she/he would be considered a migrant by place of birth.[25] A migrant would be considered a migrant by place of last residence, if he/she had resided at a place other than his/her place of enumeration.[26]

Inter-State Migration (hereinafter referred to as ISM) is very common in India due to the variations in the pace of industrialization and developments from State to State. ISM is the movement of people from one state to another, generally in search of economic prosperity, and in India, this can be linked mostly to the disparity in development among the various States in the country.[27] People move from underdeveloped areas to the developed and prosperous areas in order to improve their life and living conditions. Migration between the States turn out to be a complex affair due to the social, economic and cultural diversity prevalent in India. Thus, the issues related to inter-state migrant workers have complex Centre-State and inter-State dimensions. In order to get a holistic view, the number of migrants within India was 45.36 crores as per the most recent census, that is, the 2011 Census.[28] This records an increase of forty five percent over the 309 million recorded in 2001. The economic survey of 2018-2019 reveals that ninety three percent of the workers are in the informal economy, while NITI Aayog's '*Strategy for New India @75*' in 2018 reports that

25 *Supra* note 14.

26 *Supra* note 14.

27 Das and Saha, *Supra* note 2.

28 *Supra* note 14.

"India's informal sector employs approximately eighty five percent of all workers".[29]

Even though data remains the key aspect behind every policy measure, the migration data available in public domains reflects a hybrid mix of dissimilarities and impression.[30] As per the 2011 Census, there were 4.5 crore migrant workers in 2011.[31] The 2011 Census reveals that around seventy percent of the migration within the State was due to reasons of marriage.[32] It is estimated that eighty three percent of females moved for marriage and family, when the corresponding figure for males was thirty nine percent.[33] Overall, eight percent of people moved within a State for work, out of which, twenty one percent are male migrants and two percent are female migrants.[34] Movement for better work opportunities is higher among the Inter-State migrants in India. Almost fifty percent of male and five percent of female Inter-State migrants moved within India in search of work, according to the previous Census.[35]

However, there is a wide disparity between the actual number of migrants from the figures given by the Census. According to the Working Group Report on Migration, "the Census underestimates the migrant worker population".[36] The Census and the National Sample Survey Office (hereinafter referred to as NSSO) are the primary source of migration data in India. Researchers have argued that both suffer from inherent severe methodological issues. The latest Census figures are available only till

29 *Strategy for New India @75*, National Portal of India, https://www.niti.gov.in/the-strategy-for-new-india, (last visited Sept 09,2021).

30 *Supra* note 3.

31 *Supra* note 14.

32 Govt. of India, *Migration in India and the Impact of Lockdown on Migrants*, https://www.prsindia.org/blogcomment/845390, (last visited Dec 26,2020)

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

36 Rajan and Sumeetha, *Supra* note 19.

2011 and the last NSSO survey on migration was conducted in the year 2007-08. The last census figures are, already ten years old and many factors have changed and may not project the current migration trends clearly.[37] Despite the significant increase in internal migration recorded in 2011, it is identified that the nature of movement remains relatively unchanged since 2001.[38]

2.2 Problems specific to the Inter-State Migration in India

The Constitution of India guarantees all Indian citizens the right to reside and settle in any part of the territory of India[39], the people migrating for work face various social and economic challenges including, but not limited to, the lack of social security and health benefits and poor implementation of laws for the minimum safety standards, the lack of accessibility to the benefits given by the State such as food provided through the public distribution system, and the lack of access to affordable housing and basic amenities in urban areas where the cost of living will also be high. Low wages, physical and sexual exploitation accompanied with questions relating to safety and security are some of the challenges faced by the migrant workers in India, more specifically, the unorganized sector. Other problems involve issues of working conditions and wages of migrant workers, identity, safety, security and so on.

The core problem of Inter-State migration can be seen in its very name - 'Inter-State Migrants'. The term explicitly signifies the need for Inter-State institutions to monitor the functioning of laws for the migrants. The migrant population faces various problems in their places of destination. Immediate concerns that the migrant workers usually face, which prompts them to migrate is generally related to food, shelter, healthcare, fear of

37 Satadru Sikdar and Preksha Mishra, *Reverse Migration during Lockdown: A Snapshot of Public Policies*,(Sept,2020) https://www.nipfp.org.in/media/medialibrary/ 2020/09/ WP_318_2020.pdf,.

38 *Supra* note 29. *Ibid.*

39 Article 19(1)(e).

getting infected or spreading the infection, loss of wages, concerns about their families, anxiety, fear, and so on.

2.3 Inter-State Migration During the Nationwide Lockdown

The COVID-19 epidemic affected every country on the globe in various ways and the World Health Organization has declared it 'Pandemic' in March, 2020.[40] Since then, the Government of India has been taking several proactive, preventive and mitigating measures to contain the spread of the virus. The announcement of the 21-day nationwide lockdown by the Prime Minister of India on 24th March, 2020 limited the movement of whole of the population in India. This was subsequently extended till 3rd May, and then to May 17th, and further till 30th May, 2020, to enable 'social distancing', an effective non-pharmaceutical prevention and control intervention for COVID-19. The Government of India's response towards the COVID-19 pandemic was undoubtedly very swift, but it also manifested an apparent lack of planning and coordination in the scale of its implementation. However, India could not get many benefits from implementing early lockdown and within a few months after its implementation, India became one of the worst affected countries.[41]

The farsighted and unprecedented step of lockdown however saw a large-scale movement of migrant workers across the country due to lack of livelihood, food, shelter and transport. The photographs published in the newspapers with migrant workers along with their family including children walking in the scotching summer sun depicted the inefficient management of migrant population during the times of the crisis. This has

40 World Health Organisation, Speech of the Director General, 11 March 2020, available at, https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020,(last visited Dec 26,2020). *Ibid.*

41 University of Oxford rates Indian Government very high on its response to tackle COVID-19 crisis. (April 10,2020) Coronavirus Government Response Tracker, https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker ,(last accessed at 20/12/2020.

brought forth to the limelight, the problems faced by thousands of Inter-State migrant workers, including the migrant women workers. This incident became a litmus test which revealed how the legal framework in India so far has been unable to provide the migrant workers the prescribed minimum social security and welfare.

3. Women Migration in India

It is estimated that there are an estimated 272 million international migrants, which amounts to 3.5% of the world's population[42] and out of which, half of it are women and girls. Women and girls are also a significant proportion of economic migrants, as they are increasingly migrating on their own, or as the heads of their families.[43] There may be other reasons also behind women migration such as marriage, which is the most common reason for migration among females.[44] A casual reading of the data show that women predominantly move for marriage. According to the 2001 Census, about 154 million out of total 221 million female migrants reported marriage as the reason.[45] Males usually migrate for work related purposes.

However, there are discrepancies in the projected figures as the number of women moving for work-related reasons is not reflected in the statistics. Data shows that the female migration for work has grown far more rapidly than the male workforce. Female migration has also increased at nearly twice the rate of male migration.[46] The term 'women migrant

42 *Global migration, by the numbers: who migrates, where they go and why*, World Economic Forum, https://www.weforum.org/agenda/2020/01/iom-global-migration-report-international-migrants-2020/, (last visited Sept 20,2021).

43 Five Reasons Migration is a Feminist Issue, United Nations Population Fund,(09 April 2018.) https://www.unfpa.org/news/five-reasons-migration-feminist-issue.

44 *Supra* note 2.

45 *Supra* note 19.

46 *Report of the Working Group on Labour Laws and Other Labour Regulations*, 12TH FIVE YEAR PLAN, 2012-17, PLANNING COMMISSION, https://niti.gov.in/planningcommission.gov.in/docs/aboutus/committee/ wrkgrp12/wg_labour_laws.pdf

worker' is used here to denote a woman employed whether directly or through any agency, for wages in any establishment, outside her place of origin or her original place of residence.

The implicit relation of gender to migration is primarily due to the effects of the displacement process which impacts the genders really differently. There is, therefore, a need for a gender-based approach to deal with the present crisis. It may likewise support gender generalization that limit women's self-sufficiency, just as their absence of power in dynamic cycles, and their vulnerability to the precise infringement of their basic human rights. Their exposure to weak conditions is complemented by the numerous intersections of injustice that they face dependent on race, identity, socio-economic condition, ethnicity, age, relocation status and sex related qualities. These kinds of segregation are found at a legitimate level, in the execution of public approaches and programs, or the scarcity in that department; in the workspace, inside the family, and, regularly, it is the women themselves who don't perceive their privileges, further presenting them to vulnerability.[47]

3.1 Problems faced by Migrant Women in India

There is an increasing number of women migrants over men in India as the statistics suggests. The rural-to-rural migration accounts for more than seventy per cent of the total migration inside the country, which is dominated by women. This is often related to marriage and associational migrations, broken marriages, widowhood, desertion and destitution.[48] These and other related issues call for a more detailed investigation and analysis of female migration than has been so far attempted.

47 Sen S, *Rethinking Migration and the Informal Indian Economy in the Time of a Pandemic*. THE WIRE (2020),https://thewire.in/economy/rethinking-migration-and-the- informal-indian-economy-in-the-time-of-a-pandemic, (last visited Dec 29,2020).

48 *Ibid.*

Women face various basic and existential problems while migrating from their place of origin. They may have to stay in totally different circumstances, where the language may be a barrier, difference in the cultural background, without the support of the family or other loved ones. The migrant women face various physical and health related problems arising from poor sanitation facilities, menstrual problems, and other physical discomforts and lifestyle diseases such as weight loss, weight gain, gastrointestinal disturbances, sleeping difficulties, etc.[49] While in transit, women are likely to be deprived of the access to sexual and reproductive health care, including family planning and safe childbirth care, which in turn is considered as one of the leading causes of death, disease and disability among displaced women and girls of childbearing age.[50]

Almost all the migrant women undergo financial hardships, which may in turn impact their work and personal lives. The working hours/shifts may be sometimes tedious and hectic. There may also be times without jobs or income for months at a stretch. Most women find it difficult to sustain their daily living, which may also include the inability to pay rent or such basic expenses.[51] Other issues like safety and harassment, including sexual harassment, are also common with the migrant women workers as they do not find the facilities accessible to report and address these issues.[52] Women's concerns are not only, or in some cases, not primarily, focused on themselves but also on their wider family, including worries about their children's education and development.

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49 *Supra* note 32.

50 *Ibid.*

51 O.P. Singh, *Mental Health of Migrant Laborers in COVID-19 Pandemic and Lockdown: Challenges Ahead*, 62 INDIAN JOURNAL OF PSYCHIATRY, 233(2020), https://www.indianjpsychiatry.org/article.asp?issn=0019-5545;year=2020;volume=62;issue=3;spage=233;epage=234;aulast=Singh ,(last visited Jan 7,2021).

52 *Ibid.*

3.2 Human Rights Concerns of Migrant Women Workers

Migration is an unpredictable fact covering issues identifying with the human rights of the migrants. However, the need of great importance is a rights-based thorough methodology setting the human rights of migrants at the focal point of the conversation, specifically, women migrant workers. Some of the Human Rights violations that are faced particularly by the women migrant workers are,[53] exploitative terms of work and remuneration, working hours and stringent terms of the contracts, restrictions on the freedom of movement, gender discrimination in matters of employment, discrimination against women at workplace, etc. Women migrant workers also has to suffer dangerous and degrading working conditions, gender-based violence in the workplace, restrictions on migrant women's ability to organize for their rights, and so on.[54]

3.3 International Initiatives for the Protection of Migrant Women Workers

The Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter referred to as CEDAW), 1979, consolidates the provisions of existing United Nations instruments concerning gender discrimination. The Convention notes that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights. The Convention applies to citizens and non-citizens and provides that State parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure the same rights, on the basis of equality between men and women. The provisions of CEDAW is specifically relevant in the discussions relating to the rights of the migrant workers as it requires the State parties to take all appropriate measures, including legislations, to

53 Kundu, *Inter-State Labor Migration in India: The Normal and Reverse Phase*, (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7981502/ ,(last visited Dec 25,2020).

54 *Supra* note 32.

suppress all forms of traffic in women and exploitation of women for prostitution.[55]

Other human rights instruments relevant for the discussions of the rights of migrant workers in general include the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, the International Covenant on Civil and Political Rights (ICCPR), 1966, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984, and the Convention on the Rights of the Child (CRC), 1989. All these human rights instruments have universal application and applies to all persons alike, and thus the provisions are, by default, applicable on migrant women workers also.

The New York Declaration of the UN General Assembly,[56] reaffirmed the purposes and principles of the Charter of the United Nations and the Universal Declaration of Human Rights. The Declaration reaffirmed and fully protect the human rights of all refugees and migrants, regardless of status; all are rights holders. This Declaration is first of this kind for the protection of migrants and refugees. The objective of the Declaration focuses on three types of commitments- those relevant to migrants and refugees, those specific to migrants and those relevant only to refugees.

The ILO Convention on Labour Standards and Migrant Worker's Rights and the United Nations instruments specifically concerned with migrant workers have similar objectives. They aim to further the rights and protections of persons migrating for employment and better standard of living. The ultimate aim of these international institutions is to discourage and eventually eliminate irregular migration.

55 M. ABELLA: *SENDING WORKERS ABROAD* (Geneva, ILO, 1997). https://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_PUBL_9221085252_EN/lang--en/index.htm (last visited Dec 12,2020)

56 United Nations General Assembly New York Declaration for Refugees and Migrants, 2016.

4. Legal Protection of Women Migrant Workers in India

There are various legislations that are meant to protect the interest of migrant workers in the country. The need for a specific legislation for addressing the issues of migrant labourers culminated in the enactment of Interstate Migrant Workmen Act (Regulation of Employment and Conditions of Service) Act, 1979 (hereinafter referred to as The ISMW Act). The Act seeks to regulate the employment of Inter-State migrants and their conditions of service. The ISMW Act is applicable to every establishment that employs five or more migrant workmen from other States; or if it had employed five or more such workmen on any day in the preceding twelve months.[57] The Act tries to regulate the employment of inter-State migrant workmen and to provide for their conditions of service.

The Act provides that the wage rates, holidays, hours of work and other conditions of service of an inter-State migrant workman shall be the same for similar kind of work as is being performed by any other workman in that establishment shall be the same as those applicable to such other workman.[58] The Act also provides for the allowances such as the displacement allowance[59], journey allowance[60], etc. along with the other facilities such as regular payment of wages to such workmen[61], to ensure suitable conditions of work to such workmen having regard to the fact that they are required to work in a State different from their own State[62], to provide and maintain suitable residential accommodation to such workmen during the period of their employment[63], to provide the prescribed medical

57 Section 1(4)(a) & (b) of ISMW Act, 1979.

58 Section 13(1)(a) of ISMW Act, 1979.

59 Section 14 of ISMW Act, 1979.

60 Section 15 of ISMW Act, 1979.

61 Section 16 (a) of ISMW Act, 1979.

62 Section 16 (c) of ISMW Act, 1979.

63 Section 16 (d) of ISMW Act, 1979.

facilities to the workmen, free of charge[64], to provide such protective clothing to the workmen as may be prescribed[65] and in case of fatal accident or serious bodily injury to any such workman, to report to the specified authorities of both the States and also the next of kin of the workman[66]. Apart from these general provisions, Section 16 (b) requires the contractor employing the Inter-State Migrant workmen to "ensure equal pay for equal work irrespective of sex". Under Section 17, the contractor who employs inter-state migrant workers shall be responsible for payment of wages as prescribed.

Later, the Unorganised Workers' Social Security (UWSS) Act, 2008 was enacted to provide for social security and welfare of unorganised workers. The Act defines unorganised workers as home-based worker, self-employed worker or wage worker in the unorganised sector. This Act brings the "migrant workers" under the definition of wage worker.[67] The scope of the Act extends to "all workers in the unorganized sector, whether, employed directly or through an agency or contractor, whether a casual or temporary worker, a migrant worker and workers employed by households including domestic workers – self-employed or employed for wages".

Apart from this, provisions of various labour laws like Employees Compensation Act, 1923, Payment of Wages Act, 1936, Industrial Disputes Act, 1947, Employees State Insurance Act, 1948, the Equal Remuneration Act, 1976, Trade Unions Act 1926, Minimum Wages Act, 1948, , Payment of Bonus Act, 1965, Contract Labor (Regulation and Abolition) Act 1970, Equal Remuneration Act, 1976, Child Labor (prohibition and Regulation) Act, 1986, Maternity Benefit Act, 1961, Mahatma Gandhi National Rural Employment Guarantee Act, 2005 are also applicable to migrant workers subject to qualifying provisions.

64 Section 16 (e) of ISMW Act, 1979.

65 Section 16 (f) of ISMW Act, 1979.

66 Section 16 (g) of ISMW Act, 1979.

67 Section 2(n), The Unorganized Workers Social Security Act, 2008.

Thus, it is apparent that there is no dearth of laws to protect the interests of the workforce in India, especially, the migrant workers. However, the main issue relates to the implementation of those laws. Even after the presence of these many laws, the migrants and laborers remain poor and are exploited and completely dependent on the mercy of employers and contractors, and the case is not different for the migrant women workers.

5. Conclusion

Women migrant workers have a very poor and low standard of living and are vulnerable and are subjected to lot of exploitations. The women workers who are at the bottom of the employment hierarchy, and lacks recognition of their rights and instability of employment. The women compromise and choose to take up employment even for low wages, mainly to support their families. If not the low wage employment, the only option available would be unemployment and consequent dire poverty.

Studies on migration patterns in India reveals health hazards due to unpleasant working conditions, especially the women migrant workers. It worsens the work burden on women and increases risk to sexual harassment. It is also to be noted that the migrant women who opt for self-employment as vendors and service providers remain invisible in official labour statistics and hence are unprotected by national labour legislations. Though much is talked about women empowerment, the women migrant workers are denied of social security benefits under labour laws. The existing labour laws must take into consideration the rights of the women migrant workers also. The human rights norms and the labour laws are to be strictly enforced to accord protection to the migrant women workers from exploitation and to receive their rightful wages and their entitled working conditions.

In a society like India, where the factors such as marital status and age are more important than the economic independence of women, it is not clear to what extent the independent movement of women to cities and

employment in industrial units has helped to gain autonomy and empowerment of women.

While reviewing the existing laws related to the human rights of migrant women workers, the following points may be taken into consideration:

1. Policy making cannot be based on assumptions, it should be on statistics. Lack of reliable data on migration is the first problem to be addressed. A National Portal for the Migrant workers should be set up, in which data may be collected on their gender, age group, number of dependents, home state and the destination state. There is a need to build a robust institutional framework for the collection of data on migrant workers.
2. Issues related to the health of the migrant women workers should be addressed. It should focus on the access to healthcare, and special attention should be given to the pregnant and lactating women. Menstrual health and hygiene should be a matter of priority; separate latrines and washrooms should be provided for women at their workplace. Awareness regarding safe sexual practices and sexually transmitted diseases should be created.
3. Mental Health issues of the women migrant workers are to be addressed. It is to be noted that these women depart from their homes and native place and face language barriers, social discrimination, non-inclusion, etc. Inclusive treatment is important for the mental well being of the migrant women workers who are away from their native place and family members.
4. Special care should be accorded to the widows and women with disability. Counselling and guidance should be given to women who needs emotional support due to insecurity, fear of abuse and depression.

5. Economic and social empowerment of women can be achieved only through education. State should provide evening schools for uneducated migrant women workers.
6. Education of the children and cheche facility for the infants of the migrant women workers are to be best addressed. Shelter homes for migrant women workers should be provided.
7. Retaining Inter-State Migrant Workers Act, 1979 instead of including the same under the 2019 Code. The Act may be amended to make it gender sensitive and to provide economic and social security for the migrant women workers.
8. Awareness programmes should be initiated among the migrant women workers to sensitize them on their legal rights and welfare schemes. Legal awareness should be given on domestic violence, sexual harassment at workplace, etc. Free legal advice and free legal aid should be provided for such gender sensitive issues. Making awareness of rights and policies of migrant women workers will definitely make a change in their lives.
9. The provisions of Food Security Act, 2013 should be strictly followed. One nation, one ration card policy should be strictly followed so that the migrant workers will also get the benefit of the governmental schemes food security for all.

S.377: A Call to Conscience

Sarica AR*

"I am what I am, Take me for what I am; Because, My individuality is my autonomy."

This was the stance taken by Chief Justice Dipak Mishra on 6th September 2018, while striking down a part of S.377, the 157 year old draconian law from the Victorian era as unconstitutional and violating the provisions of part III of the Constitution of India, in the land mark judgement of *Navtej Sing Johar* v *Union of India*[1].

Introduction

India has a long tradition of tolerance for all kinds of beliefs, faiths, philosophies, orientations and ways of living. Though India is a deeply religious country but at the same time it is also a country which has accepted non- religious communities as well. In ancient India there was a place for all kinds of diverse cultures, arts and literatures; the society was very assimilative. At one place we have purely and strictly religious painting and sculptors like at Konark or at JagganathPuri temples and at another place we have monuments like Khajuraho which is famous world over for its erotic arts and sculptors; this also includes sculptors with

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1 WP (Crl.) No. 76/2016, order dated 12-07-2018

homosexual activities. This shows that not only all types of sexual orientations were there in ancient past but people were so tolerant and broad minded that paintings and sculptors depicting the same sex love-making were being freely created and displayed.

But our modern society somehow has become less tolerant towards anything which is not regular or common according to their collective perception; whether we study society's behaviour towards religious minorities such as Islam or Christianity or its behaviour towards sexual minorities such as gays, lesbians or bisexuals. In all such cases, it can be found that people in minority are the target of the people in majority and harassment or discrimination against such minorities is widely prevalent.

Thus unlike ancient India, people with different sexual choices i.e.Homosexuals are not treated equally in today's society and their basic human rights are violated frequently like food, shelter and water, sexual need is also one of the basic human needs without which life cannot be fully realized or enjoyed. Sexual orientations may differ from person to person. Though persons with non- regular sexual behaviour are in minority but they are a reality. Non-regular sexual behaviour may be understood as sexual preference and attraction not with opposite sex but with same sex persons.

Section 377 of the Indian Penal Code deals with the offence of unnatural offences. The IPC states-

"377. Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Thus, this Section introduced by Lord Macaulay in 1860 as a part of the Indian Penal Code on a plain reading makes clear it that it punishes 'carnal intercourse against the order of nature' with either imprisonment of 10 years or life and fine. This section corresponds to the offences of sodomy

and bestiality under the English law. As evident from the wordings of this section, consent is immaterial in the case of unnatural offences and the party giving consent would be equally liable as an abettor of the offence. This section is very vague. As per this section homosexuality is an unnatural offence against the order of nature. This has led to many controversies and questions regarding its constitutional validity. In order to determine the constitutional validity of this section and the reasons for its incorporation in the IPC it is important to analyse its historical backdrop.

History of the legislation

The Indian Penal Code was drafted by Lord Macaulay in 1861 during the British Rule over Indian Subcontinent. It has been largely influenced by the colonial rules of British Empire. What was considered crime in Britain is a crime under IPC to a large extent, despite the differences in the countries.

In Britain, Underthe Buggery act 1533, Acts of sodomy was a serious crime punished with death by hanging. This was re-enacted by Queen Elizabeth I in 1563, after which it became the charter for the subsequent criminalisation of sodomy in the British colonies".[2] Section 377 of Indian Penal Code owes its origin to the Buggery Act. This law, ever since its enactment, has not been amended by Parliament as it is based on Jewish and Christian moral and ethical standards which consider sex on purely functional terms of procreation. Thus, on this basis homosexuality is considered as unnatural and against the order of nature. In this context, it is necessary to understand what is natural and what is unnatural and also, to determine whether homosexuality is against the order of nature or not. The constitution Bench headed by the Chief Justice Dipak Mishra termed the part of section 377 IPC which criminalizes consensual unnatural sex as irrational , indefensible and manifestly arbitrary.

2 Naz Foundation v. Govt. of NCT, 2010 CrLJ 94.

Indian equal rights activists have undertaken a long and arduous journey to decriminalize same sex relationships. They had tasted their first victory when the Delhi High Court in July 2009 decriminalized homosexuality among consenting adults. However, in December 2012, the SC, quashing the HC order, held that the order was legally unsustainable.

Soon after a group of a well-known LGBT rights activists NS Jauhar, journalist Sunil Mehra, ChefRituDalmia, hotelier AmanNathetc. approached the SC which agreed to reconsider the issue.The petition claimed their "rights to sexuality, sexual autonomy, choice of sexual partner, life, privacy, dignity and equality along with the other fundamental rights guaranteed under Part 3 of the constitution of India are violated by section 377.As a result, the historic verdict became a ray of hope by striking down 377 of IPC as being violative of the right to equality and right to live with dignity.

Aspect of Homosexuality

It is natural tendency that persons of one gender are sexually or emotionally attracted towards persons with opposite gender i.e. males are a males are attracted towards females and vice versa. But sometimes and in some cases this sexual or emotional attraction is not towards opposite sex rather it is towards the same sex persons. This same sex attraction or orientation is known as Homosexuality and persons with such orientation are called as Homosexuals. Homosexuals can be persons of both the sexes i.e. Gays (male-male) and Lesbians (female-female). Another term LGBT is also commonly used for persons with homosexual orientations; LGBT being abbreviation of Lesbians, Gays, Bisexuals and Trans-genders.

The reasons for such type of sexual behaviour or choice are not yet fully known but several researches have been done and different experts have found different results or theories. The reasons may be biological, psychological or both.

- **Biological Reasons**

  Several scientists have concluded that one is born with a particular kind of sexual orientation and it is in the genes. Thus it is a natural phenomenon. But no conclusive proof is there that homosexual behaviour is simply a biological thing. There may be a factor of genetics in determining one's sexual choice but other factors might also be there.

- **Social and Psychological Factors**

  It is a fact that socio-cultural environment affects the development of a child in significant ways. One's family, friends, society, and experiences decides how one views life, how one feels and how he or she acts. Thus psychological factors are also very important in determiningone's sexual preferences.

  But it is true that not one single factor but combination of many things determines one's sexual orientation. And whatever be the reason as it is natural for a person to decide what kind of food he/she wants to eat, what kind of living he/she wishes to have; similarly, it is also natural that with whom he/she wants to have sexual relationship either with opposite sex or with same sex.

Discrimination Faced by the LGBT Community

Discriminations faced by homosexuals in our society are at various levels; beginning from within their homes to outside world as a whole. Their entire life is a struggle only because they are born with a particular sexual orientation which is different from others. In fact it is proved through various scientific or psychological studies that such behaviours are perfectly natural.

Our society is a very complex one; at one side we are most modern of societies of the world with all the liberal thoughts and beliefs but at on another level we are the most conservatives of societies of the world. We

specially avoid facing so-called taboo social issues such as pre-marital sexual relationship, live-in relationship, inter-caste or inter-religion marriages etc. Homosexuality is also one of the most avoided or detested issues in our society. Even the mentioning of the terms Gays or Lesbians is a strict no-no. Thus, the society as whole has not accepted persons with different or so-called unnatural sexual behaviour.

The discrimination against LGBT community persons is fairly common. And it begins from their own homes; their own family members treat it as a disease or perversion and accordingly treat them badly. In fact family members feel ashamed of in the society if any member of their family has such sexual orientation.

Outside of home, they experience all the more severe and hateful behaviour of people, be it at work place, school, and colleges or at any other public place. Everywhere they become a target of obnoxious comments and sexually colored jokes. The problem is due to their appearances and way of walking or talking they are easily recognizable and become victim of such derogatory remarks etc. In our day to day life we pass jokes and messages ridiculing and making fun of LGBT people; even in our movies these people are presented in a very objectionable way just to invoke some kind of laughter among the audiences**.**

So overall general perception of the society is against such individuals and we are not ready to accept them as one among ourselves.

Legal Scenario

India has a very dynamic and progressive Constitution which in a way is the backbone of this very vast and complex nation. The Indian Constitution provides rights and protections to each and every citizen of this country whether he is in majority or in minority. The Constitution treats everyone equally without any discrimination. It is the duty of the State to ensure that no one should be discriminated against.

LGBT community persons are in minority and they too have equal constitutional rights. But their right to equality and right to get equal treatment in the society are violated on regular basis. Not only society as whole but State machinery also treat them differently, especially police. They are regular victim of rights violations. They are deprived of their basic human right and right to life which includes right to enjoy life properly.

This provision of 377 of the IPC has become a major controversial point and topic of debate in recent times. People of LGBT community are trying from quite sometimes to convince and pressurize our law makers to decriminalize Section 377. In other words, LGBT social action groups are demanding that if two consenting adults of same sex are involved in homosexual activities, it should not be a criminal offence.

But when their plea was not responded by our legislatures, they went to the Court for appropriate and just solution to their grievances through a Public Interest Litigation (PIL). The said PIL was filed by a NGO namely Naz Foundation in Delhi High Court.

In the case *Naz Foundation v Govt. of NCT of Delhi* [3](2009 Delhi H C) passing a landmark judgment on 2nd July 2009, Delhi High Court declared Section 377 as illegal as far as it criminalizes same sex sexual activity between two consenting adults done in private. Thus, in effect Delhi High Court, in its historic decision upheld and secured the LGBT people's right to sexuality**.**

Natural vs. Unnatural

The Black's law dictionary defines natural as "A fundamental quality that distinguishes one thing from another; the essence of something. It is something pure or true as distinguished from something artificial or contrived. The basic instincts or impulses of someone or something".[4] To

3 Naz Foundation v. Govt. of NCT, 2010 CrLJ 94.

4 BLACK'S LAW DICTIONARY 750 (9th ed. 2009).

determine what is natural, there is a functional basis which means that every instrument or organ of the body has only one particular function to perform and using such any organ for any purpose other than its principal or primary function is unnatural.[5] As per this functionality logic, every form of sex other than penile vaginal sex and anything other than procreative sex is unnatural.

Based on this logic, the judiciary has struggled to find a solution to since 1860 to unnatural sex. Initially while the meaning of Section 377 back in 1884 was restricted to anal sex, by 1935 it was wide enough to include aspects like oral sex and thigh sex. Section 377 was not merely about anal sex alone, but applied to homosexuality in general. The lack of a consent-based distinction in the offence has made homosexual sex synonymous to rape and equated homosexuality with sexual perversity.[6]

The principle which holds together these various sex acts prohibited by Section 377 was laid down as early as in 1935 itself. In *Khanu* v *Emperor*[7] it was held that "the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of coitus per se is impossible". Thus, the courts interpreted the term "carnal intercourse against the order of nature" so broadly that it now includes oral sex, anal sex and even penetration into artificial orifices such as folded palms or thighs. A wide application of section 377 with unclear and vague language has eventually led to arbitrary application against the rule of law and which ultimately led to challenging the constitutional validity of this section.

Section 377 clearly makes homosexuality illegal on the ground that it is against the order of nature and has led to various controversies with regard to the inalienable rights or fundamental rights under part III of the

5 BURTON LEISER, SEX, MORALITY AND THE LAW (Gruen&Panichas eds 1996)

6 Alok.Gupta,_*Art 377 and the Dignity of Indian Homosexuals* 41(46)EPW. 4815-4823(Nov.2006).

7 Khanu v. Emperor, AIR 1925 Sind 286

constitution, like right to privacy and right to life.[8]Due to arbitrariness of section 377 and violation of basic fundamental rights of the constitution, the constitutional validity of this section was challenged in the court many times. The issue was settled and put at rest only on September 6th, 2018 and the Supreme Court has finally struck down the draconian law which did not value LGBT community as full citizens of India. This idea of sex without the function of procreation and conception was used by the judiciary for the last 140 years and homosexuality, which is a person's choice of sexual inclination was seen as 'perversion', 'despicable specimen of humanity', 'abhorrent crime', 'result of a perverted mind' and 'abhorred by civilized society', 'disease of the mind' than a person's fundamental right. The judicial interpretation included both acts of consensual sex and sexual assault under the same category of 'carnal intercourse against the order of nature'. On a plain reading, Section 377 did not prohibit homosexuality or criminalize homosexuals but targeted on the sexual acts and the fact that these sexual acts were always associated with only homosexuals has made homosexuals far more vulnerable under law, arbitrarily in an unjust manner.

Section 377 was used as a tool to misuse state power and harass the third gender i.e. those of a different sexual orientation or gender identity. As stated by Lord Akton, **Power tends to corrupt**; **absolute power corrupt**, hence, such enormous power for the state to enforce its idea of morality was arbitrary and brutal against the vulnerable minority of third gender.

According to a recent survey, across the world, countries are moving towards growing acceptance of same-sex relationships, often forcing the law to play catch up.With 30% of Indian respondents broadly supportive of homosexuality in 2014 (the rest range from somewhat opposed to completely opposed), India towards the liberal top of the distribution of 60 countries. Most developing countries have more conservative views on

8 KD GAUR, INDIAN PENAL CODE 618(3rd ed., 2013).

homosexuality than India. The US and western European countries have far fewer respondents who believe that homosexuality is not justified. Pakistan and western Asian countries have far stronger opposition to homosexuality. Compared to India, opposition to homosexuality is also higher among several other Asian countries such as China, Singapore and South Korea.

Another indirect estimate of views on homosexuals comes by asking the question: "could you mention a group that you would not like as neighbours"? In 1991, 91% mentioned homosexuals; in 2014, fewer than half (42%) mentioned homosexuals. In 2014, unmarried couples and people from a different religion or part of the country were less desirable as neighbours than homosexuals for survey respondents**.**

Plight of the LGBT Community in India

India has about one million of its population who are in the LGBT category, who are not yet considered as normal humans due to social stigma of culture and religion. They are addressed as "Hijras" and live on the fringes of society, in utter poverty, ostracised or harassed due to their gender identity. Most of them strive to make both ends meet through singing and dancing or by means of begging and prostitution.

The Proof of such harassment and exploitation, in public and even in government custody like police stations is evident from the various incidents that keep getting reported on social media and newspapers on a day to day basis.

One example is an incident In August 2004 regarding the double murder at AnandLok, involving the murder of two gay men in South Delhi where media diverted the attention from the murder to "unsafe lifestyle" of the gay victims. To increase sales and TRP ratings, headlines such as "Gay Murders Tip of Sordid Sleazeberg"[9] became a sensational topic with media

9 *Gay Murders Tip of Sordid Sleazeberg*, THE HINDUSTAN TIMES, (17 August 2004).

forgetting its ethics and violating the basic human rights of the LGBT community.

Another incident is in 2006 where the Lucknow police trapped five gay men by tracking them over the internet and arresting them under Section 377 for unnatural sex. For years, police have used Section 377 to extort, threaten, intimidate and harass LGBT people. Commenting on how law-enforcers have misused their power, AmartyaSen observed that the harm done by such an "an unjust law can be far larger than would be indicated by cases of actual prosecution".[10]

The next notable incident occurred on 20th October 2008, yet again, where five hijras were taken to the Girinagar police station where they were beaten up by the police and charged under section 341 (wrongful restraint) and 384 (extortion) of the Indian Penal Code, falsely. They were produced before the magistrate and sent into judicial custody. Despite the Supreme Court guidelines in *DK Basu v State of West Bengal*, [11] they were handled by male police and given no medical treatment for their injuries in police or judicial custody. They were released on bail on 22nd October, 2008. This incident was brought to light by Sangama, a human rights organization working for the rights of the LGBT community for the past ten years.

In police stations, they are not only abused verbally but also physically and are sometimes even forced to give "sexual favours". This follows with brutal rape or evengang rape when the victim resists. This has led to terrible trauma, helplessness, fear of contracting HIV and STDs, depression and other psychological/emotional complications, with complete loss of faith in the state and administration of justice.[12]

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10 Shohini Ghosh, *India: End to Unnatural Exclusion*, HINDUSTAN TIMES, (July 2nd 2009)

11 1997 1 SCC 416

12 Aditya Bondyopadhyay, *State-Supported Oppression and Persecution of Sexual Minorities*, NGO Briefing, United Nations Commission on Human Rights (April 8 2002).

A survey[13] across eight Indian states has found that respondents are not forthcoming in stating their support of adult consensual same-sex relations. Social acceptance of intimate homosexual relations remains low even as a clutch of petitions against Section 377 of the Indian Penal Code, which criminalises all forms of non-penile vaginal intercourse, lies before the Supreme Court.

This survey was sought to map opinions on a range of subjects from ease of accessing government schemes to perceptions on gender roles, has found that respondents are not forthcoming in stating their support of adult consensual same-sex relations. The survey, conducted jointly by the Bengaluru-based AzimPremji University (APU) and LokNiti at the Delhi-based Centre for the Study of Developing Societies (CSDS), is the second of three annual surveys titled 'Politics and Society between Elections' planned across 24 states and Union Territories to map social and political attitudes between elections.[14] It covered 15,222 respondents from eight states, including Telangana, Andhra Pradesh, Rajasthan, Jharkhand, and Maharashtra, and was conducted between December 2017 and January 2018. The participants were asked to respond to the following statement: 'Sexual relationships between two men or two women should be accepted in society.' They were expected to answer with any one of the five options: Fully agree, somewhat agree, somewhat disagree, fully disagree, and No opinion.

A total of 28% agreed with the statement while 46% disagreed (these numbers are a combination of 'fully' and 'somewhat' categories). The remaining — a significant 26% — had no opinion. Bihar and Rajasthan registered the largest share of respondents who supported same-sex

13 Dhamini Ratnam. *Social acceptance of same-sex relations remains low: Survey*, HINDUSTAN TIMES, April 28,2018 (Feb 28,2019,2:35 PM)https://www.hindustantimes.com/india-news/social-acceptance-of-same-sex-relations-remains-low-survey/story-kI9JHEGEx2hzcdmQQvYjOI.html.

14 *Society Politics Between Elections, A Report-2017*,(Feb 28,2019,2:35 PM) https://azimpremjiuniversity.edu.in/SitePages/pdf/Azim_Premji_Univ_PSBE_2017.pdf.

relationships, 39% and 37%, while Jharkhand, with 64% who chose to disagree with the statement, had the largest share of respondents who did not support same-sex relations. The southern states of Andhra Pradesh and Telangana had the highest proportion of respondents who had no opinion, 46% and 33% respectively.

Love jihad is a term coined by fringe Hindu groups to describe what they claim is a conspiracy by Muslim men to lure Hindu women into marriage. Gharwapsi (back home) is the campaign led by some groups for the conversion of non-Hindus to Hinduism.

The survey asked questions to judge people's attitude towards freedom of expression, displays of nationalism and patriarchal gender roles. For instance, they were asked to respond to the following statements: 'The government should punish those who do not stand during the national anthem'; and 'Women should have the right to decide whether to get married or not'.

It was also found that many with socially liberal views did not come out strongly in support of same-sex relations. For instance, nearly 76% of those who fully disagreed with the statement that the government should punish those who do not stand during the national anthem did not support the acceptance of same-sex relations in society.

Age was not a factor in expressing acceptance either: 21% of the youth surveyed (ages 18 to 35) did not have an opinion on same-sex relations, while 39% fully disagreed with the proposition. Only 11% fully agreed. Among the middle aged (36 to 59 years), approximately 37% fully disagreed and 29% did not have an opinion, while among the older respondents (60 years and above), a comparable 35% fully disagreed and 35% chose 'no opinion'.

According to Bengaluru-based counsellor, Vinay Chandran, who has worked with the queer community for close to two decades, "The findings indicate that gender and sexual identity experiences challenge the social

norm at a very fundamental level, a challenge that most people in India are still uncomfortable with."[15]

Among those who had an opinion on the marriage question, 47% of those who agreed that women should have the right to decide to marry fully disagreed with the proposition that same-sex relations should be accepted in society.

Interestingly, a significant proportion of respondents, 21% among those who disagreed with the marriage question 'somewhat agreed' that same-sex relations should be accepted.Gay sex is considered taboo by many in socially conservative India, and while it no longer carries the previous punishment of up to 10 years in prison, other rights like gay marriage are likely to prove elusive.India's government, a broadly right-wing, Hindu nationalist coalition led by the BharatiyaJanata Party, has indicated it will support the Supreme Court in its ruling, but will oppose any attempts by activists to push for further rights. Gay people in India are currently not allowed to marry, adopt children or inherit their partner's wealth should they die.

Social Bias

There has been social stigma attached to out casting the LGBT Community mainly because of the role of religion where people have mistaken LGBT persons as sinners. Not only religion, even science has a major role and has deeply impacted our understanding of the concept of homosexuality.

Most people think that the religions in India are against homosexuality. That's not the case.

The beautiful sculptures outside the temple of Kajuraho depict the life of homosexuals in all grandeur. The prime deity of the Hindus, Lord Shiva

15 Brindalaskhmi K, *Healthcare challenges faced by LGBT community in India: In conversation with Vinay Chandran,* (Dec 12,2018,12.30 PM)http://www.hidden-pockets.com/healthcare-challenges-faced-by-lgbt-community-in-india-in-conversation-with-vinay-chandran/.

in his *ardanadeeshwar* form is half man and half woman with the feminine part representing goddess Parvati as his Shakti. The most worshipped, Lord Ayappan, is the son born out of the transgender relation between Lord Shiv and Lord Vishnu, the supreme deities of Hinduism.

Even Hindu mythology like Mahabharata has its war hero Arjun as a Hijra or shikandi and the HinduVedas, the most revered texts of Hinduism, considered third gender as blessed with divine power and insights.

In Islam, the opinions of the All India Muslim Personal law Board is worth noting. The All India Muslim Personal Law Board will not contest a move to scrap the colonial-era ban on homosexuality if the Supreme Court decides to do so. They had decided to trust in the courts wisdom by realising the need to repeal this law and take a modern outlook.[16]

In Christianity, pope Francis had send out his message that the parents of LGBT children should treat them with kindness and compassion thereby conveying that it is not against Christianity, nor is it a sin and in turn that the expression of ones sexuality is not an illness.[17]

The next is the role of science and medicine which led to a false notion that unnatural sex is more susceptible to deadly diseases like HIV and AIDS. This was due to the popular misconception that homosexuals spread HIV and AIDS in the course of unclean sexual relation.

This was the result of **PATIENT ZERO THEORY**, in which it was stated that HIV is caused by homosexuals becausea part of a cluster of homosexual men who travelled frequently, were extremely sexually active, and died of AIDS at a very early stage in the epidemic.The idea of Patient

16 A Vaidyanathan, *Won't Oppose Scrapping Homosexuality Ban, Says Muslim Law Board* (November 15,2018,3:30 PM)) https://www.ndtv.com/india-news/section-377-aimplb-wont-oppose-scrapping-homosexuality-ban-1882536.

17 *Pope Francis: gay kids' parents shouldn't condemn them*, SYDNEY MORNING HERALD, Aug 27,2018 (December 2, 2018, 4:40 PM)https://www.smh.com.au/world/europe/pope-francis-gay-kids-parents-shouldn-t-condemn-them-20180827-p4zzyd.html.

Zero was an interesting concept for the media to use the LGBT community as a scapegoat by focusing solely on the man and his sexuality, rather than the virus itself, the media birthed a defamatory point of view on gay life, that gay sexuality was unclean and promiscuous and thus punishable by AIDS.[18]

"The media was all too eager to cast blame on a single person, rather than reflect on the stigma they were creating and the lack of political will to actually do something about the disease," says Kelsey Louie, CEO of Gay Men's Health Crisis. "The stigma created in the past is still strong today and prevents many from talking about HIV to educate themselves, getting tested for HIV for fear of being labelled, and even seeking treatment if they are positive. The Patient Zero storyline also fostered the belief that HIV was a gay disease, when we now know that anyone can be impacted by HIV, regardless of your sexual orientation."[19]

It has been 35 years since this theory was formulated and now even after it was debunked by showing that AIDS and HIV virus can occur due to multiple reasons other than homosexuality, yet, homosexuals are still stereotyped as the primary transmitters of the disease and this Stigma affects the world community more than the virus itself.

Global Recognition

The interdependent relationship between health and human rights is well recognized. Human rights are indivisible and inalienable rights due to all people. Articles 1, 2, 3, 5, 6, 7, and 16 of the Universal Declaration of Human Rights (UDHR) address, respectively, the rights to equality; freedom from discrimination; life, liberty, and personal security; freedom from torture and degrading treatment; recognition as a person before the

18 David Artavia, *Patient zero theory is debunked* (Nov 28,2018,3:30 PM)https://www.hivplusmag.com/features/2016/10/28/patient-zero-theory-debunked-yet-myth-hiv-gay-disease-lives.

19 *Id*

law; equality before the law; and the rights to marry and have a family. Some people, specifically lesbian, gay, bisexual, and transgender (LGBT) individuals, are in many places and circumstances denied their claim to the full set of human rights. This puts LGBT people in many countries at risk for discrimination, abuse, poor health, and even death.

Denial of the recognition of human rights for any group of individuals is a denial of their humanity, which has a profound impact on health. For LGBT people, it may result in discrimination in housing and jobs (affecting the ability to purchase food, shelter, and health care); lack of benefits (affecting the ability to pay for health care and financial security); harassment and stress (affecting mental health and/or prompting substance abuse, smoking, overeating, or suicide); isolation (leading to depression); sexual risk-taking (exposing oneself and loved ones to sexual health risks, including HIV); physical abuse and injuries; and/or torture and death. If heath care organizations take a rights-based approach to health provision for LGBT people by explicitly recognizing their existence and targeting health interventions to their needs, it may alleviate fear of discrimination and discrimination itself, as well as improving health outcomes.

LGBT people in many societies are subjected to discrimination, abuse, torture, and sometimes state-sponsored execution. For many human rights violations, there exist laws under which countries punish perpetrators of such abuses. For LGBT people in most countries, abuses perpetrated against them are not viewed as human rights violations. Some countries, such as Iran and Saudi Arabia, have laws calling for the execution of "practicing homosexuals." At least 40 countries criminalize same-sex behaviour for both men and women, and an additional 35 or more criminalize it just for men. Countries most recently in the news in this respect include Uzbekistan, India, Nigeria, and Saudi Arabia. In many Muslim countries, both civil law and *shari'a* (the rules governing the practice of Islam) criminalize homosexual activity. Police abuse of LGBT people is common and pervasive in many places, including the United

States. Recent notable abuse cases have occurred in Nepal, Guatemala, Ecuador, Honduras, Colombia, Peru, India, Taiwan, Cameroon, Uganda, and Zimbabwe. Many countries legalize and condone discrimination in housing and employment. Laws providing citizens with benefits, including those in the US, do not provide equal benefits to LGBT couples. For example, a report by the US Government Accountability Office (GAO) documented more than 1,000 benefits, rights, and privileges that the federal government provides to opposite-sex married couples but not same-sex couples, including taxation and social security survivor benefits. Protections under the law are similarly lacking. Thirty-four of the 50 US states and the District of Columbia do not prohibit discrimination on the basis of sexual orientation. Twenty do not have "hate-crime" laws that include sexual orientation among their protected categories. Protection for transgender identity is even more limited.[20]

Legal marriage conveys many additional benefits and protections to couples. Only a few governments (to date, Canada, Belgium, the Netherlands, and Spain) recognize LGBT rights to marry and form a family. South Africa, which in 1996 became the first country to include sexual orientation in its Constitution as a status protected from discrimination, is expected to allow same-sex marriage by the end of 2006. In Brazil, where state and federal laws prohibit discrimination based on sexual orientation, inheritance rights are provided to same-sex couples. Several European countries (Denmark, Sweden, Norway, Finland, the UK, France, Germany, Switzerland, Portugal, Slovenia, Croatia, and Iceland) as well as Israel and New Zealand have some benefits for same-sex couples, but not equal to those for heterosexual couples. Within the US, only one state (Massachusetts as of May 2004) grants civil marriage rights to same-sex couples; however these are only the rights provided by the state, not the more than 1,000 federal benefits mentioned above. California,

20 Suzzane M Marks, *Global Recognition of Human Rights for LGBT people*(December 12,2018,3:30 PM)https://www.jstor.org/stable/4065388.

Connecticut, the District of Columbia, Hawaii, Maine, New Jersey, and Vermont have either civil laws or other domestic partnership laws to provide some benefits to unmarried couples (again, not equal to marriage rights).[21]

In the human rights arena, major international human rights organizations have only committed to including the rights of LGBT people within the past decade or so. Human rights organizations such as Amnesty International and Human Rights Watch now have campaigns to address LGBT human rights violations. Specialized LGBT human rights groups have been active for much longer. For example, the International Gay and Lesbian Human Rights Commission (IGLHRC) has existed for the past 16 years to secure the full enjoyment of the human rights of LGBT people and communities subject to discrimination or abuse on the basis of sexual orientation or expression, gender identity or expression, and/or HIV status. Likewise, for the past 28 years the International Lesbian and Gay Association (ILGA) has been fighting for equal rights for LGBT people.[22]

There is some support for LGBT human rights at the United Nations (UN). UN Secretary-General Kofi Annan expressed his support in August 2003 for LGBT non-discrimination, stating, "The United Nations cannot condone any persecution of, or discrimination against, people on any grounds."[23] The UN Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights, found that laws punishing adult consensual homosexual acts violate the Covenant's

21 Goodridge v. Department of Public Health, 440 Mass. 309 (2003)(Jan 3,2018,2:30 PM) https://www.littler.com/same-sex-marriage-legal-massachusetts-what-does-mean-employers-and-outside-commonwealth .

22 Dominic McGoldrick, *The Development and Status of Sexual Orientation Discrimination under International Human Rights Law* (2016)(Jan 3,2018,3:30 PM) https://academic.oup.com/hrlr/article/16/4/613/2694928.

23 Suzanne M. Marks, *Global Recognition of Human Rights for Lesbian, Gay, Bisexual, and Transgender People* (Dec 23,2018,4:30 PM) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5451102/ .

guarantees of non-discrimination and privacy and held that discrimination on the basis of sexual orientation is prohibited under Articles 2 and 26 of the Covenant.[24]

However, advocates still have trepidation about using UN fora to claim the human rights of LGBT populations because of the threat of opposition from several sectors, including the Vatican, countries in the Organization of Islamic Cooperation (OIC), and, recently, the US.LGBT advocates were not allowed to join discussions at the UN Economic and Social Council (ECOSOC) when the Council dismissed the applications of the ILGA and the Danish Association of Gays and Lesbians for observer status. This was the first time in its history that the Council, at the request of Iran, Sudan, and the US, dismissed the application of a nongovernmental organization (NGO) without the hearings usually given to applicants. The US action was a reversal of policy, as it had voted for ILGA observer status in 2002. Forty-one human rights organizations wrote a joint letter to US Secretary of State Condoleezza Rice condemning the US action. In 2003 and 2004, the US refused to endorse a Brazilian draft resolution to the UN Commission on Human Rights that would have condemned discrimination on the basis of sexual orientation, citing ideological values opposed to the resolution.[25]

The US action at the UN made a mockery of the increased documentation by the US Department of State of LGBT human rights abuses around the globe.

Egregious human rights abuses against LGBT people continue. Two recent examples highlight the nature of the abuses and their impact. The brutal murder of lesbian activist Fanny Ann Eddy in the office of the Sierra Leone Lesbian and Gay Association occurred only a few months after she

24 UN High Commissioner Office, *Born Free and Equal,* https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf.

25 *Gaining the right to speak in our own name at the United Nations: the ECOSOC campaign* (Dec 23,2018,4:40 PM)https://ilga.org/gaining-the-right-to-speak-in-our-own-name-at-the-united-nations-the-ecosoc-campaign.

gave an impassioned speech to the UN Commission on Human Rights in 2004.[26]In February 2006, another deadly attack took place, this time in South Africa. Zoliswa Nkonyana, a lesbian who was walking down a street in a Cape Flats township with her partner, was stoned and killed by a mob. This occurred despite South Africa's constitutional protection against discrimination.[27]

Human rights are the fundamental rights of every human being, regardless of culture or societal norms. Working for the recognition of LGBT human rights is about ensuring access to health services, but also involves speaking out and acting to ensure the visibility of LGBT people, understanding LGBT issues, and being aware of the range of human rights violations that occur. Principles must be codified into policies and laws, both international and country-specific, for LGBT human rights to be recognized, and prejudices must be challenged so that others treat LGBT people as human beings deserving of all human rights.

Cases under Section 377

The courts, in India have dealt with a variety of case laws since times immemorial in which they have applied the Section, explained its ingredients and examined its scope. In the case of *Nowshiriwan Irani v Emperor*[28], the Court held that there was no offence committed nor any attempt made to commit the offence could be interpreted since there had been no penetration. In Mirro v Emperor, the judge stated, referring to the accused: "It seems clear to us that he is not only a desperate character but is a man of depraved morality." [29]

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26 T*he LGBT community mourns the death of Fanny Ann* (Nov 3, 2018,5:30 PM) https://ilga.org/the-lgbt-community-mourns-the-death-of-fanny-ann.

27 *Mounting violence haunts South Africa's gays and mobilizes activists* (Nov 3, 2018,5:30 PM) https://ilga.org/mounting-violence-haunts-south-africa-s-gays-and-mobilizes-activists.

28 AIR 1934 Sind: 37 CrLJ 728.

29 AIR 1947 All 97

In *Lohana Vasantlal Devchand v State*[30] the aspect of whether the act of placing one's organ inside the mouth of another could be termed as carnal intercourse. The courts reached this conclusion after examining the definition of sodomy in English law and comparing it to Section 377 of the Indian penal Code. This case had established thatthe concept of oral intercourse is a form of carnal intercourse which is punishable under law.

In *State Government Of Nct Of Delhi v Sunil*[31], where two men committed rape and sodomised a four year old girl led to her death; based on medical evidence it was proved that the accused had indulged in anal intercourse with the girl, were convicted under Section 377 of the code.

In *State of Kerala v Kudumkara Govindam and Anr*[32] the court upheld the ruling of *Khanu's* case and held thigh sex punishable under this section. Similarly in *Fazal Rab Choudary v State of Bihar*[33], the court held that S.377 was synonymous to sexual perversity.

In the case of *Raju v State of Haryana*,[34] where the 20 year old appellant was found guilty of committing sodomy, the court once again addressed this as perversity. In Amit v State of UP,[35] the accused committed unnatural sex with a minor girl and was imposed death penalty for the offence of murder. The Supreme Court converted the death sentence of the accused into imprisonment for life on the ground that accused was a young person and may reform over a period of years.

In the case of *Ou v The State of Maharashtra*[36], the accused tried to penetrate inside a 14 months old child which did not happen as thechild

30 AIR 1968 Guj 252

31 2001 Cri.L.J 504.

32 1969 CriLJ 818

33 1983 CriLJ 632

34 (1998) CrLJ 2583 (2592)

35 (2012) 4 SCC 107

36 Criminal Application No.2581 of 2009.

cried out in pain which was heard by outsiders who prevented further harm. The court also stated that "the extremely tender age of the child makes the acts of the accused even more deplorable calling for stringent punishment".

NAZ Foundation Case

On 7th of July2001, the police raided a park in Lucknow based on an FIR by a person who had alleged to have been sexually assaulted. This raid led to the arrest of a social worker from the Bharosa Trust, a NGO working with the MSM community and the police also raided the offices of Bharosa and Naz Foundation. Apart from search and seizure of materials, the police also arrested nine people. The media took turn to sensationalize the news with terms like "sex racket".

The arrested persons were remanded to judicial custody where they were physically tortured and also their offices were sealed by the government. They were charged under Sections 377 (unnatural offences), 292 (sale of obscene books, etc.), 120b (criminal conspiracy) and 109 (abetment) of the IPC; under Section 60 of the Copyright Act; and Section 3 and 4 of the Indecent Representation of Women Act with their bail applications rejected twice. It was only on 16-17 August that all four accused were granted bail, and that too only after the public prosecutor had proven that there was no link between the NGOs and the incident in the park on the 7th of July. Even medical examination was done of all the accused and it was clear that no evidence to charge them under Section 377 was found.

This incident created a situation of alarm in the entire nation about how Section 377 was being used as a means of discrimination. To address this became the need of the hour considering the injustice faced by the minority community of LGBT for over two decades. Thus, NAZ foundation filed a petition under the Delhi High court for striking down this unconstitutional law as a violation of right to privacy. The petition also

requested for private consensual sex between adults to be decriminalised. The petitioned challenged the legislative intent of this colonial law as arbitrary and discriminatory on the grounds of sexual orientation and hence outdated.

Naz Foundation v Government of NCT[37]

In the writ petition by Naz Foundation, as a Public Interest Litigation to challenge the constitutional validity of Section 377 of the Indian Penal Code, 1860 (IPC), was challenged on the ground that Section 377 IPC, when it deals with consensual sex with adults in private infringes the fundamental rights guaranteed under Articles 14, 15, 19 and 21 of the Constitution of India. The petitioners submitted that Section 377 IPC should apply only to non-consensual and non- vaginal sex involving minors.The writ petition was dismissed by the Delhi High court on the ground that there was no cause of action in favour of the petitioner and that a petition cannot be entertained to examine the constitutionality of a legislation. On appeal the Supreme Court set aside thisorder of the lower court on the ground that this is a matter which requires consideration and is not of a nature to be dismissed on such a flimsy ground and thus, the matter was remitted to the Delhi High Court for a new decision.

ISSUES:

I. Whether Section 377 is in violation of Article 14

Article 14 of the Constitution of India. Article 14 of the Constitution of India provides for equality before the law or equal protection within the territory of India. It was submitted that Section 377's legislative intent of penalizing 'unnatural sexual acts' has no rational nexus to the classification created between procreative and non- procreative sexual acts, and is thus in violation of Article 14 of the Constitution of India. Section 377's

37 Writ Petition (Civil) No. 7455 of 2001

legislative objective is based upon misunderstandings and stereotypes that is outdated and has no historical or logical rationale due to which it is arbitrary and unreasonable. The Court made it explicit that- "where an Act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, in violation of Article 14."[38] According to Union of India, the object of Section 377 IPC was to protect the vulnerable category of women and children and prevent the spread of epidemics like HIV/AIDS and enforce social morality.

It is clear from a plain reading of Section 377 IPC and the judgements that followed that it was not enacted to protect children against child sexual abuse or fill the lacuna in a rape law under S.375. It was a way to enforce a fake morality from the Victorian era where carnal sex was considered a sin based on illogical myths and beliefs.The claim of legislative intention to protect women and children was just for theory purpose and not practically effective.

The claim of the second objective of the legislationwas that Section 377 IPC helps to maintain public health by criminalising homosexual behaviour which is the main reason for spread of epidemics. Section 377 IPC was held as preventive measure for protection against HIV and AIDS. But, with patient zero theory debunked, this claim also did not stand valid.

Lastly, it was held that the state does not have the right to intrude into the privacy of the life of its citizens or provide regulations for their conduct on the basis of a purely subjective aspect of morality. The criminalisation of sexual relations in private between adults with full consentshows no idea of harm which makes the objective of the legislation arbitrary and unreasonable.

As stated in *Maneka Gandhi v Union of India*[39], the state's interest 'must be legitimate and relevant' for the legislation to be non-arbitrary and

38 *Id*

39 AIR 1978 SC 597

must be proportionate towards achieving the state interest. If the objective is irrational, unjust and unfair, necessarily classification will have to be held as unreasonable.[40]Thus, the classification must be based on intelligible differentia and must have a reasonable and logical nexus to the object to be attained. The nature of Section 377 IPC has no other purpose other than to criminalise conduct which does not confirm to moral or religious views of a section of society despite it being no fault of the individual as expression of sexual orientation is not an illness or a crime. This discriminationon the 7-8% of minority population of the LGBT community severely affects their rights and interests and dignity in such a way that few are put to peril to satisfy the fake interests and morality of the majority.

II. Whether Section 377 is in violation of Article 15?

Article 15 of Constitution of India deals with Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. India is also a signatory of the ICCPR.

International Covenant on Civil and Political Rights (ICCPR) purports right to equality and states vigorously that, 'the law shall prohibit any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social region, property, birth or other status'.

In *Toonen v Australia*[41], The Human Rights Committee, held that the reference to 'sex' is to include 'sexual orientation' and held that certain provisions of the Tasmanian Criminal Code which criminalisedhomosexual sex as violation of the ICCPR.Therefore, sexual orientation is similar to sex andany discrimination on the basis of sexual orientation is thus, not permitted under Article 15. Article 15(2) prohibits discrimination of one citizen from another even in the case of access to public spaces and opportunities. Therefore, discrimination on the ground of sexual orientation

40 *Id*

41 No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

is not permitted even on the horizontal application of the right enshrined under Article 15 of the constitution[42].

III. Whether it violates Article 21

Article 21 of the Constitution of India provides that, "No person shall be deprived of his life or personal liberty except according to procedure established by law."

Blackmun, J. in his dissenting opinion in Bowers, *Attorney General of Georgia v Hardwick*[43], quoted that the 'right to be let alone' should be not seen simply as a right to occupy a private space free from government interference, but as a right to get on with your life, your personality and make fundamental decisions about your intimate relations without penalisation.[44] This aspect of privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which one gives expression to one's sexuality is at the core of this area of private intimacy. If, in expressing one's sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy.[45]

In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21[46]. Section 377 IPC denies a person's right to life with dignity and criminalises the person on account of his or her sexuality and thus violates Article 21 of the Constitution which stands for the fact that life is not mere animal existence

42 D P Joshi v State of Madhya Bharat, AIR 1960 SC 1208

43 478 US 186 (1986)

44 *Id*

45 *Id*

46 Justice K.S Putthaswamy v. Union of India, Writ Petition (CIVIL) No. 494 of 2012; R. Rajgopal v. State of T.N.; AIR 1995 SC 264; People's Union for Civil Liberties v. Union of India, Writ Petition (Civil) No.196 of 2001

but to live with dignity[47].Thus, Section 377 IPC violates a homosexual person's a right to live and develop in his or her full personhood which is implicit in the right to life under Article 21 of the Constitution.

Ratio Decidendi of the *NAZ foundation case*:

Section 377, by criminalising consensual sexual acts between adults in private penalises the minority by targeting the homosexuals to satisfy the interests of the majority who consider it to be against the order of nature. Therefore, it is arbitrary and unreasonable under Article 14. The expression 'sex' in the Article 15 is not limited to 'gender' but includes 'sexual orientation' also and, thus equality on the basis of sexual orientation is also implied in the fundamental right against discrimination under article 15 of the constitution.

Thus, the Delhi High Court struck down the provision of Section 377 that criminalises consensual sex between homosexual individuals, and it also effectively opened up public space for the LGBT community to carry out a democratic struggle against the oppression they faced because of their sexuality and also created an opportunity to live with dignity. The Court, however upheld that even though there have been violations under article 14 and 15 but, right to life under Article 21 includes the right to health, and concluded that Section 377 is an impediment to public health because it hinders HIV-prevention efforts despite the debunking of patient zero theory. The Court did not strike down Section 377 fully. The section was declared unconstitutional insofar it criminalises consensual sexual acts of adults in private[48]. The judgement has kept intact the provision insofar as it applies to non-consensual non-vaginal intercourse and intercourse with minors. The court stated that the judgement would hold until parliament chose to amend the law[49].

47 Kharak Singh v. The State of U.P,AIR 1993 SC 1295

48 *Id*

49 *Id*

Positive and Negative Changes after *NAZ Foundation Case*

This decision to decriminalize homosexuality saw several changes. The harassment and blackmail of LGBT people by utilising their fear of prosecution for their sexual orientation and gender identity was reduced. However, sex workers were still trapped, harassed, detained and penalized using other laws. The decision in the *Naz foundation case* had also enabled LGBT and HIV/AIDS community to continue their work without fear of torture by authorities. Individuals were able to participate in Pride marches and demonstrations just like any other citizen of India.

At the same time, there was worry of negative repercussions also as a favourable judgment will not end the phobia and its devastating effects on the lives of LGBT community. The organized and social backlash against LGBT people as their issues and identities are made more public, prominent and fierce in mainstream media and has potentially increased family and community surveillance and violence on the LGBT community. Some activists say there is an even greater urgency now for safe houses, particularly for young lesbians, bisexual women, and non-gender conforming men and women.

Navtej Singh Johar v Union of India[50]

The privacy judgment in *Koushal's case* was living on borrowed time until when a Constitutional Bench of the Supreme Court, overruled *Koushal's* case and upheld the Delhi High Court judgment in *Naz Foundation*, clearly and unambiguously. All the confusions and contradictions of s.377 was put to rest and it was held that the LGBT community, just like any other Indian citizen was entitled to protection under articles 14, 15, 19 and 21, i.e. the inalienable or fundamental rights guaranteed by the Constitution.

This case is a mix of four concurring judgments with the outcome that Section 377 violated Article 14 (equal protection of laws), 15(1) (non-

50 WP (Crl.) No. 76/2016, order dated 12-07-2018

discrimination on grounds of sex), 19(1) (a) (freedom of expression) and 21 (right to life and personal liberty) of the constitution.

1. Concept of Choice by Chief Justice Dipak Mishra and Justice Khanwilkar

The Chief Justice Dipak Mishra wrote for himself and Justice Khanwilkar. The core aspect of his judgement relates to the idea of *choice*. The judges observed that, "When we talk about identity from the constitutional spectrum, it cannot be pigeon-holed singularly to one's orientation that may be associated with his/her birth and the feelings he/she develops when he/she grows up. Such a narrow perception may initially sound to sub serve the purpose of justice but on a studied scrutiny, it is soon realized that the limited recognition keeps the individual choice at bay."[51]

"Natural orientation" and "choice" are seen as complimenting concepts throughout the judgment [52] and a holistic reading of the judgment gives a clear idea that the concept of choice equally important in the exercise of constitutional rights as the "naturalness" of sexual orientation. It can also be seen that while defining the various aspects sexual orientation, the judges refer to both the concepts of "inherent orientation" and "demonstration of choice.[53]"

It is on this basis of choice that the Chief Justice rejected *Koushal's* argument in which Section 377 only criminalises "acts" and not "persons", and it does not violate constitutionally guaranteed rights: "Individuality of a person and the acceptance of identity invite advertence to some necessary concepts which eventually recognize the constitutional status of an individual that resultantly brushes aside the ―act‖ and respects the dignity and choice of the individual." [54]

51 *Id*

52 *Id*

53 Para 140

54 Para 81

The aspect dignity under article 21 was also read in the light of the aspect of choice: Dignity while expressive of choice is averse to creation of any dent. When biological expression, be it an orientation or optional expression of choice, is faced with impediment, albeit through any imposition of law, the individual's natural and constitutional right is dented.[55]

The concept of "choice" became an important basis of the Judges finding that Section 377 violates the article 21 of the Constitution. It not only disrespects individual choice, but also affects right to live with dignity as guaranteed under article 21 and is hence, irrational and arbitrary and ends up violating Article 14 also.[56] The section was held to be violating the expressive rights under Article 19(1) (a), and the right to privacy under Article 21 which too is defined in terms of "intimacy in privacy as a matter of choice".[57]

2. Justice Nariman's Concept of Equality and Presumption of Constitutionality

Justice Nariman was of the opinion that Section 377 violates right to dignity under article 21[58], and that it is "manifestly arbitrary".[59]For his second conclusion he referred the 2017 Mental Healthcare Act, which expressly prohibits discrimination on grounds of sexual orientation and along with and scientific evidence, he concluded that the natural/unnatural distinction of Section 377 has no rational basis, and thus, violates Article 14[60]. For article 14, there has to be classification based on intelligible differentia with a reasonable nexus to the object of the legislation as stated by the honourable court in Menaka Gandhi's case.

55 Para 132

56 Para 240

57 Conclusion X

58 Para 79

59 Para 82

60 Para 82

Nariman J.'s opinion, was that pre-constitutional laws do not enjoy any presumption of constitutionality as they were framed during the colonial era to supress the Indian freedom struggle. "The presumption of constitutionality of a statute is on the fact that Parliament understands the needs of the people, and that, as per the separation of powers doctrine, Parliament is aware of its limitations in enacting laws, it can only enact laws which do not fall within List II of Schedule VII of the Constitution of India, and cannot transgress the fundamental rights of the citizens and other constitutional provisions in doing so. Parliament is therefore deemed to be aware of the aforesaid constitutional limitations. Where, however, a pre-constitution law is made by either a foreign legislature or body, none of these parameters obtain. It is therefore clear that no such presumption attaches to a pre-constitutional statute like the Indian Penal Code."[61]

Justice Nariman was not successful in explaining that the Parliament's failure to repeal a pre-constitutional law indicates an implied acceptance.

3. Justice Chandrachud Concept of Equality and Indirect Discrimination

According to Justice Chandrachud, Section 377 violates Article 15(1) (non-discrimination on grounds of sex), Articles 15 (non-discrimination) and 14 (equality before law). In his judgement he stated that, "Equating the content of equality with the reasonableness of a classification on which a law is based advances the cause of legal formalism. The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so, the test of classification risks elevating form over substance. The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights".[62] This is an important part of the judgement which shows that the, "classification test" to judge equality violations is still followed stringently by the courts.

61 Justice Nariman in Navtej Singh Johar's case

62 Para 27

According to Chandrachud J, "Article 14 has a substantive content on which, together with liberty and dignity, the edifice of the Constitution is built. Simply put, in that *avatar,* it reflects the quest for ensuring fair treatment of the individual in every aspect of human endeavour and in every facet of human existence." The heart or the main part of his judgement is where he states that,: " Indian courts have historically interpreted the statement "The State shall not discriminate on grounds … only of sex" in a highly formalistic manner, and have upheld laws that – in their language – use more than one or a differently worded ground (for example, in *Koushal,* the Court held that because Section 377 only criminalised "carnal intercourse against the order of nature", there was no question of discriminating against identities). This, however, is flawed: what matters is the *effect* of law upon the exercise of fundamental rights."[63]

"The effect of law must be understood by taking into account the broader social context within which law is embedded. It must therefore take into account "*the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context*."[64]

He concluded his opinions from progressive gender equality judgments and held that, "A provision challenged as being *ultra vires* the prohibition of discrimination on the grounds only of sex under Article 15(1) is to be assessed not by the objects of the state in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex."[65] This judgement is extremely valuable in Indian history as for the first time the courts have recognised direct and indirect discrimination.

63 Para 34

64 Para 36

65 J.Chandrachud in Navtej Singh Johar's case

LGBT individuals were subject to a shadow of criminality. The harassments and tortures they underwent for over two decades because of draconian laws had thrown justice to the winds. The constitution does not accept the putting into peril of an individual to confirm to society standards and beliefs of morality and gender roles. It rather purports development of an individual to his full potential under right to life.

It is in this manner that Chandrachud J. draws together the discriminatory character of the facially neutral S. 377, the effects test, the prohibition of "sex" discrimination under Article 15(1) in a case about "sexual orientation", and the importance of social context to the enquiry. Thus, While, Article 15(1) prohibits sex discrimination, discrimination on grounds of sex is based on society's notions and beliefs about the role of each gender. These stereotyped about roles make any deviation criminalised, which is gross injustice. Thus, though the wordings of Section 377 may be neutral, it has led to indirect discrimination on the grounds of sexual orientation for the LGBT community and thus is a violation of Article 15(1) of the Constitution.

Article 19(1) (a) guarantees freedom of expression, s.377 was criminalising sexual orientation has pushed the LGBT community into a life of secrecy due to fear of prosecution, in case of sexual expression. Like his opinion in *Puttaswamy's case,*Chandrachud J. stated that "*the right to sexual privacy, founded on the right to autonomy of a free individual, must capture the right of persons of the community to navigate public places on their own terms, free from state interference.*"[66] He highlights the right to privacy and autonomy [67]under article 19, right to intimacy[68] under article 21 and the right to health including the aspect of mental health as the mental pressure, frustration, agony and depression faced by this community cannot be overlooked. S.377, thus, has been inconsistent with part III and had to be struck down according to him also.

66 Para 62

67 Para 65

68 Para 67

4. Justice Indu Malhotra's True Vision of Equality

Justice Malhotra in her judgement clearly mentioned about how article 377 has Articles 14, 15, 19(1) (a) and 21 of the constitution. She stated that "S.377 creates an artificial dichotomy. The natural or innate sexual orientation of a person cannot be a ground for discrimination. Where a legislation discriminates on the basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on an intelligible differentia." [69]

Malhotra J. stated that "where a legislation is discriminatory on the basis of an "intrinsic or core trait", it *ipso facto* violates Article 14 and cannot be accepted as reasonable classification. The concept of equality under Article 14 *rules out certain kinds of classifications at the threshold*. In her view, legislation based on an "intrinsic or core trait" fails that threshold inquiry. I would put it slightly differently: *legislation based on a core trait (related to personal autonomy), a trait that has been a historical or present site of systemic discrimination, is ruled out under Article 14*. I believe that the language of "intrinsic" or "immutable" characteristics is a dangerous road to go down." This reasoning has paved way for a transformative potential of Article 14 and 15(1).

J. Indu Malhotra's view was accepted by the Chief justice who stated that "Any attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of constitutional morality. Devotion and fidelity to constitutional morality must not be equated with the popular sentiment prevalent at a particular point of time."[70]

Justice Nariman also held that Section 377 was the by-product of the Victorian era and what was relevant was not the Victorian morality of the colonial era but constitutional morality guaranteed by the supreme law of

69 Para 13

70 Para 116

the land. Constitutional morality is the soul of the Constitution and is found in Part III especially with respect to right to life and individual's dignity and the Preamble which declares its ideals and aspirations.[71]

The aspect of "constitutional morality" was first introduced in Naz Foundation and in this case of Navtej Singh Johar, the vision of constitutional morality was the core reason decriminalisation of homosexual sex relations. "When equality is viewed through the lens of constitutional morality it is defined by the values of pluralism and inclusiveness different forms of life and different ways of being are guaranteed equal treatment, equal concern, and equal respect under the transformative Indian Constitution."[72]

Repercussions of *Navtej Singh Johar's Case*

There is also some criticism that the disappearance of Section 377 will not make a significant difference in the daily lives of vernacular (non-English speaking) youth, economically disempowered people, or non-heteronormative women facing forced marriages, forced confinement by the family, and forced separation from same sex partners because these issues are grounded in denial of autonomy and dignity for non-conforming sexuality, gender identity or expression. Despite these concerns, the overwhelming feeling among most activists is that the positive verdict in Delhi has tremendous symbolic value and could lead to more public debate, more challenges to other repressive morality laws, and increased support for social change in India.

India, in 21st century is trying to become a super power and the world leader; in fact it has all the potential to become one. But this potential would not be realized until and unless we as a society will not be able to freely accept and discuss so-called taboo issues such as homosexuality.

And for that to happen above all mentality of the people will have to be changed. The first step is sex education in schools and at homes. A child

71 Para 78

72 J.Indu Malhotra in Navtej Singh Johar's case

must feel comfortable to discuss his/her problems or issues related to sexual matters and even their sexual choices with their parents or teachers. And it is important that parents/teachers fully appreciate their wards' situation and guide them accordingly. Therefore, not only children but grown-ups or adults need more education and sensitization as far as matters related to sex are concerned.

Law enforcement agencies such as police also need sensitization so that they will be able to appreciate the genuine concerns of LGBT people.

Similarly, our media and film fraternity are required to be more considerate while depicting such people in their shows and films respectively. In fact they can play a very important role in imparting knowledge and disseminating true information about LGBT people and their sexual choices so that society could get a real picture of their situation and conditions.

The legal battle has been partially won. Over the years, the movement has seen a shift in the social reaction – from fierce homophobia to more openness. What is now crucial to the movement is, perhaps, its ability to make people question the conventional norms of the social structure and to highlight its own aim as one that seeks not to annihilate the accepted social fabric but to ensure that the social ethos reflects the nuances of human life and is not bound only by tradition.

Policing of E-Commerce Cybercrimes: A Look into Police Reaction to Upcoming Crimes

Jennifer Maria Dsilva*

Introduction:

With a growing society crime is on the rise, now there is a new trend of criminals who hide behind their computers to commit crimes. It is cybercrimes that are now becoming prominent with the increased use of technology by the common man and so law enforcement now faces difficulty with these new crime techniques. The police officers though are given certain training with regard to such crimes, still find trouble in many other areas when dealing with and investigating such crimes. Here it is important to understand that the growth in use of e-commerce is at a new high with plenty of transactions taking place online, this is a new window for criminals to commit crimes in relation to e-commerce.[1] The dealing of such cases are a little different than dealing with other cybercrimes mainly as this deals with monetary and property matters instead of personal attacks. The laws that surrounds cybercrimes and e-commerce is stated clearly but with changing technology the police enforcement of the same has to be up

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1 The e-commerce sector has registered a growth of 36% year over year in the last quarter of 2020.

to date and even be able to deal with this new emerging crimes. Hence from a current stance, laws relating to police can be reformed involving certain changes on how the police can handle such crimes better also providing better infrastructure and better training regarding the same. Also looking into the legislations that govern both cybercrimes and police training, the possible changes that could be incorporated in order to ensure a better trained and equipped police force.

Here the main focus will on e-commerce with relation to cybercrime, looking into the different types of cybercrime and how it not only effects people differently, but also how the method of investigating such crimes would defer. Though this difference is not a huge gap seen in the investigation method, yet there are various difference that do make these crimes unique and hence they need to be given better attention. Here the importance of police will be discussed and how certain attention should be given to police handling cybercrimes, mainly by better methods of investigation, infrastructure and so on which need to be given. The current stance and legislations surrounding police and cybercrimes has to be analysed and possible changes that can be made to handle these crimes more effectively.

Cybercrime and E-commerce:

With crime moving into the virtual world, it is seen that there are several problem that arise with this new form of criminal activity. Yet before considering the best methods to tackle such crime, it's best to understand what cybercrime is and the different types of crimes that can be committed through cyberspace. Also with the development of e-commerce, enabling online transactions and as a result making all personal data available online or in cyberspace causing possible outsiders to get access to private information. Though such information is protected to the best extent, there are times when such accounts can be hacked and have information

stolen, just because this information is stored or used in cyberspace. Hence, with current infrastructure, it is difficult for law enforcement to

track and block such attacks, mainly with the developed and developing technology used by the criminals. So first it is important to establish, what are cybercrimes and the major crimes in relation to e-commerce that happen in cyberspace, in order to understand the gravity of such crimes and to what extent such crimes can be committed.

What is Cybercrime?

To begin, cybercrime can best be understood by looking into the several aspects as to why such activities are crimes. Cybercrime are the crimes or offences that are committed with the use of computers, in such situations the computer would either be used as a tool to commit such crimes, as a target or both.[2] This can be of crimes as simple as defamation or crimes as technical as identity fraud. It is seen that in cybercrime the offence can be committed against either a person or his property[3], the property of a person being theft of confidential information, selling of such information and so on. Mainly cybercrime can be committed either towards a particular individual or a group of people, because cyberspace gives access to people from all around the world. Since people use cyberspace for different things including online transactions or using ones social media accounts such information is available in cyberspace, which is protected. Yet because such activities occur in cyberspace, people with the proper knowledge can get the same through certain methods resulting in illegal activities. It was only in recent times that cybercrime was recognised by countries and the same have now been incorporated into its legislations.

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2 Dr. Ajeet Singh Poonia, *Cyber Crime: Challenges and its Classification*, 3(6) INTERNATIONAL JOURNAL OF EMERGING TRENDS & TECHNOLOGY IN COMPUTER SCIENCE, IJETTCS. (November-December 2014),http://www.ijettcs.org/Volume3Issue6/IJETTCS-2014-12-08-96.pdf

3 Alpna and Dr. Sona Malhotra, *Cyber Crime-Its Types, Analysis and Prevention Techniques*, INTERNATIONAL JOURNAL OF ADVANCED RESEARCH IN COMPUTER SCIENCE AND SOFTWARE ENGINEERING(May2016),http://ijarcsse.com/Before_August_2017/docs/papers/Volume_6/5_May2016/V6I5-0315.pdf

It is seen that cybercrime is said to be any offence that has been committed in cyberspace, the reason for such an explanation is because though Indian Legislations deal with different cybercrimes, the definition of cybercrime is not seen under any legislation. It is seen mainly under the Information Technology Act, 2000 (henceforth referred as ITA) under Chapter XI[4] which talks about the offences that can come under this legislation, also the scope of Section 66[5] which dealt with hacking, now includes cyber terrorism, privacy violation and so on. These amendments were made by enacting the Information Technology Amendment Act, 2008 (henceforth referred to as ITAA) was due to the growing activities in cyberspace. This amendment includes the definition of cyber security as protecting information from unauthorised access.[6] It is also seen that under the Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013 that a cyber-incidents defined as real or suspected event that is likely to cause or cause an offence. [7] It is observed that though cybercrime has not been defined the offences that can be committed are established in various legislations. Here the main cybercrimes that will be looked into are mainly those in relation with e-commerce as explained below.

Different types of Cybercrime Offences related to E-commerce:

E-commerce, seen as the easier and newly developed way of doing business, purchases and online transactions, now are in danger due to the raging increase in cybercrimes. The cybercrimes in relation to e-commerce are mainly against a person's property and due to this there are several security measures taken by companies and individuals to ensure the same does not happen. Yet in developing times there are still several new

4 Information Technology Act, 2000, §65 to §78

5 Information Technology Act, 2000, § 66

6 Information Technology Amendment Act, 2008, § 2(nb)

7 Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013, § 2(g)

technology used to counter such measures and so we are going to look into some of the major cybercrimes in relation to e-commerce mainly fraud, identity theft and phishing.

(i) Fraud:

Though the definition of cyber fraud is not seen anywhere under the Information Technology Act, 2000, it is stated according to D. Bainbridge that computer fraud is described as 'stealing money or property by means of a computer that uses the computer to obtain dishonestly, property including money cheques and credit cards. It might also include dishonestly giving instruction to the computer to transfer funds, forge bank cards to obtain money and so on.'[8] It is seen under Section 25 of the Indian Penal Code, 1860[9] as an act which is done with the intention to defraud. It is observed that although the specific term is not found, yet the act of cyber fraud is seen through several provisions under the ITA. It is observed that under Section 74 the term fraudulent purpose is used but this provision, yet this provision is only concerned with digital signatures[10], also the term fraud can be seen under Section 66C of the ITAA[11]. Several other provisions, though not specifically mentioning the term fraud, gives way for fraudulent activities to become offences under this legislation.

(ii) Identity theft:

Identity theft, now becoming a common offence, causes problems not only for the customers but businesses as well. Identity theft, a type of fraud committed when someone enters into a transition

8 DR M DASGUPTA, CYBER CRIME IN INDIA, A COMPARATIVE STUDY 104-129(Eastern Law house 2009).

9 Indian Penal Code, 1806, § 25

10 Information Technology Act, 2000, § 77

11 Information Technology Amendment Act, 2008, § 66C

while using the identity of someone else,[12] this can be done either through simple knowledge of a person's password or even through hacking of a person's account. Identity theft can even be a result of carelessness, stealing personal information from public spaces or even sharing personal information.[13] It is observed that under the ITAA that identity theft is an offence punishable under Section 66C, it states that 'whoever fraudulently or dishonestly makes use of electronic signatures, passwords or any other unique identification feature of a person.'[14] This amendment was made to ensure proper punishment for identity theft by bringing the same under the ambit of the ITAA.

(iii) Phishing:

Though this term too, phishing is not seen under the Indian legislations, the courts have recognised such a crime and have even passed judgements based on the same. Phishing is said to be 'misrepresentation made in the course of trade leading to confusion as to the source and origin of the emails causing immense harm not only to the consumer but even to the person whose name, identity or password is being misused.'[15] It was observed in the judgement of *National Association of Software and Service Companies v Ajay Sood and Others*[16] which first declared phishing to be illegal in India in the

12 Ompal, Tarun Pandey and Bashir Alam, *How To Report Cyber Crimes In Indian Territory*,6(4) INTERNATIONAL JOURNAL OF SCIENCE TECHNOLOGY AND MANAGEMENT (April 2017), http://meity.gov.in/writereaddata/files/HOW_TERRITORY.pdf

13 Shweta, Vikas Deep and Naveen Garg, *Cyber Threats And Its Impact On Ecommerce Sites*,10 I J C T A 805-812(2016) http://serialsjournals.com/serialjournalmanager/pdf/1500284389.pdf

14 Information Technology Amendment Act, 2008, § 66C

15 Shreya Suman et al, *Cyber Crimes and Phishing Attacks*,2(2)IJRITCC 334-337 (2014) http://www.ijritcc.org/download/Cyber%20Crimes%20and%20Phishing%20Attacks.pdf

16 National Association of Software and Service Companies v Ajay Sood and Others, 2005 (30) PTC 437 Del

absence of legislations regarding the same. It was after the amendment made under the ITAA under Section 66D, which talks about cheating by personation. [17] Hence this provision can also include phishing though the term is not expressly mentioned in the legislation. Often the difficulty of tracking and arresting such criminals is not looked into, as stated that cyberspace being so vast it is difficult to establish a person's location and bring them to justice. And so the importance of police reforms in relation to cybercrime are a need in today's society, and the same should be developing in a developing world.

Police approach on cybercrime:

Discussed above are the laws that govern certain cybercrimes in our society and now it should be understood how the police can tackle such issues. The development of e-commerce has resulted in an increase in cybercrime, also the technology used by such criminals are also developing and so an urgent need to update the Indian Police Force on such technology is seen. It is seen under Section 78 of the ITA[18], it gives power to a police officer not below the rank of Deputy Superintendent of police to investigate offences under the legislation. This provision hence enables the police to investigate and get involved in the investigation and arrest of cybercriminals. Also seen under Section 80 of the ITA[19] which gives the power to authorized police officers to enter, search and arrest any person (who is reasonable suspected to have committed an offence under the legislation) without a warrant. Hence it is seen from the two provisions stated above, that police officers are empowered under the ITA to investigate into cybercrimes. Though giving the right to a police officer to investigate such crimes might be easy but the implementation of the same, by providing proper infrastructure, proper training and so on might be a little difficult. So before understanding the need for police reforms the current stand on the same must be examined.

17 Information Technology Amendment Act, 2008, § 66D

18 Information Technology Act, 2000, §78

19 Information Technology Act, 2000, §80

First, the Model Police Act, 2006 (henceforth referred to as the MPA) has to be examined, mainly in relation to the provisions regarding the criminal investigation which includes the use of science and technology and training, research and development covered under Chapter X of the MPA[20], that the Criminal Investigation department should have a specialised unit investigation cybercrimes (under Section 132) and the officer posted under this department would be selected based on their aptitude, professional competence, experience and integrity and these officers should go under the appropriate training which shall be updated from time to time (under Section 133). Also seen under Section 137[21] that the Criminal Investigation Department shall be equipped with adequate facilities for investigation and also qualified and trained manpower. Now looking into Chapter XI of the MPA which talks about the training, research and development, Section 140 and 141[22] talk about evolving training policy and on-the-job training and also upgrades in infrastructure and training institutions. The State Bureau of Police Research and Development should prepare five-year's perspective plans to modernise police infrastructure.

It is observed that there are several recommendations with regard to cybercrime and police reforms, and there are certain steps the state and union territories whole take regarding the same. The most recent recommendations that can be seen to this regard is in the 2018, a letter send to the Chief Secretaries of State Governments and U/T Administration with regard to the 'advisory on the prevention of cybercrime prevention and control'.[23] This stated that each state should set up a State Cyber Coordination cell be established to set up an institutional mechanism for dealing with cybercrime on the state and district level and also district

20 Model Police Act, 2006, § 122-137

21 Model Police Act, 2006, § 137

22 Model Police Act, 2006, § 140 and § 141

23 Letter from Government of India, Ministry of Home Affairs to the Chief Secretaries of all State Governments/UT Administrations, 13th January 2018 https://mha.gov.in/sites/default/files/CyberCrimeprevention_15012018_0.PDF

cybercrime cells. It's also stated that three domain experts in formation technology be hired under the district crime cells. Also seen that the research and development has to be done more frequently in specific areas in cybercrime and amendments should be made regarding the same. Also there should be a proper online complaint system, which the police can access and the same can be reported. There should be proper training for judicial officers as well, the police should be aware of the different types of cybercrimes and even provide for several e-learning platforms for the same.

The cyber police cells with are now established in different parts of the country do conduct training programmes that educate police officers on the new trends in cybercrime. One such programme is Cyber Crime Awareness Program for Police Officers, which is a three day workshop to be conducted teaching police officers the use of hardware, credit cards, e-wallets, social media, and the crimes that can come under the ITA in relation this. The basics of a good cyber FIR will also be taught along with the counselling of victims and setup of the subsequent cybercrime investigation. This workshop would help the police file proper reports, counsel victims and know which authority to approach or investigation regarding the same. Another workshop will also be conducted in order to improve the knowledge of public prosecutors, judicial officers and cybercrime investigators.[24]

It is seen that although the working of police is very essential in dealing with cybercrime the lack of awareness seen in society is one of the main factors that cybercrime is increasing. Due to the ignorance several crimes are committed and at times go unreported. Seeing that cybercrime is a recent phenomenon several workshops should be conducted to educate the public on raging crimes in order to prevent them.[25] These several initiatives

24 Letter from Government of India, Ministry of Home Affairs to the Chief Secretaries of all State Governments/UT Administrations, 2nd February, 2018 https://mha.gov.in/sites/default/files/capacity_building_advisory-2-2-18_09022018%20%281%29.pdf

25 *Id*

as stated above are the major reforms that are suggested to be implemented in each state in order to prepare police with the new and upcoming cases involving cybercrime. Yet there are still come issues that need to be dealt with in such regards which will be explained, also the importance to focus on cybercrime in relation to e-commerce will also be dealt with.

Concluding remarks for need of Rapid Change in Police Reforms with Regard to Cybercrimes:

(i) Reasons for separate speciality needed for e-commerce cybercrime:

To begin it must be understood as to why e-commerce crimes can be considered a different category when dealing with cybercrime. Frist it is to be understood that e-commerce crimes are against the computer and not directly against an individual. And so with regard to crimes like defamation or publishing of obscene content, e-commerce crimes mainly involve the stealing of assets or property of a person. Also as seen in many cases that when a single person is targeted with certain other crimes the source of the harassment can be traced, yet in e-commerce cybercrimes because a large group of people is under attack it is difficult to trace. If we are to take the example of the Bank NSP Case[26] it is seen that because the bank trainee's wife to be has send several e-mails to clients the bank ended up losing clients. The reason the culprit of this case was easy to track was because the company system was used and it was the wife to be of one of the trainee's, yet in several cases it is not as easy because the culprit is mostly nowhere close to the crime scene or could even be sitting in a different state altogether. And so the technology used to trace cybercrimes in regard to e-commerce has to be developed in order to handle the complexity of such crimes.

26 The Bank NSP Case, Important Cyber Law Case Studies, Cyber law & Information Security Advisors, http://www.cyberralegalservices.com/detail-casestudies.php

(ii) Spreading awareness

The police can take an active part when it comes to spreading awareness about certain crimes, as stated that when cybercrimes occur usually it would be on a large scale and so in such circumstances, precaution is the best step. Since the phone numbers of Indian citizens is now government information, sending information regarding a particular crime which is at large would alert and help them be safe. And also informing banks and other institutions regarding the rising scams would help them take precaution and also the police can give orders to ensure information regarding the same is send out. The police should have access to such information in certain cases where this can be done in order to prevent crimes on a large scale. There could also be communication done through newspapers for those who use cyberspace less, also stating that after getting information that such a problem has risen, people should be taught how these attacks can happen and how they can be cautious. Also this would give proper tracking of such scams, including checking whether these were aimed at a certain group of people or customers of which company. The police must also be in contact with such growing industries to ensure proper protocol is taken including warning and at times blocking certain accounts if necessary. These can be some police initiatives which can be taken in order to spread awareness of cybercrimes.

(iii) Cyber police stations:

There should be separate police station when dealing with cybercrimes and within the same having different police officers who are specialized in different areas in cybercrimes. Since it is established that cybercrimes regarding e-commerce is different from other cyber cases and hence a different method of handling such cases. When also counselling the victims of different crimes, a different approach is needed, for example when counselling the victim of a defamation crime and victim of a fraud crime. Though the emotional and mental reactions of different people would vary there must be proper training with regard to the same. There should also be

proper training for persons regarding general protocols and specific training regarding specific crimes. These cyber police stations should also have a central police station that deals with cybercrime on large scale crimes and even track down culprits from different locations around the country. There should also be regular training sections every police stations so the police officers can get updated on new technology and new methods of dealing with upcoming cybercrimes. Also proper developments in relation to setting up online complaint forum and updating business on certain crimes and warnings to watch out for. These are some of things that can be done when separate cyber police stations

(iv) Proper legislation:

As stated above the current structure of how police should take action regarding e-commerce and cybercrimes, yet most of this is not legislated. The difference between recommendations, policies and legislations is that legislations are enforceable and not following the same could attract punishments. Though it is observed through the MPA that there are several steps and several provisions governing how police should handle cybercrime and there are also several recommendations that are send out in order to enhance the same. One such example is regarding cyber police stations, though it's understood that with the increase in cybercrime and also the different method of dealing with the same, such a step should be taken. Yet due to several reasons these cyber police stations are still not set up in every state. There should be a central authority which deals specifically with cybercrimes especially those which are on a large scale. There are also problems with infrastructure which is being looked into yet with the proper legislation and several other guidelines when dealing with the infrastructure these cybercrimes can be taken care of in a much better way. This legislation will also empower police to take proper control in certain situations, even giving them access to certain information, if needed. And so through this police will be able handle such crimes in a much better way with a much better infrastructure supposing them.

Conclusion:

Though the police still do face certain problems when dealing with cybercrimes there has been a lot of effort by the legislature in setting up legislations to give police both the power and the training to handle such crimes. There are several provisions showing the different types of cybercrimes and the police officers who can investigate them, yet due to the certain problems stated, there are still some grey areas which causes problems for police officers. And the proper legislation of this can solve a lot of problems, from proper training programs to a separate police station to investigate cybercrimes, these are some possible suggestions which could help the police. The difference seen in e-commerce and the effects that it has on people and businesses, also the different methods in investigating used, since both the target and the reasons for such crimes are different from other cybercrimes. And so police approach is different towards such crimes and so there should be different specialist to handle these special cases, as stated in certain suggestions given above. These would help the police and the people as well in detection and tracking if such criminals and even at times prevent such large-scale crimes from happening. The proper legislation would give better guidelines as to how each state could deal with uprising cybercrimes and also ensure police are well equipped in handling anticipated future attacks.

Authentication of Electronic Evidence: Judicial Approach

*Aditya Saurabh**

Introduction

> The effect of the use of computers cannot be left undebated and the need for constructive criticism of the interface between computer industry and the judicial system is apparent for our system of justice to work. The gaps... in the law caused by out-of-date statutes should be noted and filled at the earliest opportunity by Parliament.[1]

The knowledge that world's transactions are increasingly electronic in nature is trite. India has shown dynamism in responding to the challenges posed by the proliferation of information technology especially in relation to electronic evidence and one such inevitable outcome of this proliferation is that courts have been compelled to take cognizance of electronic evidence, from CCTV footage to emails, making their contributions are crucial. The Information Technology Act, 2000 which amended the Indian Evidence Act, 1872 has made electronic evidence admissible in law in an attempt to modernize Indian evidentiary practices and help our courts deal

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1 KELMAN AND SIZER ,COMPUTER GENERATED OUTPUT AS ADMISSIBLE EVIDENCE IN CIVIL AND CRIMINAL CASES: A REPORT (1982).

with the advances in technology. The provision deems computer output such as printouts, CDs, data on hard disks etc. to be 'documents' under the Evidence Act, thus making them admissible in court.[2] It simultaneously seeks to ensure the reliability and accuracy of such evidence by demanding that certain conditions listed under S. 65B (2) be met. In order to meet the requirements of the IT Act, the definition of "evidence" under Section 3 of the Act has been amended to the effect that all documents, including electronic records, produced for the inspection of the court are called "documentary evidence". The definition of the term "electronic records" is provided in Section 2(1)(t) of the Information Technology Act, 2000 which defines "electronic record" to mean "data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche."

It is also important to note that contents of an electronic record cannot be proved by oral evidence[3] and can only be proved by documentary evidence. However, as per Section 64 of the Indian Evidence Act, documents, including electronic records, must be proved by primary evidence except in those circumstances as enumerated under Section 65 of Indian Evidence Act when secondary evidence of contents of a document including an electronic record may be given. Sections 64 and 65 of the Indian Evidence Act are based on the cardinal rule of law of evidence that the best evidence in the circumstances must be given to prove a fact in issue.[4] Keeping in view the nature of electronic records and ease of tampering with the same, the Information Technology Act, 2000 inserted more stringent conditions for admissibility of secondary evidences as to the contents of an electronic record. Thus, Sections 59-65; 64A & 65B of the Indian Evidence Act provide for a complete set of law on conditions of

2 See generally Indian Evidence Act, 1872, S. 65B.

3 Section 59 of the Indian Evidence Act, 1872 says that all facts, except the contents of documents or electronic records, may be proved by oral evidence.

4 Roop Kumar v. Mohan Thedani, (2003) 6 SCC 595 : AIR 2003 SC 2418 at para 16.

admissibility of electronic record. Thus, with the amendments introduced in the statute, electronic records have been made admissible in evidence without the need to produce the original.

However, despite their evidentiary relevance, electronic records suffer from problems that their physical counterparts do not. Electronic data is easy to create, copy, alter, destroy, and transfer from one medium to another. In short, by their very nature, electronic records can be easily manipulated. Consequently, their accuracy and reliability is frequently suspected. This creates a conflict between the relevancy and admissibility of electronic evidence, something that has been recognized by jurisdictions across the world. Therefore, despite the good intentions behind this amendment, the provision has been controversial.[5] This is primarily because High Courts in their treatment of electronic evidence under S.65B of Indian Evidence Act have been inconsistent and arbitrary. Due to different courts demanding different methods for the fulfillment of the conditions laid down in S. 65B (2) and the court's interpretation of S. 65B (4) for the evidence's authentication has led to tremendous lack of uniformity in the method of authentication through certificate. This variation in practice not only inconveniencies litigants, it also creates possibilities for the derailment of justice. Given the language of S. 65B of Indian Evidence Act, it is important to determine whether the approach that regards the availability of a 'certificate' (or the lack thereof) in respect of a particular piece of electronic evidence, as the necessary precondition and the sole ground for determination of its admissibility, is correct or not.

Acceptance of Electronic Evidence

Section 65-A of the Indian Evidence Act requires that electronic evidence may be proved in accordance with the provisions of Section 65-B. Thus,

5 See Apar Gupta, *How to rely upon an email in court*, December 14, 2011 (October 20, 2018,10.30 A.M) https://iltb.net/how-to-rely-upon-an-email-in-court-33856ff6246b.

every piece of electronic evidence sought to be relied upon has to be accompanied by a certificate given in the manner prescribed in Section 65-B. The section requires that for admitting an electronic record in a proceeding without further proof or production of the original, a certificate attesting the following should be given[6]:

1. The computer from which the record is generated was regularly used to store or process information in respect of activity regularly carried on by a person having lawful control over the period, and relates to the period over which the computer was regularly used;
2. Information was fed in computer in the ordinary course of the activities of the person having lawful control over the computer;
3. The computer was operating properly, and if not, was not such as to affect the electronic record or its accuracy;
4. Information reproduced is such as is fed into computer in the ordinary course of activity.

   The certificate has to identify the electronic record containing the statement and describe the manner in which it was produced and give the particulars of the device. Further, the certificate signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate. The deponent must swear to the best of his knowledge and belief.[7]

   The Indian law has replicated the certification requirement laid down in the UK law. Section 69 of the UK Police and Criminal Evidence Act, 1984 (now repealed[8]) provided that electronic

6 Sec. 65B (2) of Indian Evidence Act, 1872.

7 Sec. 65B (4) of Indian Evidence Act, 1872.

8 Repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999.

evidence shall be accepted only if the following two conditions are met:

(i) There must be no reasonable ground for believing that the statement is inaccurate because of improper use of the computer.[9]

(ii) The computer must have been operating properly at all material times or at least the part that was not operating properly must not have affected the production of the document or the accuracy of the contents.[10]

In *R*. v. *Shephard*,[11] the accused was alleged to have shoplifted from a clothing store in London. When apprehended, she contended that she had purchased the items but had done away with the receipt. The prosecution sought to rely upon the store's central computer system records. The question that arose before the House of Lords was whether this evidence should satisfy the requirement of Section 69 of the Act. Lord Grifitths observed that: If the prosecution wishes to rely upon a document produced by a computer, they must comply with Section 69 in all cases.

In India, the introduction of Sections 65A and 65B, with their elaborate conditions and safeguards was the corresponding attempt to solve the unique problems faced due to technological advancement. The provisions were meant to provide guidance and lay down standardized procedure for trial courts to follow, so that they could deal with the new challenges thrown up by technological advances. However, as the next section demonstrates, the divergent attitudes taken by trial courts towards electronic evidence, has frustrated both these aspirations.

9 Section 69(1)(a), UK Police and Criminal Evidence Act, 1984.

10 Section 69(1)(b), UK Police and Criminal Evidence Act, 1984.

11 (1993) 2 WLR 102 (HL).

Judicial History

The test for admissibility under S.65B of Indian Evidence Act, 1872 was considered for the first time in 2003 in *State* v. *Mohd. Afzal*,[12] also known as the Parliament Attack case. The Division Bench of the Delhi High Court was called upon to determine whether the call records in evidence had been admitted in accordance with S.65B. The appellant-accused contended that certain call records were inadmissible as the prosecution had not submitted the S.65B (4) certificate, which they argued was the only permissible way of satisfying S.65B. The prosecution rebutted this on the grounds that the conditions under S.65B (2) had been met through the testimony of the relevant prosecution witnesses. This argument of the prosecution found favor with the Delhi High Court. On an examination of the provisions under S.65B, the Court noted that, "compliance with Sub-sections (1) and (2) of S.65B is enough to make admissible and prove electronic records". They agreed with the prosecution that the certificate under S. 65B (4) was merely an "alternative mode of proof".[13] Comparing computer output under S.65B to secondary evidence under S.65(d), the court held that the oral evidence was equally sufficient; the lack of certificate was not an automatic bar.[14]

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12 State v. Mohd. Afzal, (2003) 107 DLT 385.

13 That the S.65B(4) certificate was an 'alternative method' was approved by the Delhi High Court in *Rakesh Kumar* v. *State*, (2009) 163 DLT 658. This in turn has been used as authority to waive certification. See Vijay v. State (Govt. of NCT of Delhi), (2014) 4 JCC 2494.

14 The Court states: "The normal rule of leading documentary evidence is the production and proof of the original document itself. Secondary evidence of the contents of a document can also be led under S.65 of the Evidence Act. Under sub-clause (d) of S.65, secondary evidence of the contents of a document can be led when the original is of such a nature as not to be easily movable. Computerized operating systems and support systems in industry cannot be moved to the court. The information is stored in these computers on magnetic tapes (hard disc). Electronic record produced there from has to be taken in the form of a print out."

Two years later, this decision was affirmed in appeal by the Supreme Court in *State (NCT of Delhi)* v. *Navjot Sandhu (Afsan Guru Case)*.[15] The Court examined and accepted as sufficient the oral testimony provided by the prosecution witnesses. It unequivocally held that even if the requirements under S. 65B (4) were not satisfied, evidence could be produced under Sections 63 and 65 of the Evidence Act. In the words of P. Venkatrama Reddi, J:

> Irrespective of the compliance with the requirements of S.65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, SS.63 and 65. It may be that the certificate containing the details in sub-section (4) of S.65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, SS. 63 and 65.

This decision led to a general relaxation of standards for electronic evidence. High Courts around the country approved other authentication methods as replacements for certificates, most notably, oral evidence. This has been done through the testimony of persons who created the computer output,[16] persons qualified to testify as to the signature of the certifying officer, or the particularly low threshold of persons capable of "speaking of the facts based on [their] personal knowledge."[17]

At the same time, many courts have also ignored both *Mohd. Afzal* and *Afsan Guru Cases* and instead chose to continue to demand a certificate for authentication.[18] In other cases, where neither certificates nor oral evidence were deemed adequate authenticators for uniquely complex

15 State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600.

16 Om Prakash v. State, (2014) 143 DRJ 349; Sun Pharmaceuticals Industries Ltd. v. Mukesh Kumar P., 2013 SCC OnLine Del 2713.

17 Societe Des Products Nestle SA v. Essar Industries, (2006) 33 PTC 469 (Del).

18 Aniruddha Bahal v. CBI, (2014) 210 DLT 292.

technology, courts have called for technical data such as 'bit image copy' and hash codes.[19] In one exceptional case, the court simply did away with the authentication requirement on the basis that the other party had consented to placing certain computer files on record.[20]

On an overall analysis of the cases dealing with S. 65B, it is clear that admission of evidence depends entirely on judicial discretion. Courts choose to follow whatever local requirements they believe is most appropriate for a case.

Change in Judicial Trend: Making Certificate Mandatory

The critical issues pertaining to admissibility of electronic evidence remained in a state of flux till 9 years when in *Anvar P.V.* v. *P.K Basheer*,[21] (hereinafter "Anvar case") the Supreme Court seized the opportunity to crystallize the law on admissibility of electronic evidence in a judicial proceeding. What is the nature and manner of admission of electronic records was one of the principal issues for consideration in this appeal. The case relates to the Assembly elections in Kerala in 2011 where the issue was of the admissibility of CDs containing the election propaganda for which the certificate discussed by S. 65B (4) was missing. Due to this appellant had lost and had preferred an appeal to the High Court for setting aside the election of the opponent alleging involvement of corrupt practices under S. 100(1) (b) read with Sections 123(2)(ii) and (4) of The Representation of the People Act, 1951 which having lost the appeal to the High Court, the appellants knocked the doors of the apex court. The Supreme Court commenced its analysis by taking note of S. 59,[22] which prohibits the use of oral evidence to prove the contents of documents, and

19 Chetan Gupta v. CIT, ITA Nos. 1891, 1892 & 1893.Del/2012.

20 Mohd. Tahir Mohmed Arif Bakaswala v. State of Gujarat, 2010 SCC OnLine Guj 4829.

21 AIR 2015 SC 180.

22 Indian Evidence Act, 1872.

S. 65A, which states that the only way to adduce evidence of electronic records is through S. 65B.[23] On this basis, it excludes the applicability of all provisions of the Evidence Act, except S. 65B. Therefore, applying the principle of *generalia specialibus non derogant*,[24] the Supreme Court holds that electronic evidence can be adduced solely under S. 65B.

In its analysis of the provision, the Supreme Court's focus is almost exclusively on sub-sections (2) and (4) of S. 65. It comes to three significant conclusions: first, all the conditions under sub-section (2) are mandatory. This understanding appears to be in consonance with the language used in sub-sections (1) and (2) of S. 65B, as noted earlier in this paper.[25]

The second conclusion of the Supreme Court relates to its interpretation of S. 65B (4). In addition to the four conditions under S. 65B (2), the Court paraphrases S. 65B (4) to arrive at five conditions that it states must be satisfied before a statement under S. 65B can be made.[26] The first of these relates to the method of authentication. The court states that under S. 65B (4), a certificate 'must' be produced. The obvious corollary is that in the absence of a certificate, the electronic record will be inadmissible under S.65B. The remaining four conditions laid down by the court concern the contents of the certificate.[27]

The third conclusion the Supreme Court arrives at, in its interpretation of S.65B, is that there is a requirement of contemporaneity in the production of the certificate. It is worth extracting the same here: *"Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in*

23 Anvar P.V. v. P.K Basheer, (2014) 10 SCC 473.

24 See Blacks' Law Dictionary (9th ed., 2009) (This Latin maxim translates literally as general things do not detract from specific things. It enshrines the principle that a special law, or a law enacted to cover specific situations, will always prevail over a more generally applicable law).

25 Anvar P.V. v. P.K Basheer, (2014) 10 SCC 473.

26 *Id*.

27 *Id*.

terms of S. 65B obtained at the time of taking the document". This dicta is to be read alongside a reference made to *Afsan Guru case*. The Supreme Court in *Anvar case* specifically notes that in Afsan Guru, a 'responsible officer' had certified the electronic records in question "at the time of production itself". That contemporaneous authentication is met with implicit approval in Anvar. The Supreme Court held that since a certificate was not produced at the same time the computer output was generated, it could not be admitted at all.[28]

What this means is that if a party omits to get a certificate at the time of, say, generating CD or printout, the evidence becomes inadmissible. This requirement imposes exceptional burdens on parties who may not always be in a position to obtain such a certificate at the time of generating the evidence, such as whistleblowers.

The court's reading of S. 65B had created a limitation on the methods of authentication, namely, that only a certificate under S. 65B (4) can be used to satisfy the conditions under S. 65B (2). Therefore, if a litigant wishes to use any alternative method to satisfy the conditions under S. 65B (2), it is now no longer possible. This rule has already seen application: the Delhi High Court in the recent decision of *Jagdeo Singh v. State*,[29] held that oral evidence regarding electronic evidence was insufficient and also in the absence of a certificate satisfying the *Anvar case* conditions, the evidence was held to be inadmissible.

Criticism to Judicial Approach: *Anvar Case*

However, this was not a conclusion supported by the language of the provision. On the contrary, on a plain and literal reading, S. 65B (4) merely states that a duly signed certificate containing some matter compliant with (a), (b), or (c), 'shall be evidence' of that matter. Nowhere does the provision state that a certificate 'shall be submitted' if electronic evidence

28 *Id*.

29 2015 SCC OnLine Del 7229.

is to be admitted, or that 'all' other authentication methods are barred. In the absence of any such bar, the conclusion drawn by the Supreme Court is incorrect. This is supported by SS. 65B(1) and (2), which deem computer output of electronic records as documents subject to the fulfillment of certain conditions. The mode of fulfilling the conditions is not specified. Given that S. 65B does not mandate the submission of a certificate, one question logically follows: what other authentication methods for electronic records are legally permissible under the Evidence Act?

The answer to this question lies in the kind of evidence that is permitted under the Evidence Act. As per S. 3, broadly two kinds of evidence are permitted, documentary evidence and oral evidence.[30] Either of these two kinds of evidence may, theoretically, be sources of information regarding the accuracy and reliability of an electronic record.

The former-documentary evidence-would relate to certificates, affidavits, reports, official documents, and the like. I have previously established that S. 65B (4) does not make a certificate either mandatory or an exclusive method of authentication.[31] In the absence of such language, the logical conclusion would be that there is no express bar on other kinds of documentary evidence. Therefore, it should be possible to use other documentary evidence, other than a certificate under S. 65B (4), to admit electronic records.

The Supreme Court also reads in words where none exist. For example, the Court states that all the 'applicable' conditions of S. 65B (2) must be specified in the certificate. No such language of 'applicability' exists in the section. Alarmingly, the addition of such a word creates a dichotomy between sub-section (2) and sub-section (4). Sub-section (2) makes 'all' the conditions mandatory, without regard to their "applicability." Given this, it is unclear how an element of "applicability" can be introduced into

30 Indian Evidence Act, 1872, S. 3.

31 *Supra*.

sub-section (4) by judicial interpretation.

Such an approach is in complete contravention of the literal rule of statutory interpretation.[32] What is truly unfortunate is that no part of the Supreme Court's decision acknowledges or attempts to explain the deviations made.

Problems in Mandating Certificate

Firstly, Indian courts are frequently faced with situations where evidence has been improperly or illegally obtained especially by whistleblowers, investigative agencies conducting surreptitious/unapproved searches, approvers seeking favor with authorities etc. Also through Report No. 94, the Law Commission of India has proposed insertion of S. 166A according to which such evidence is allowed because Indian evidence law famously does not follow the 'fruit of the poisoned tree' doctrine; instead we have adopted the position that the method by which the evidence is obtained is irrelevant.[33] The problem that is likely to arise in such cases is that certification by a "person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities"[34] will be practically impossible.

Secondly, certificate-based authentication method is also particularly susceptible to fraud/manipulation. It is not based on objective, ascertainable facts as metadata is. It also does not have the three-fold safeguards of oath, cross-examination and observation of demeanor that is guaranteed in the case of oral evidence. On the contrary, the certificate is a mere statement

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32 G.P SINGH, PRINCIPLES OF STATUTORY INTERPRETATION (2004); P. ST. J. LANGAN, MAXWELL ON THE INTERPRETATION OF STATUTES (12th ed., 1969).

33 See Law Commission of India, Evidence obtained illegally or improperly: Proposed Section 166A, Indian Evidence Act, 1872, Report No. 94, 1983; Yusufalli Esmail Nagree v. State of Maharashtra, AIR 1968 SC 147; R.M Malkani v. State Of Maharashtra, (1973) 1 SCC 471.

34 Indian Evidence Act, 1872, S. 65B(2)(a).

on the record that is submitted by the same party desirous of getting the evidence admitted. Consequently, apart from the fear of falling afoul of the law of perjury, there is nothing preventing parties from submitting fraudulent/manufactured certificates.[35] Therefore, Anvar fails in its attempt at setting a higher threshold of authenticity/genuineness of electronic records.

Apart from potential misconduct by parties, the reliability of the certificate is also undercut by the fact that it does not verify against tampering or other improper procedures affecting its accuracy. If the conditions under S. 65B(2) are examined, it is clear that it is limited to determining who has control over the computer in question and the regularity with which the information has been fed into the computer.[36] It does not guard against tampering/alteration of the information. Therefore, even if the lawful owner of a computer, in the regular course of business, deliberately alters evidence, the conditions of S. 65B would be satisfied.

This cumulatively results in a very low reliability threshold for the certificate.

Recent Judicial Approach

In *Shafhi Mohammad v. The State of Himachal Pradesh*,[37] the Two-Judge Bench of the Supreme Court has clarified the legal position in context of admissibility of electronic evidence to hold that furnishing of certificate under S. 65B (4) of the Evidence Act is not a mandatory provision and its requirement could be waived off in view of facts and circumstances and if interest of justice required the same.

In this case the core issue was whether videography of the scene of crime or scene of recovery during investigation should be necessary to

35 Indian Penal Code, 1860, SS. 191-200.

36 Indian Evidence Act, 1872, S. 65B(2).

37 SPECIAL LEAVE PETITION (CRL.) No.2302 of 2017.

inspire confidence in the evidence? During the course of hearing in the case apprehension was expressed on the question of applicability of conditions under Section 65B (4) of the Evidence Act to the effect that if a statement was given in evidence, a certificate was required in terms of the said provision from a person occupying a responsible position in relation to operation of the relevant device or the management of relevant activities. It was submitted that if the electronic evidence was relevant and produced by a person who was not in custody of the device from which the electronic document was generated, requirement of such certificate could not be mandatory.

The court also observed that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case, and thus the admissibility of electronic evidence cannot be ruled out on any technicality if the same was relevant.

The Bench also made reference to the case of *Tomaso Bruno and Anr. v. State of Uttar Pradesh*[38] that observed that advancement of information technology and scientific temper must pervade the method of investigation. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an investigating agency.

The court also observed that the applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. That it will be denial of justice to not permit a person who is in possession of

38 (2015) 7 SCC 178.

authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B (4) is not always mandatory.

Present Scenario, i.e. Post *Shafhi Mohammad Case* –

The Supreme Court in *Shafhi Mohammad Case*[39] took note of the instances, such as those where the documents may be in the custody of the opponent, when a litigant may not be able to submit a certificate under Section 65-B(4), as envisaged under *Anvar case*[40] i.e. including compliance with Section 65-B(2) of proving that the device worked properly without disruption. The Supreme Court therefore held that Sections 65-A and 65-B "cannot be held to be a complete code on the subject" and in such instances litigants may resort to Section 63 and Section 65 of the Evidence Act. After this judgment the forthcoming cases reiterated this principle such as that of *Sasumorov Enterprises Private Limited* v. *Odeon Builders Private Limited,*[41] *EL Roi Praise and Prayer House* v. *Mary Elezabeth,*[42] etc. But leaving the discretion to the Court to decide on the necessity or otherwise of a certificate under Section 65-B(4) could merely result in inconsistency in processes for proving electronic documents and consequently uncertainty in the minds of litigants.[43] Subjective satisfaction of a court is not what the legislature has mandated under the above special provisions. These special provisions were amendments to the Evidence Act as Section 65-A and Section 65-B were clearly intended to facilitate proving of electronic records. No law is enacted to hamper justice dispensation, especially

39 (2018) 5 SCC 311.

40 (2014) 10 SCC 473.

41 MANU/DE/4297/2018.

42 MANU/KA/3878/2018.

43 State of Maharashtra v. Chandrabhan Sudam Sanap and another, MANU/MH/3383/2018.

procedural ones, which are often quoted to be handmaids of justice. But even after this Supreme Court judgment these provisions continue, as they are and it is therefore imperative for the true and correct interpretation to be now implemented to ensure that justice delivery is not impeded. Whilst the interpretation in the Shafhi Mohammad case, did provide some alternatives to vacuous filing of certificates by persons of the functioning of third-party devices, it still missed the mark with respect to the actual interpretation of Section 65-B(4) and its mandate.

Therefore it may be time now for legislators to review the complicated structure of Section 65-B, which draws heavily from the now repealed Section 69 of the UK's Police and Criminal Evidence Act, 1984. It may therefore be expedient to also review existing provisions and provide simple and easy to interpret provisions for relying on electronic records to ensure fair dispensation of justice.

Conclusion

If we are to truly embrace the modernization of evidence law, we cannot accept the low reliability threshold that *Anvar case* sets, nor can we restrain our future selves from capitalizing on inevitable technological advances. Therefore, it is essential that the methods of authenticating electronic evidence should not be restricted in the way *Anvar case* desires. This proposition had serious repercussions for all those cases where the prosecution relies on the electronic data and particularly in anti-corruption cases of bribery etc. where audio-video recordings are being presented before the courts as evidence. In all such cases where the CD/DVD etc. were brought forward to the courts without a certificate under Section 65B (4) of the IEA, such CD/DVD etc. were not admissible in evidence and further the expert opinion as to their genuineness could not be looked into by the court. Thus, genuineness, veracity or reliability of the electronic evidence shall be seen by the court only after the stage of relevancy and admissibility.

It is a common knowledge that in several cases even the original recordings on CD/DVD/HD etc. are not being preserved properly and once the same is lost or destroyed, there cannot be any question of issuing the certificate as contemplated in Section 65B (4) of the IEA. In such cases, the CD/DVD/HD etc. containing the data are not admissible. Evidently, when the original is lost, the transferred/downloaded data becomes secondary evidence and cannot be proved without complying with Section 65B of the IEA. Also the crime investigation is increasingly becoming dependent on cyber forensics. If the prosecution case is based on circumstantial evidences in the electronic form, the best option to prove it is by producing the original. However, this may not be possible in majority of cases for obvious reasons.

Therefore, the rigid requirements for admissibility of electronic evidence in both civil and criminal proceedings have been done away with by the Supreme Court of India and have rationalized the rules pertaining to admissibility of electronic evidence making the certificate not mandatory wherever interest of justice so justifies. But now this also makes mandatory, that the Indian Evidence Act's complicated provision Section 65-B must be reviewed in this context.

Disclosure of Evidence Under the Criminal Justice System in India

M V Rahul, & Mishaal Abraham Cherian***

Introduction

Disclosure is the process by which material collected by the police during an investigation is made available, first to prosecutors and subsequently, subject to certain rules, to defence as well.[1] Prosecution and defence may make use of this material in preparation for and during a trial where it is potentially relevant to an issue, or issues, in a case. When it works properly, the disclosure process enables judges and magistrates to have all the relevant evidence before them when deciding on guilt of an accused person and in the event of conviction it may be used in deciding an appropriate sentence. So far in India, Fair Disclosure of Evidences hasn't been propagated into the Justice Delivery System, we must bear in our minds that evidences collected by the Police which are in favour of the accused if not disclose will clause miscarriage of justice, these documents or other relevant materials cannot be made available by the accused lawfully.

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1 Justice Committee of the House of Commons, Disclosure of Evidence in Criminal Cases, 11th Report of 2017-2019 Session(2018).

The prosecution has the obligation of fair disclosure which means the prosecution should place before the court all factors even including that which is in favour of the accused. As Justice Arthus stated: "*If they (the common citizens) have respect for the work of the courts, their respect for law will survive the shortcomings of every other branch of Government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society.*"

Natural justice of a party whose interests are likely to be prejudiced by a decision-making authority receive a fair hearing, an opportunity to rebut the material furnished against him, and an opportunity to produce all the material in support of his case.[2] The concept of fairness requires notice to satisfy the "adjudicating authority that those very documents upon which reliance has been placed do not make out even a prima facie case requiring any further inquiry.[3] In India, any procedure which prevents a party from receiving a fair trial would violate Article 14 and Article 21 of the Constitution of India.[4]

In India, all criminal proceedings are governed by the Criminal Procedure Code (Cr.P.C), 1973. Sub-Section (1) of Section 91 of the Cr.P.C. empowers a Magistrate or officer in charge of a Police Station to issue summons to produce any document or other thing necessary or desirable of any investigation, inquiry, trial or other proceeding under Cr.P.C… This power vested upon the Magistrate or the officer in charge also has the power to issue summons for the production of a document or related things.

Judgements has sometimes stood against the accused ,such as the judgement in *Swaminathan v. State of Delhi,*[5] in which the Court held that

2 Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax, West Bengal, AIR 1955 SC 65

3 Natwar Singh v. Director of Enforcement, (2010) 13 SCC 255, 270

4 Dwarka Prasad Agarwal v. B.D. Agarwal, (2003) 6 SCC 230; ECIL v. B. Karunakar, (1993) 4 SCC 727

5 2008 Cr.L.J. 1962 (Del)

the accused at the stage of framing charges cannot invoke Section 91 for summary/production of document in support of his plea of discharge. The Judgement in *Alagesan v. State of Tamil Nadu,*[6]where the Court held that the accused does not have the absolute right confer under Section 91. In the judgment in *M. Sathiamoorthi v. State of Rajasthan,*[7] where the Court held that the accused would not be entitled to summon documents at the stage of discharge of the offence.An accused is not precluded from the purview of this Section.[8]

Full disclosure of any material held by the prosecution which weakens its case or strengthens that of the defendants must also always be disclosed to the defendants. Furthermore, "the principles of natural justice must be read into unoccupied interstices of the statute unless there is a clear mandate to the contrary."[9]

Legal Provisions and Issues

Section 172(1) of the Code, requires every Investigating Officer to record the proceedings in an investigation into the offence, from beginning to the closure of the investigation into the offence by recording the proceedings in a diary in a day to day basis. The Court may use the Police Diary to aid it in an inquiry or trial, and not as an evidence, any Criminal Court may summon the Police Dairy under Sub-Section (2) of Section 172. The Police dairy can be called for by issuing a summons under Section 91(1) and it is not limited by Sub-Section (3) of Section 172 which restricts the accused and his agents from using the diaries, unless the Police Officer uses it to refresh his memory or if the Court uses them for the purpose of contradicting such officer, the same may be used for contradicting the witnesses as well[10].

6 2008 (2) M.L.J. (Cri) 1335 (Mad.)

7 2004 Cr.L.J. 1627 (Mad)

8 Kuriland (P) Lts. v. Thomas, 2008 (4) KLT 585 (Ker.)

9 N.S Tewana v. Union of India, (1994) 29 DRJ 258

10 R.Lakshminarayan v. Inspector of Police, *CBI.* 2006 (6) Kar.L.J. 443

As per Section 173(2) of CrPC, the Investigating Officer shall forward a report to the Magistrate a report as soon as the investigation is completed stating: (i) names of the parties; (ii) nature of the information; (iii) names of the persons connected with the case; (iv) whether any offence appears to have been committed and, if so, by whom; (v) whether the accused has been arrested; (vi) whether the accused has been released on bond, if so, with or without sureties; (vii) whether the accused has been in custody under Section 170; (viii) the medical examination report of a women when the investigation relates to an offence under Sections 376 to of IPC.

By virtue of Section 173(5) of CrPC empowers the Investigating Officer has to forward the report as mentioned in Sub-Section (5) of Section 173 along with documents or its relevant extracts and statement of witnesses which the prosecution relies upon.

Under Section 173(6) of CrPC, if the Investigating Officer is of the opinion a statement(s) is not essential or their disclosure to the accused is against the interest of justice and against the public interest, the Investigating Officer shall indicate such statement(s) and request the Magistrate exclude that part along with his reasons.

The Report, Statement of the accused under Section 164 of Cr.P.C., Witness statement under Section 161 of Cr.P.C., Copy of the FIR under Section 154 and the Attached documents forwarded to the Magistrate under Section 173(5) of Cr.P.C. shall be supplied to the accused for free of cost[11]. The accused is only receiving the materials which stands in favour of the prosecution. The accused while preparation of their defence is left no other option other than to rely on the documents or the relevant extracts of the documents.

These powers vested on the Prosecution and the Investigating Officer, acts unjustly for the accused. In India, even though The Right to Information Act, 2005(RTI Act) is in force, the First Schedule excludes the intelligence

11 Section 207 of Cr.P.C.

and security organisation established by the Central Government from the purview of the Act. By virtue of the powers vested under Section 24 of the RTI Act, the State Governments been excluded the Regional Forensic Science Laboratories, State and District Finger Print Bureau from the purview of the RTI Act. Therefore, any data which the accused would like rely upon which is in the possession of any of the institution mentioned above, the accused would be deprived of justice and will cause him an irreversible damage(s).

The inability of the accused to produce any material which can be relieved upon for proving his/her innocence is thereby deprived by the State authorities, even though there is a presumption of innocence during the trial of a case there is a high chance of the accused being convicted.

Developments in the Disclosure of Evidence

Law Commission Recommendations

India felt the need for "Fair Disclosure" during the starting of the 21st century, the Law Commission of India on submitting its 178th Reported,by which the Commission recommended for some checks for improving the authenticity of such statements recorded by the police and obtain signature of the person so examined and to furnish a copy of the same shall be send to the deponent and also to the Magistrate and to other superior officers. This will ensure against any error or malpractice being committed by the officer. These recommendations' were made by the Commission observing that the statements are allowed to be filed after long delay, there is scope for several malpractices and manipulations.[12]

Seeing this in the 178th Law Commission Report, the Commission recommended the insertion of a new provision after 207 which is "207A. *In any case, where the proceeding has been instituted on a complaint made by a public servant acting or purporting to act in the discharge of his*

12 178th Law Commission of India's Report.

official duties, the Magistrate shall without delay furnish to accused, free of cost, a copy of the complaint and documents on which it is based and other documents referred to therein.".[13]

Through this Amendment Commission seeks to reduce the chances of a witness getting hostile. It enables access to all relevant documents which are relevant to the case, but again this right of the accused to get access to such documents is limited to a proceeding initiated on a complaint given by a public servant who was acting or purporting to act in the discharge of the official duties.

Supreme Court

In the matter of *State of Punjab v. Swaran Singh*[14], the Court held that it is not necessary to disclose the entire prosecution evidence to the accused even at a stage were the accused is personally allowed to explain the circumstances appearing in the evidence against him referred in Section 313 of the Code.

In the matter of *Harendran Nath Chakrabarthy v. State of West Bengal*[15], it was held that all documents obtained by the Investigating Agency which were in possession of the accused need not be disclosed to him by the prosecution.

In the matter of *Manu Sharma v. State (NCT of Delhi)*[16], it was held that there is a Constitutional and a statutory right to the accused on an implied obligation to make for disclosure which is essential for the fair trial, but the Court further stated that accused cannot claim indefeasible right to every documents on Police file and the obligation of disclosure is limited to the evidence on which prosecution proposes to rely. In the matter

13 178th Law Commission of India's Report.

14 (2005) 6 SCC 101

15 (2009) 2 SCC 758

16 (2010) 6 SCC 1: AIR 2010 SC 2352

of *V.K.Sasikala v. State of Uttar Pradesh*[17], it was held that the accused has the right to ask for all documents that may entitled to one of the facets of a just, fair and transparent investigation, even at a stage of trial which may prejudice the accused.

In the matter of *Manjeet Singh Khera v State of Maharashtra*[18], it was held by the Supreme Court that non-disclosure of complaint or contents thereof did not, violate principle of fair trial in a corruption case. Where disclosure is not possible, the affected party must be allowed to review the relevant material, inspect it, and take notes if possible.[19]

Om Prakash Sharma v. Central Bureau of Investigation,[20] the Supreme Court held that, if the accused produces any reliable material event at any trial during any stage of a criminal procedure which could totally affect the very sustainability of the case, a refusal to even look into the material so produced may result in injustice, but the Court refused to call for.

High Courts

In matter of *Kamal Ahmed Mohammed Vakil Ansari &Ors v State of Maharashtra*[21], in this case the appellant applied for producing certain documents, in which appellants wanted to tender in evidence. The Bombay High Court set aside the said order of the Trial Court and stated that the Trial Court that the Trial Court, if so desired by the Appellant to produce such documents it should do so.

In the matter of *Manoharan v State of Tamil Nadu&Ors*[22], the fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a Constitutional, as well as a human

17 (2012) 9 SCC 771

18 (2013) 9 SCC 276

19 State Bank of Patiala v. S.K. Sharma, (1996) 3 SCC 364

20 AIR 2000 SC 2335: (2000) 5 SCC 679

21 2013 Cr.L.J. 858 (SC)

22 2015 (3) MLJ(Cri) 10

right. Denial of such right would amount to the denial of a fair trial. Hence, it is essential that the rules of procedure that have been designed to ensure justice and the court must be zealous in ensuring that there is no breach of the same. Hence, to struck the balance, the defence is entitled to take material from the site in the manner, to prove their case and it will not amount to leading evidence by the defence before the examination of the prosecution witnesses...

It was held by the Madras High Court in *Surya Narayan v. M.V. Vijayan,*[23] where the Court held that the guarantee under Article 20(3) would extend to compulsory production of documents against the accused and hence, cannot be called for. The power conferred by Section 91 can be exercised at any time.[24]

Balancing Disclosure and Non Disclosure of Evidence

In *Tribhuvandas Bhim ji Zaveri v. CCE*[25], authority had expressed inability to disclose the materials found against the accused, yet they issued a show cause notice, the court found fault in the very issuance of the show cause notice. It was held that the document which set the law into motion against the accused ought to be made available to it so as to require a proper explanation. The failure to supply important piece of information to the affected party prejudices the case and the principles of natural justice stood violated.

In *Swadeshi Cotton Mills v. Union of India*[26], the government was satisfied by the documents and other evidences in it is possession that an industrial undertaking was being managed in a manner detrimental to the industry and public interest, it took over the undertaking. The Supreme Court upon the decision of the government, observed that the company

23 1995 (3) Crimes 767 (Mad)

24 Nadeem v. State of Rajasthan, 2006 (4) East Cri.C. 313(Raj)

25 (1997) 11 SCC 276

26 Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664

could have been given an opportunity to explain the evidence against it, as also an opportunity to be informed of the proposed action to take-over and to represent why it should not have been taken.

Global Vectra Helicorp vs. Directorate General of Civil Aviation:[27] The Government may or may not be required to give detailed information. In such a case, the Government is obliged to communicate the reasons on the basis of which the action is proposed or action in fact is taken. In a quasi-judicial proceedings, there is a duty cast on the adjudicating authority to disclose and supply copies of all the documents that may be available with it, enabling a notice to effectively defend and rebut allegations contained in a show-cause notice.[28]

In *Union of India v. Ranu Bhandari*[29], certain vital documents having direct bearing on a detention order against the detenu were withheld, preventing him from defending himself effectively, the court placed importance on the significance of effective representation. It held that irrespective of whether the detenu has knowledge of the documents and it is contents or not, the documents must have to be supplied in compliance with Article 22(5) of the Constitution of India in order to effectuate proper representation.

Judiciary Favoring Public Interest and National Security Against Fair Trial Principle

The main issue of disclosure subsequent to a denial by the State on the ground of public interest has not been addressed. There has not been an attempt by the Legislature nor Judiciary to give a definition for the Concept of "Public Interest". Even though the word "National Security", literally means threat to the nation which will cause law and order issue which will

27 Global Vectra Helicorp vs. Directorate General of Civil Aviation and Anr., 2012 SCC Online Del 3267

28 Pepsu Road Transport Corpn. v. Lachhman Dass Gupta, (2001) 9 SCC 523

29 Union of India v. Ranu Bhandari, (2008) 17 SCC 348

lead to the failure of rule of law. There were cases wherein natural justice was not complied with.

Ex-Army men's Protection Services (Pvt.) Ltd. v. Union of India:[30], where the denial of security clearance for ground handling service at different airports on the ground of national interest was challenged. The Court accepted that the argument"national interest" is an exception to the principles of natural justice. It was held that, a party could not insist on the strict observance of the principles of natural justice. The court held the call for the files to determine whether the invocation of national security is justified. The court laid that once the state took the stand that the issues involved national security concerns, it would not disclose the reasons to the affected party.

Satish Nambiar v. Union of India:[31], a security agency of the Central Government had submitted an adverse report necessitating the cancellation of an Overseas Citizenship of India registration granted to the Petitioner. Hechallenged the legality of the order on the ground that a hearing ought to have been granted before passing such a prejudicial order. The Court after examination of the materials produced before it in a sealed cover came to the conclusion that when the Government had acted on the opinion of the security agency it is likely to affect the security of the country and relationship with foreign countries., therefore, the Court concluded that the action of the State was proper.

In *Bycell Telecommunications India Pvt. Ltd. v. Union of India*:[32], the intelligence and security agencies reached a subjective conclusion regarding a company's financial investments. After due consideration they withdrew the company's security clearance. The affected company argued that the revocation without a disclosure of the underlying grounds was a violation of natural justice. The approval was cancelled on the ground that

30 (2014) 5 SCC 409

31 AIR 2008 SC 158

32 (2011) 185 DLT 494

the investment was being routed through countries of unfriendly countries. It was urged by the company that, if the information only pertained to funds being tainted then it should be provided to enable a response to this information. The plea was rejected by the court, which observed that the disclosure of information was likely to jeopardize and expose the sources of information.

The noticeable issue is the absence of a definition of "national security". The courts have tried to find what all will encompass within the characterization of the term 'national security', and later emphasized that national security is "not a question of law," but instead "a matter of policy."

Disclosure of Evidence: International Position

Canada

The right to disclosure, being a fundamental element of the fair and proper operation of the Canadian criminal justice system that an accused person has the right to the disclosure of all relevant information in the possession or control of the Crown, with the exception of privileged information flows from Section 7 of the Canadian Charter of Rights and Freedoms, provides that "*everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*" The right to proper disclosure is recognized in particular under principles of fundamental justice as necessary to the accused person's ability to defend himself or herself against the charges that have been laid in the Canadian Jurisdiction. The main legal principles applying to the disclosure of information in criminal matters were set down by the Supreme Court of Canada in the landmark case of *R. v. Stinchcombe*[33]. In *R. v. Taillefer; R. v. Duguay*[34], the Court went on to summarize the key principles of Disclosure:

33 [1991] 3 S.C.R. 326

34 [2003] 3 S.C.R. 307

> The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. Relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea…. Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses.

United Kingdom

In the English Jurisdiction, disclosure can be found in the Criminal Procedure and Investigations Act 1996 (CPIAct, 1996). This law only applies to summary proceedings in a Court. CPIAct, 1996 defines 'Disclosure' as "*to providing the defence with copies of, or access to, any prosecution material which might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused, and which has not previously been disclosed.*". According to the CPIAct of 1996, the Prosecutors will only be expected to anticipate what material might undermine their case or strengthen the defence in the light of information available at the time of the disclosure decision, and they may take into account information revealed during questioning. The Police must reveal relevant material they collect to prosecutors, and the Crown Prosecution Service have the duty to disclose that material to the defence. The CPIAct, 1996 also places a reciprocal duty on the defence to give a statement which outlines the defence case so that the police and prosecutors can review the disclosure. The defence statement is mandatory in Crown Court cases but optional for cases taking place in Magistrates' Courts.

The defence needs to only disclosure the materials in possession of it only after prosecution complies with its preliminary disclosure.[35] The prosecution is obliged to only disclose those materials which are not opposed to public interest.[36]If the accused discloses an *alibi*, the defence has to include the name and address of the witness who is capable of adducing evidence or any material which may assist in finding the witness[37]. Section 6provides for a Voluntary Disclosure by the Accused *i.e.,* when the accused gives a statement to the prosecution and, if he does so he has to give the same before the Court. Under Section 7 there can be a Secondary Disclosure of Materials which was not done under Section 3 of the Act by the prosecution or the prosecution has to give the defence is writing that there won't be any material with in the possession of the prosecution.

In 2016 the Criminal Cases Review Commission (CCRC) of England, the organisation set up to investigate suspected miscarriages of justice, stated that *"the single most frequent cause of miscarriages of justice continues to be failure to disclose to the defence information which could have assisted the accused*." But issues with disclosure are wider than these miscarriages of justice, late disclosure causes all sorts of difficulties within the criminal justice system. It wastes time and resources. It means that cases are delayed and that victims do not see justice.

In Article 6(1) of the European Convention on Human Rights talks about the concept of "fair trail" which goes as:

> In the determination of his civil rights and obligations of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order

35 Section 5(1)(b)

36 Section 3(6)

37 Section 5

> or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The Convention provides guidance concerning the minimum rights of accused persons as they are guaranteed throughout Europe. The words "*to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him"* guarantees a person charged with a criminal offence the right to a fair trial.

Scotland

Part 6 of The Criminal Justice and Licensing Act,2010 is dealing with the disclosure of evidence in Scotland. Section 116 defines "Information" as "*in relation to criminal proceedings relating to a person, means material of any kind given to or obtained by the prosecutor in connection with the proceedings."*. Section 121(3) of the Act perceives material information namely as the one which weakens the prosecution case, which strengthens the accused case, the ones which are likely to form part of the evidence to be submitted by the prosecution. This also includes all real information undermining the crown's case that will cast a reasonable doubt on the prosecution's case and something which postulates assistance to the accused case. Hence, it is very clear that the prosecution is obliged to disclose all materials to the defence.[38] Prior to this decision it was held in *R v. H&C*[39], that the prosecution is not obliged to disclose all material information's which are self-incriminating in nature. This information are called 'neutral information' or evidences/information which damages the defence case.

Section 122(3) says that the prosecution need not disclose information which are 'sensitive 'in nature. Sub-section lays down meaning of 'sensitive' that if it were to be disclosed there would be a risk of— (a) causing serious

38 McDonald v. HMA, 2008 [AC] 154

39 2004 [AC] 1324

injury, or death, to any person, (b) obstructing or preventing the prevention, detection, investigation or prosecution of crime, or (c) causing serious prejudice to the public interest. In *Osman v. Ferguson,*[40]if the Crown withheld certain information's the Court would order to disclose those informations in other words, non-disclosure of informations/evidence by prosecution on grounds of public interest immunity is in violation of Article 6(1), sub-section (3)(b) and (d).

Ireland

The disclosure of evidence is a Constitutional as well as a statutory right in Ireland. The Constitutional right to a trial in course of law by fair procedure is enshrined in Articles 38.1 and 40.3 of the Constitutional of Ireland. It places a duty on the prosecution to disclose all relevant evidence which is within its possession to the defence. This duty was stated in *Director Public Prosecution v. Tuite,*[41] as:

> The Constitutional right to fair procedures demands that the prosecution be conducted fairly; it is the duty of the prosecution, whether adducing such evidence or not, where possible, to make available all relevant evidence, parol or otherwise, in its possession, so that if the prosecution does not adduce such evidence, the defence may, if it wishes, do so.

Subsequently, in *Director of Public Prosecution v. Special Criminal Court,*[42] the Supreme Court define "relevant material" as "evidence which might help the defence case, help to disparage the prosecution case or give a lead to other evidence". Therefore, it is the duty of the prosecution to disclose to the defence all relevant materials which is in the possession of the prosecution whether it is a help the prosecution or damages it's case it is the prosecutions duty enshrined under the Constitution to make available

40 [1993] 4 AllER 344

41 [1983] 2 Frewin 175

42 [1999] 1 IR 60

all materials to the defence. The prosecution is therefore, obliged to disclose all relevant within its possession. When a person is charged with a criminal offence he has the right to be furnished with all relevant evidence(s), firstly, with the details of the prosecution evidence that is to be used at the trial, and secondly, with evidence in the prosecution's possession which the prosecution does not intend to use if that evidence could be relevant or could assist the defence. The limits of this duty are not precisely delineated and depend upon the circumstances of each case.

When a case is disposed of by trial it is the duty of the prosecution to abide by Section 4B(1)(a) of the Criminal Procedure Act, to serve on the accused certain documents which set out the evidence intended to be adduced against the accused with 42 days on which the accused is being informed by the District Court to the accused that he/she has the right to be tried by the jury; the prosecutor may elect to prosecute either summarily or on indictment; District Court finds that the offence by fact is not a minor offence and cannot be tried in summary proceeding. Sub-clause (b) refers to those documents which needs to be served under sub-clause (a): (i) a statement of the charges against the accused; (ii) copy of any sworn information in writing upon which the proceedings were initiated; (iii) a list of the witnesses the prosecutor proposes to call at the trial; (iv) statement of the evidence that is expected to be given by each of them; (v) copy of any document containing information which it is proposed to give in evidence by virtue of Part II of the Criminal Evidence Act 1992, mainly documentary evidence.

By sub-section 3, the District Judge on application by the Prosecution may extend the time to serve the documents mentioned in Sub-Section (1). The High Court decision in *Joseph Farrell v Judge Geoffrey Browne*[43] established that the '42 day rule' applies only to hybrid offences triable either summarily or on indictment. No time limit applies for service of the book of evidence in respect of offences triable on indictment only.

43 [2012] IEHC 54

Section 4C of the Criminal Procedure Act, lays down that the prosecution during or after the trial proceedings if the prosecutor proposes to adduce further evidence, or call additional witnesses, or live television video link(s), or evidence to be submitted upon sworn to the Court, the Prosecution, shall apply serve the following evidence where applicable: (a) a list of any further witnesses the prosecutor proposes to call at the trial; (b) a statement of the evidence that is expected to be given by each witness whose name appears on the list of further witnesses; (c) a statement of any further evidence there is expected to be given by any witness whose name appears on the list already served under Section 4B(1)(c); (d) notice of intention to give information contained in a document in evidence under section 7(1)(b) of the Criminal Evidence Act, 1992 together with a copy of the document; (e) where appropriate, a copy of a certificate under section 6(1) of the Criminal Evidence Act 1992; (f) a copy of any deposition taken under section 4F; (g) a list of any further exhibits.

Conclusion

Section 91 of Cr.P,C seeks for an application to call for any document or other thing necessary or desirable of any investigation, inquiry, trial or other proceeding under Cr.P.C…The scope is very limited as mentioned before, therefore, we recommend to eithermake it mandatory to accept such application which are inevitable for the defence to move their case forward or to make a special law as what United Kingdom(Criminal Procedure and Investigations Act 1996) did and it shall not be as stringent and technical as that of Ireland(The Criminal Procedure Act, 1967). The disclosure that every stage of a case shall not be included in the statute as it consumes a lot of time. A limitation period shall be fixed for filing an application for disclosure for both the side, and preferably, the defence maybe given more time for filing the application or to widen the scope of the proposed Section 207A of Cr.P.C. to all cases.

Environmental Terrorism – A Threat in Need of Recognition and Regulation

Advik Rijul Jha*

Introduction

This paper attempts to give a brief yet holistic view of the concept of environmental terrorism and its growth over time. Further, this paper will explore the present regulatory framework existent in the United States of America (hereinafter '**USA**') to combat this threat and attempt to suggest a plausible regulatory framework for USA and India to follow in order to overcome and effectively deal with this fast-emerging threat. This paper commences by explaining the concept of environmental terrorism in Part I. Part II of the paper looks at the growth of environmental terrorism. In Part III, the existent regulatory framework in the USA is discussed. Part IV ventures into the plausible way forward for USA and India to respond to the threat posed by environmental terrorism. The paper is concluded by proposing to criminalize environmental terrorism with death penalty as the severe most punishment with regard to the magnitude of the crime committed under the nomenclature of 'Ecocide.'

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What is Environmental Terrorism?

Environmental terrorism, like environmental warfare, involves the utilization of the forces of nature for hostile purposes. Environmental terrorism includes both the targeting of the environment itself, such as deliberate contamination of water or agricultural resources, and the use of the environment as a conduit for destruction, such as releasing chemical or biological weapons into the atmosphere.[1]

It is pertinent to not be confused between eco-terrorism and environmental terrorism. Eco-terrorism is the violent destruction of property perpetrated by the radical fringes of environmental groups in the name of saving the environment from further human encroachment and destruction.[2] Environmental resources as the target are the crux of environmental terrorism which is done in an attempt to perpetrate violence and cause mass destruction for purposes of terrorism.

Environmental terrorism is the deliberate use or threat of use of physical, chemical, nuclear, or bacteriological agents in the commission of a terrorist act in which either the agent is delivered to a target population by use of an environmental medium (such as air, water, or soil) or the agent is used to render a natural resource unsuitable for a desired use.[3] The use of water as a medium to perpetrate environmental terrorism will be explained below in order to put the threat posed in perspective.

Growth of Environmental Terrorism

The environment has been used as a weapon of war for centuries. During the Vietnam War, the United States sprayed herbicides over vast areas

1 Timothy Schofield, *The Environment as an Ideological Weapon: A Proposal to Criminalize Environmental Terrorism,* 26 B.C. ENVTL. AFF. L. REV. 619 (1999),

2 Elizabeth L. Chalecki, *A New Vigilance: Identifying and Reducing the Risks of Environmental Terrorism*, 2(1)GLOBAL ENVIRONMENTAL POLITICS,46-64(2001).

3 John Zirschky, *Environmental Terrorism,* 60J (WATER POLLUTION CONTROL FEDERATION) (1988).

of South Vietnam to destroy forests and vegetation and deny its enemy cover, mobility, and sustenance.[4] However, with the changing times, the threat faced by nations now is not from other nations but a global threat i.e. terrorism. There has been a rise in the same especially after the end of the Cold War. Terrorists, like warring nations before them, seek to harness the forces of nature because a modest expenditure of time and effort can result in devastating long-term destruction.[5] Traditionally, terrorism has been violence, or the threat of violence, calculated to create an atmosphere of fear and alarm.[6] Evidence increasingly suggests, however, that many terrorists have shifted their goals and are now more interested in mass destruction.[7]

Environmental terrorism has the potential to combine the worst of both of these scenarios: it can have higher consequences than conventional terrorism because the potential damage from an environmental attack can be long-lasting and widespread, and it is more likely than Weapons of Mass Destruction terrorism because it can be carried out using conventional explosives or poisons.[8] Moreover, with the changing times terrorism is also bound to change.

Water is a fundamental resource for human and economic welfare and modern society depends on complex, interconnected water infrastructure to provide reliable safe water supplies and to remove and treat wastewater. This infrastructure is vital for human welfare and economic development and it is vulnerable to intentional disruption from war, intrastate violence and, of more recent concern, terrorism.[9] As with other forms of environmental

4 Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict,* 22 YALE J. INTL L. 1, 7-8 (1997).

5 Arthur H. Westing, *Environmental Warfare,* 15 ENVTL. L. 645, 646 (1985).

6 Michael Stohl, *Demystifying the Mystery of International Terrorism, in* INTERNATIONAL TERRORISM 81, 82 (Charles W. Kegley, Jr. ed., 1990).

7 *Id.*

8 Elizabeth L. Chalecki *Supra* note *2*.

9 Peter H. Gleick, *Water and Terrorism*, Pacific Institute for Studies in Development, Environment, and Security, (2006).

terrorism, the use of water as a weapon originated on the field of battle.[10] However, the use of water as a mode of terrorism is also not inevitable. As seen in the USA, thirty-five gallons of cyanide was found which was to be used to poison the water supply of New York. .[11] In the event that the terrorists succeeded with their plan, it would have caused thousands to become sick, deaths and other devastation of gigantic proportions.

In today's day and age, the contamination of water for purposes of terrorism can lead to destruction of gigantic proportions which words cannot explain. Water is the essence for survival and the need of the hour is to protect the earth's most important resource from being harnessed as a catalyst for terrorism along with other potential resources which could be mobilized to perpetrate terrorist activities.

USA's response to this threat -

There is currently no law which specifically addresses the issue of environmental terrorism. The two most applicable legal doctrines, terrorism law and the law of environmental protection, fail to adequately address the practical issues associated with this emerging threat.

The United States government operates on the principle that terrorists are common criminals. This strategy of treating terrorists as common criminals is designed to delegitimize the terrorist act. By ignoring the political nature of the crime, prosecutors frustrate terrorists' desire for publicity while avoiding the impression that a serious terrorism problem exists.

Terrorists are indicted for each crime committed in furtherance of the subsequent act of terror rather than with terrorism in its own right. Prosecution of common law crimes such as murder, assault, and conspiracy

10 Ibm Knudson & Nancy Vogel, *Aging Dams, Already Under Siege, Face New Pressures,* THE SACRAMENTO BEE, (Nov. 25, 1997).

11 Stephan H. Leader, *The Rise of Terrorism,* SEC. MGMT., (Apr. 1, 1997).

are essential elements of the case against the terrorist. However, no provision of criminal law is currently in force which has the capacity to deal with environmental terrorism.

The United States is one of the world leaders in the area of environmental protection. Federal statutes aimed at protecting the environment have been a part of American law since the nineteenth century. Environmental protection expanded dramatically with the enactment of numerous federal statutes in the 1970s including the Clean Air Act Amendments and the Safe Drinking Water Act.[12] Most of the major environmental laws in the United States contain criminal penalties for violation of their provisions. Transporting or disposing of hazardous waste without proper documentation, for example, is a criminal offense under the Resource Conservation and Recovery Act (RCRA).[13]

Until relatively recently, however, criminal prosecution for violations of environmental laws were rare.[14] The vast regulatory schemes created by statutes such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) are designed to deter corporate pollution, not environmental terrorism. Existing environmental protection statutes were not intended to govern the type of malicious environmental destruction perpetrated by terrorists.[15]

Prosecuting environmental terrorists under environmental protection statutes is also not consistent with the paradigm of treating terrorists as common criminals. As discussed previously, acts of terrorism have traditionally been prosecuted by means of the component crimes. Complex statutory schemes such as those found in many environmental statutes do

12 SUSAN F. MANDIBERG & SUSAN L. SMITH, *CRIMES AGAINST THE ENVIRONMENT* 8 (1997).

13 FRONA M. POWELL, *LAW AND THE ENVIRONMENT* 365 (1997).

14 Richard J. Lazarus, *Assimilating Environmental Protection Into Legal Rules and the Problem with Environmental Crime,* 27 LOYOLA L.A. L. REV. 867, 868 (1994).

15 FRONA M. POWELL *,Supra* note *13.*

not readily adapt to this "terrorist as criminal" paradigm.[16] Such statutes, while armed with criminal provisions, treat violations more like regulatory offenses than common law crimes. Moreover, the standards of liability, evidence, and proof that are well established under traditional criminal statutes are less clear under these environmental regulation schemes.[17]

Prosecuting environmental terrorists under the same regulatory statutes as corporate polluters does not adequately reflect this position. Environmental protection statutes provide criminal sanctions for regulatory offenses, but they do not satisfy the expressive function of the criminal law. These provisions do not provide adequate force and symbolic representation to society's condemnation of deliberate environmental destruction. Prosecuting environmental terrorists under these statutes, therefore, undermines society's expressed desire to punish acts of environmental crime. Environmental terrorism is condemned by society, but not adequately punished by law. [18] Hence, in effect neither the current criminal law nor environmental law jurisprudence is equipped to deal with this imminent threat.

Way forward for the USA -

Due to the lack of effective legislation being in place to deal with the threat and providing punitive measures to be applied against perpetrators of environmental terrorism, it is suggested that a new legislation be drafted specifically dealing with this issue. The nature of this legislation is sought to contain strict penal provisions for committing any acts which harm the environment in a negative manner with the intent or *mens rea* of causing mass destruction and irreversible harm to the environment for the

16 Steven L. Humphreys, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal,* 39 AM. U. L. REV. 311, 326-27 (1990).

17 Kevin A. Gaynor et aI., *Environmental Criminal Prosecutions: Simple Fixes for a Flawed System,* 3 VILL. ENVTL. L.J. 1, 5 (1992).

18 Susan Hedman, *Expressive Function of Criminal Sanctions in Environmental Law,* 59 GEO. WASH. L. REV. 889, 890 (1991).

objectives of terrorism. The nomenclature which is proposed to be applied to this crime of environmental terrorism is that of 'ecocide '

Acts of environmental terrorism should be recognized as crimes against the environment. Criminalizing environmental terrorism as acts of "ecocide" codifies societal outrage at such behavior while enabling law enforcement officials to operate within the "terrorist as criminal" paradigm.

The domestic crime of ecocide should be defined as the intentional or reckless manipulation or destruction of any aspect of the physical environment which damages or exploits, in whole or in part, any portion of the global ecosystem.[19] This definition incorporates not only acts which destroy the environment, but also those which employ it as a conduit of destruction. Acts performed with knowledge of or reckless disregard for the immediate or long-term effects on global ecosystems should be punished as acts of ecocide. Causation would be established from the harm to the ecosystem affected or from evidence that the environment was used as a conduit for an act of terror.

A statutory crime of ecocide enables law enforcement officials to combat environmental terrorism within the context of the "terrorist as criminal" paradigm. Environmental terrorists could be apprehended and punished as common criminals. Prosecutions for ecocide would resemble those of other common crimes. This would play a helping hand and empower prosecutors to avoid the morass of complex environmental protection statutes. Punishment could also be more severe than that found in regulatory environmental protection statutes such as incorporating the death penalty.[20]

Ecocide would not supplant prosecution for the component crimes of an act of environmental terrorism, but it would provide prosecutors with another weapon in their indictment arsenal i.e. a weapon which expressly condemns the environmental nature of the crime.

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19 Lynn Berat, *Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law,* 11 B.U. INTL L.J. 327, 330 (1993).

20 Steven L. Humphreys, *Supra* note *16*.

Way forward for India –

India till now has been fortunate enough to not have had to face the scare and devastation which can be caused by environmental terrorism, although conventional terrorism has wreaked havoc in the lives of the people and events such as 26/11 will be etched the minds of the people forever. In this regard, it is suggested that India should also look into and take steps to formulate legislations and amend existing statutes to deal with environmental terrorism. It is always better to be prepared well before hand rather than be finding ways to deal with a calamity and punish its perpetrators after it has already taken place. The lack of legislations dealing with something as dangerous as environmental terrorism should not hamper delivery of justice to the citizens and punishment of the perpetrators in the event of such a disaster taking place.

In this regard, it is suggested that a cue is taken from the experience of the USA to recognize the realistic threat of environmental terrorism instead of treating it as a mere First World threat and sweeping it under the carpet. A small but significant recognition of this threat in the Indian context can be seen in the report of the Administrative Reforms Commission which was headed by Mr. Veerappa Moily.[21] In this backdrop, India should also take steps to criminalize environmental terrorism as 'ecocide' with harsh punishment with the last resort being the death penalty in cases of causing mass destruction, irreversible damage to the environment and loss of life. Since much like the USA, India's criminal or environmental law statutes are not equipped to deal with this threat, a new 'ecocide' law should be enacted.

However, the recognition and advent of ecocide as a standard punitive measure for environmental terrorism will take time to establish itself and for a specific legislation to be enacted by the Indian Parliament.

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21 Second Administrative Reforms Commission, *Combating Terrorism: Protecting by Righteousness*, (2006), https://darpg.gov.in/sites/default/files/combating_terrorism8.pdf.

In the meantime, in order to be abreast with and negate the eminent threat, an amendment can be proposed to be done to the Prevention of Terrorism Act. Although, penalties for environmental degradation also need to be increased, owing to the criminal nature of environmental terrorism, the Prevention of Terrorism Act would be best to deal with it in the interim. A step to introduce harsher penalties for environmental degradation was undertaken through the Draft Environment Laws (Amendment) Bill 2015. However, there is a need to bring in still harsher punishment for causing environmental degradation.[22] Moreover, environmental terrorism needs to be brought under the ambit of the Unlawful Activities Prevention Act.[23] A similar definition albeit under Section 15 of the Unlawful Activities Prevention Act can be formulated for the crime of environmental terrorism.[24] Keeping with the tenor of the brutality of the criminal act, punishment as envisaged under Section 16 of the Unlawful Activities Prevention Act can be formulated.[25] Causing death and irreversible damage to the environment

22 Shibani Ghosh, *Penalising Environmental Violations: An Analysis of the Ministry's Proposal*, (2006) (Mar.28,2019,9.30 PM)http://www.cprindia.org/research/papers/penalising-environmental-violations-analysis-ministry%E2%80%99s-proposal.

23 Erstwhile Prevention of Terrorism Act, 2002 (Section 3) which was repealed and the Unlawful Activities Prevention Act, 1967 is currently in force.

24 Suggested definition: Whoever with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people **and** *causes irreversible damage to the environment, natural resources in order to use it as a conduit for terrorism and does any act or thing by using physical, chemical, nuclear, or bacteriological or any other substances of a hazardous nature by use of an environmental medium (such as air, water, or soil) and renders a natural resource unsuitable for a desired use,* in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or disruption of any supplies or services essential to the life of the community *shall be deemed to have committed environmental terrorism*.

25 Suggested penalty: Whoever commits an act of *environmental terrorism*, shall,—

(a) if such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine;

(b) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

would entail the strictest penalty i.e. death while other relatively smaller misdemeanors can invoke imprisonment and fine as advised with regard to the Draft Environment Laws (Amendment) Bill 2015 which can be adopted under the Prevention of Terrorism Act as well.[26]

The above is suggested in the interim till a dedicated law to deal with environmental terrorism can be formulated. However, an example has been provided below to elucidate on how the legal framework of ecocide would function practically.

For example, suppose that a drum containing fifty gallons of cyanide was discovered in the compound of a group which had criminal intentions. The cyanide was to be used to poison the water supply of New Delhi or Calcutta. For purposes of demonstration, let's assume that the terrorists succeeded in their plan. The cyanide attack on the Calcutta water supply caused thousands to become sick, nterrupted water service in the city for days, and had long-term impacts on both plant and animal ecosystems.

This act of environmental terrorism could be punished as a crime of ecocide because it involved the intentional manipulation of the physical environment that exploited or damaged parts of the global ecosystem. The act was also performed with the knowledge or reckless disregard for its immediate or long-term effects on the global ecosystem. The causal link would be established by proving that the poisoning of the water exploited or damaged any aspect of the global ecosystem.

The prosecution in the case could still indict the terrorists for common law crimes such as attempted murder or assault or for violations of environmental protection statutes, but a crime of ecocide provides a better option. An option that is free from the burdens associated with complex environmental protection statutes and an option that reflects society's outrage at the environmental aspects of the crime.

26 Shibani Ghosh ,*Supra* note 22.

Conclusion

The criminalization of ecocide provides force and symbolic representation to society's condemnation of deliberate environmental destruction. Acts of ecocide are treated as traditional crimes rather than mere regulatory violations. This not only provides practical advantages for prosecutors; it is also more reflective of public attitudes which now consider offenses against the environment as a serious crime. Although it is unlikely that criminalizing acts of ecocide will deter the actions of environmental terrorists, doing so serves the practical requirements of having an effective legislation in place when the need to prosecute perpetrators for this crime arises.

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